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**VOL. 1**

**OCTOBER, 1916**

**NO. 2**

# **THE FEDERAL RAILWAY DIGEST**

## **THE CIVIL LIABILITY OF INTERSTATE CARRIERS BY RAIL**

**UNDER THE FEDERAL  
EMPLOYERS' LIABILITY ACT  
SAFETY APPLIANCE ACT  
BOILER INSPECTION ACT  
HOURS OF LABOR ACT  
AND  
CARMACK AND CUMMINS  
AMENDMENTS**

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**Destroy No. 1, Volume I**

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**PRICE, \$6.50 PER ANNUM**

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**THE FEDERAL LAW BOOK COMPANY, 180 N. Dearborn St., CHICAGO**



THE  
**Federal Railway Digest**

A Cumulative Quarterly

**Digesting All Decisions**

Both State and Federal

Pertaining to the Civil and  
Criminal Liability of

**Interstate Carriers by Rail**

Under All Acts of Congress

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*WILLIAM J. INGERSOLL, Editor*

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PUBLISHED QUARTERLY BY  
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## ANNOUNCEMENT

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This quarterly supersedes the July number, which may be destroyed.

All cases reported to September 1, 1916, and decided under the Federal Employers' Liability Act, The Safety Appliance Act, The Hours of Labor Act, The Boiler Inspection Act, and the Carmack and Cummins Amendments are digested in this number. The quarterly for January, 1917, will bring these several subjects down to December 1, 1916, and also digest all other cases decided under every other Act of Congress which imposes civil liability on carriers by rail. The quarterly for April, 1917, will bring the previously digested subjects down to March 1, 1917, and also include the criminal liability of such carriers under all Federal laws.

A new feature of this work, which we hope will prove useful, is the giving, in an Appendix, of the full text of all Acts of Congress under which the digested cases were decided.

THE FEDERAL LAW BOOK CO.

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# THE FEDERAL RAILWAY DIGEST

## *A Cumulative Quarterly*

Entered as second-class matter July 10, 1916, at the postoffice at Chicago, Ill., under the act of March 8, 1879.

Vol. 1

OCTOBER, 1916

No. 2

### BOILER INSPECTION ACT

#### FEDERAL

Act Feb. 17, 1911, Ch. 103, 36 Stat. at Large 913, U. S. Comp. Stat. 1913, §§ 8630-8639.\*

#### I. VALIDITY AND CONSTRUCTION.

- A. In General.
- B. Effect of Act on State Laws.
- C. Duty Imposed on Carriers.

#### II. LIABILITY FOR INJURIES TO EMPLOYEES.

- A. In General.
- B. Actions.

#### III. CRIMINAL LIABILITY.

(Will be covered in subsequent issues.)

#### I. VALIDITY AND CONSTRUCTION.

- A. In General.  
(No decisions.)

#### B. Effect of Act on State Laws.

##### In General.

A state law pertaining to the inspection of locomotive boilers similar in purport to the Federal Boiler Inspection Act, but imposing conditions in addition to those prescribed by the Federal law, was superseded by the latter act as to engines employed in interstate commerce. *Louisville & N. R. Co. v. Hughes*, 201 Fed. 727.

#### C. Duty Imposed on Carriers.

##### In General.

The Federal Boiler Inspection Act does not, like the Safety Appliance Act, impose an absolute duty on a carrier to provide

perfect locomotive boilers. *Virginian R. Co. v. Andrews*, — Va. —, 87 S. E. 577.

#### II. LIABILITY FOR INJURIES TO EMPLOYEES.

##### A. In General.

##### Carrier as Insurer.

Since a carrier by turning over to an engineer a locomotive with boiler in proper condition and safe to operate, satisfies the requirements of the Federal Boiler Inspection Act, it is not answerable to the engineer as an insurer of his safety throughout his run. *Virginian R. Co. v. Andrews*, — Va. —, 87 S. E. 577.

##### What Constitutes Negligence.

Where a locomotive was turned over to an engineer with its boiler complying with the requirements of the Federal Boiler Inspection Act, and he was killed shortly after by an explosion, the mere happening of the accident did not per se cast on a carrier an imputation of negligence. *Virginian R. Co. v. Andrews*, — Va. —, 87 S. E. 577.

When the evidence tends to show that an engineer's death was due solely to his own negligence which caused the explosion of a locomotive boiler, there cannot be a recovery therefor under the Federal Employers' Liability Act on the ground that his negligence merely contributed to the

\*See Appendix for text of act.

accident and should reduce the amount of his recovery only. *Virginian R. Co. v. Andrews*, — Va. —, 87 S. E. 577.

Where a locomotive was inspected by a Federal inspector three days before the boiler exploded and killed an engineer, and by the decedent and a hostler an hour before the accident, and found in perfect condition, and the evidence failed to show any defect in the boiler, a carrier cannot be held liable on the theory of a violation of the Federal Boiler Inspection Act. *Virginian R. Co. v. Andrews*, — Va. —, 87 S. E. 577.

### B. Actions.

#### Burden of Proof.

The burden rests on the plaintiff in an action for the death of an engineer caused by the explosion of a boiler, to show the negligence of the defendant in furnishing a locomotive with a boiler that did not comply with the requirements of the Federal Boiler Inspection Act. *Virginian R. Co. v. Andrews*, — Va. —, 87 S. E. 577.

### III. CRIMINAL LIABILITY.

(Will be covered in subsequent issues.)



## CARRIERS OF INTERSTATE FREIGHT AND EXPRESS

- I. IN GENERAL.
- II. WHAT LAWS GOVERN.
  - A. In General.
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\*See appendix for text of Act.

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\*See Appendix for text of Act.

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#### XIV. CRIMINAL LIABILITY.

(Will be covered in quarterly for April, 1917.)

##### I. IN GENERAL.

(No decisions.)

##### II. WHAT LAWS GOVERN.

###### A. In General.

(No decisions.)

###### B. Federal Laws.

Applicability of Carmack Amendment to Interstate shipments, see *infra* XI, F.

###### In General.

The rights and liabilities of shippers and carriers with respect to property transported by freight or express from one state to another is governed exclusively by Federal laws. *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397, reversing — *Tex. Civ. App.* —, 128 S. W. 932; *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556, reversing 36 Okla. 435, 129 Pac. 20; *Atchison, T. & S. F. R. Co. v. Moore*, 233 U. S. 182, 58 L. ed. 906, 34 Sup. Ct. Rep. 558, reversing 36 Okla. 433, 129 Pac. 24; *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541, affirming 15 Ga. App. 142, 82 S. E. 784; *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. ed. —, 36 Sup. Ct. Rep. 555; *Appel v. Platt*, 55 Colo. 45, 132 Pac. 71; *Baldwin v. Chicago, R. I. & P. R. Co.* — Ia. —, 156 N. W. 17; *Miller v. Atchison, T. & S. F. R. Co.* — Kan. —, 156 Pac. 780; *Donoho v. Missouri, P. R. Co.* — Mo. App. —, 187 S. W. 141; *Johnson v. Missouri, P. R. Co.* — Mo. App. —, 187 S. W.

282; *American Silver Mfg. Co. v. Wabash R. Co.*, 174 Mo. App. 184, 156 S. W. 830; *Collins v. Denver & R. G. R. Co.*, 181 Mo. App. 213, 167 S. W. 1178; *Hamilton v. Chicago & A. R. Co.*, 177 Mo. App. 145, 164 S. W. 248; *Colby v. American Express Co.*, 77 N. H. 548, 94 Atl. 198; *Oilvet v. Penn. R. Co.*, 88 N. J. L. 241, 96 Atl. 582; same v. same, 88 N. J. L. 376, 377, 96 Atl. 587; *Spada v. Penn. R. Co.*, 88 N. J. L. 388, 96 Atl. 587; *Albrecht v. Penn. R. Co.*, 88 N. J. L. 367, 96 Atl. 587; *United Lead Co. v. Lehigh V. R. Co.*, 156 App. Div. 525, 141 N. Y. Supp. 310; *Davenport v. Chesapeake & O. R. Co.*, 87 Misc. 303, 149 N. Y. Supp. 865; *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717; *Pacific Express Co. v. Krower* — Tex. —, 163 S. W. 9; *Southern R. Co. v. Weatherford Cotton Mills* — Tex. Civ. App. —, 134 S. W. 778; *Texas & P. R. Co. v. Langbehn* — Tex. Civ. App. —, 158 S. W. 244.

The validity and interpretation of contract for the interstate shipment of property must be determined under the laws of the United States and the decisions of the Federal courts thereunder. *McElwain v. St. Louis & S. F. R. Co.*, 176 Mo. App. 379, 158 S. W. 464; *Smith v. St. Louis S. W. R. Co.*, 186 Mo. App. 401, 171 S. W. 635; *Kent v. Chicago, B. & Q. R. Co.*, 189 Mo. App. 424, 176 S. W. 1105; *Hamilton v. Chicago & A. R. Co.*, 177 Mo. App. 145, 164 S. W. 248; *Washington Horse Exchange v. Louisville & N. R. Co.* — N. C. —, 87 S. E. 841; *United Lead Co. v. Lehigh V. R. Co.*, 156 App. Div. 525, 141 N. Y. Supp. 310; *Davenport v. Chesapeake & O. R. Co.*, 87 Misc. 303, 149 N. Y. Supp. 865; *Chicago, R. I. & P. R. Co. v. Whaley* — Tex. Civ. App. —, 177 S. W. 543; *Hovey v. Tankersley* — Tex. Civ. App. —, 177 S. W. 153.

The Federal laws and the decisions of the Supreme Court of the United States construing them, afford an exclusive rule for determining controversies in state courts pertaining to interstate shipments. *American Silver Mfg. Co. v. Wabash R. Co.*, 174 Mo. App. 184, 156 S. W. 830; *Collins v. Denver & R. G. R. Co.*, 181 Mo. App. 213, 167 S. W. 1178; *Hamilton v. Chicago & A. R. Co.*, 177 Mo. App. 145, 164 S. W. 248; *Johnson v. Missouri P. R. Co.* — Mo. App. —, 187 S. W. 282.

###### C. State Laws.

Effect of Carmack Amendment on state laws, see *infra* XI, D, 2.

###### In General.

Whether a special contract made in consideration of the rate paid, limiting an express company's liability for an interstate shipment to an agreed valuation, was

fairly entered into without fraud, deceit or imposition, is a question of local law. *Lefebure v. American Express Co.*, 160 Iowa 54, 139 N. W. 1117.

### III.-X. PARTICULAR REGULATIONS; RATES; REBATES; DISCRIMINATIONS, ETC.

(Will be treated in January Quarterly.)

## XI. CARMACK AMENDMENT.\*

### A. In General.

#### When Act Effective.

The Carmack Amendment became effective June 29, 1906. *Southern P. Co. v. Meadors*, — Tex. Civ. App. —, 129 S. W. 170, reversed on other grounds, 104 Tex. 469, 140 S. W. 427.

### B. Validity.

#### In General.

The Carmack Amendment (Act June 29, 1906, ch. 3591, § 7, 34 St. Large 593, Comp. St. 1913, § 8592 (11) Fed. St. Anno. Supp. 1909, p. 273) requiring a common carrier receiving property for transportation in interstate commerce to issue a receipt or bill of lading therefor, and making it answerable for loss or damage occurring on its own or the lines of any connecting carrier over which the property may pass, and forbidding contracts, rules or regulations exempting the initial carrier from the liability created by the act, is constitutional. *Louisville & N. R. Co. v. Scott*, 219 U. S. 209, 55 L. ed. 183, 31 Sup. Ct. Rep. 171, affirming 133 Ky. 724, 118 S. W. 990, 19 Ann. Cas. 392; *Atlantic C. L. R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 Sup. Ct. Rep. 164, 31 L. R. A. (N. S.) 7, affirming 168 Fed. 990; *Smeltzer v. St. Louis & S. F. R. Co.*, 158 Fed. 649; *St. Louis & S. F. R. Co. v. Heyser*, 95 Ark. 412, 130 S. W. 562, Ann. Cas. 1912 A. 610; *Fry v. Southern P. Co.*, 247 Ill. 564, 93 N. E. 906; *Cleveland, C. C. & St. L. R. Co. v. Hayes*, 181 Ind. 87, 102 N. E. 34, 103 N. E. 839, S. C. — Ind. —, 104 N. E. 581; *Pittsburgh, C. C. & St. L. R. Co. v. Mitchell*, 175 Ind. 196, 211, 91 N. E. 735, 93 N. E. 996; *Perkett v. Manistee & N. E. R. Co.*, 175 Mich. 253, 141 N. W. 607; *Dodge v. Chicago, St. P. M. & O. R. Co.*, 111 Minn. 123, 126 N. W. 627; *Welch Lumber Co. v. Norfolk & W. R. Co.*, 137 App. Div. 248, 121 N. Y. Supp. 985; *Greenwald v. Weir*, 59 Misc. 431, 111 N. Y. Supp. 235; *Houston & T. C. R. Co. v. Lewis*, 103 Tex. 452, 129 S. W. 594; *Galveston, H. & S. A. R. Co. v. Johnson*, — Tex. Civ. App. —, 133 S. W. 725; *Galveston, H. & S. A. R. Co. v.*

*Wallace*, — Tex. Civ. App. —, 117 S. W. 169, affirmed 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205; *Galveston, H. & S. A. R. Co. v. Crow*, — Tex. Civ. App. —, 117 Tex. 170, affirmed 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205; *Galveston, H. & S. A. R. Co. v. Piper*, 52 Tex. Civ. App. 568, 115 S. W. 107; *Norfolk & W. R. Co. v. Dixie Tobacco Co.*, 111 Va. 813, 69 S. E. 1106, affirmed 228 U. S. 593, 57 L. ed. 980, 33 Sup. Ct. Rep. 609.

The requirement of the Carmack Amendment that carriers engaged in interstate transportation shall obligate themselves to carry to points of destination using the lines of connecting carriers as their own agents, was not beyond the regulating power of Congress, and does not impose an unreasonable burden upon the receiving carrier. *Atlantic C. L. R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 Sup. Ct. Rep. 164, 31 L. R. A. (N. S.) 7, affirming 168 Fed. 990; *Louisville & N. R. Co. v. Scott*, 219 U. S. 209, 55 L. ed. 183, 31 Sup. Ct. Rep. 171, affirming 133 Ky. 724, 118 S. W. 990, 19 Ann. Cas. 392.

Under the Commerce clause of the Federal Constitution Congress may regulate the contract between carriers and shippers as to the liability for the loss of interstate shipments. *Ford v. Chicago, R. I. & P. R. Co.*, 123 Minn. 87, 143 N. W. 249.

The primary liability clause of the Carmack Amendment does not unconstitutionally render an initial carrier responsible for the act of God or the public enemy, or for the negligence of another carrier, or for the loss of or damage to an interstate shipment on the lines of connecting carriers, since, when sued, the initial carrier by vouching in the connecting carrier on notice, can have the responsibility fixed where it belongs. *Cleveland, C. C. & St. L. R. Co. v. Hayes*, 181 Ind. 87, 102 N. E. 34, 103 N. E. 839, S. C. on rehearing — Ind. —, 104 N. E. 581.

As it must be presumed that in contracting for a through interstate shipment a carrier acts under contract with the various carriers, it cannot be held that the primary liability clause of the Carmack Amendment is unconstitutional because it imposes on the initial carrier, when sued for a loss occurring on the lines of a connecting carrier, costs, expenses and attorney fees incurred in defending the action or in ascertaining where and how the loss occurred, since if the property was delivered in good condition to the connecting carrier, the defendant could, by notice, vouch in the negligent carrier or each in turn vouch in its successor in carriage, and transfer the expense to the party responsible for the loss and fix the amount of the loss and the responsibility therefore. *Cleveland, C. C. & St. L. R. Co.*

\*See Appendix for text of Act.

v. Hayes, 181 Ind. 87, 102 N. E. 34, 103 N. E. 839, S. C. on rehearing — Ind. —, 104 N. E. 581.

### Due Process of Law.

The provision of the Carmack Amendment imposing primary liability on the initial carrier, does not unconstitutionally take its property without due process of law. *Smeltzer v. St. Louis & S. F. R. Co.*, 158 Fed. 649; *St. Louis & S. F. R. Co. v. Heyser*, 95 Ark. 412, 130 S. W. 562, Ann. Cas. 1912 A. 610; *Cleveland, C. C. & St. L. R. Co. v. Hayes*, 181 Ind. 87, 102 N. E. 34, 103 N. E. 839, S. C. on rehearing — Ind. —, 104 N. E. 581; *Welch Lumber Co. v. Norfolk & W. R. Co.*, 137 App. Div. 248, 121 N. Y. Supp. 985; *Houston & T. C. R. Co. v. Lewis*, 103 Tex. 452, 129 S. W. 594; *Galveston, H. & S. A. R. Co. v. Piper*, 52 Tex. Civ. App. 568, 115 S. W. 107; *Galveston, H. & S. A. R. Co. v. Wallace*, — Tex. Civ. App. —, 117 S. W. 169; *Galveston, H. & S. A. R. Co. v. Crow*, — Tex. Civ. App. —, 117 S. W. 170, both cases affirmed 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205; *Galveston, H. & S. A. R. Co. v. Johnson*, — Tex. Civ. App. —, 133 S. W. 725.

The provisions of the Carmack Amendment imposing upon initial carriers liability for the loss of or damage to interstate shipments occurring beyond their own lines, do not violate the Fifth Amendment to the Federal Constitution by taking the property of the receiving carrier to pay the debt of an independent connecting carrier whose negligence may have been the sole cause of the loss, since the liability placed on the initial carrier is that of a principal for the acts of his agent. *Atlantic C. L. R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 Sup. Ct. Rep. 164, 31 L. R. A. (N. S.) 7, affirming 168 Fed. 990; *Louisville & N. R. Co. v. Scott*, 219 U. S. 209, 55 L. ed. 183, 31 Sup. Ct. Rep. 171, affirming 133 Ky. 724, 118 S. W. 990, 19 Ann. Cas. 392.

The Carmack Amendment does not unconstitutionally take the private property of an initial carrier for public purposes, since with respect to a shipment over the lines of several carriers the initial carrier acts voluntarily in accepting the shipment, and after doing so it is bound by its act. *Louisville & N. R. Co. v. Scott*, 133 Ky. 724, 118 S. W. 990, 19 Ann. Cas. 392, affirmed 219 U. S. 209, 55 L. ed. 183, 31 Sup. Ct. Rep. 171.

The Carmack Amendment, by fixing primary liability on the initial carrier, does not unconstitutionally take its property without due process of law by requiring one carrier to answer for the default of other carriers irrespective of their solvency or insolvency, since the amendment also fixes the liability of connecting carriers and provides for the enforcement of

their obligation. *Pittsburgh, C. C. & St. L. R. Co. v. Mitchell*, 175 Ind. 196, 211, 91 N. E. 735, 93 N. E. 996.

The Carmack Amendment does not take the property of a carrier without compensation or due process of law. *Galveston, H. & S. A. R. Co. v. Wallace*, — Tex. Civ. App. —, 117 S. W. 169; *Galveston, H. & S. A. R. Co. v. Crow*, — Tex. Civ. App. —, 117 S. W. 170, both cases affirmed 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205.

Where a carrier accepts freight for interstate transportation over a route selected by the shipper different from that which the carrier would have selected, and over which it had no route or established rate, its acceptance of the goods is voluntary, so that the imposition of the liability created by the Carmack Amendment for damages occurring on the lines of connecting carriers, notwithstanding a provision of the bill of lading to the contrary, does not take the property of the initial carrier without due process of law. *Norfolk & W. R. Co. v. Dixie Tobacco Co.*, 228 U. S. 593, 57 L. ed. 980, 33 Sup. Ct. Rep. 609, affirming 111 Va. 813, 69 S. E. 1106.

The provisions of the Carmack Amendment permitting an initial carrier to recover from any connecting carrier on whose lines a loss or damage occurs, the amount of damages that the former is required to pay, as "evidenced by any receipt, judgment or transcript thereof," does not unconstitutionally deprive the negligent carrier of due process of law when not a party to the original action by making such document conclusive evidence against it, since such provision will be construed as creating a prima facie or presumptive evidence of liability. *Central of Ga. R. Co. v. Sims*, 169 Ala. 295, 53 So. 826.

### Equal Protection of the Law.

The Carmack Amendment does not deny to an initial carrier equal protection of the law. *Galveston, H. & S. A. R. Co. v. Wallace*, — Tex. Civ. App. —, 117 S. W. 169; *Galveston, H. & S. A. R. Co. v. Crow*, — Tex. Civ. App. —, 117 S. W. 170, both cases affirmed 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205.

### Liberty of Contract.

By requiring the initial carrier to issue a receipt or bill of lading for an interstate shipment and making it answerable for the default of succeeding carrier, the Carmack Amendment does not unconstitutionally interfere with the initial carrier's liberty of contract. *Smeltzer v. St. Louis & S. F. R. Co.*, 158 Fed. 649; *St. Louis & S. F. R. Co. v. Heyser*, 95 Ark. 412, 130 S. W. 562, Ann. Cas. 1912 A. 610; *Fry v.*

Southern P. Co., 247 Ill. 564, 93 N. E. 906; Welch Lumber Co. v. Norfolk & W. R. Co., 137 App. Div. 248, 121 N. Y. Supp. 985; Galveston, H. & S. A. R. Co. v. Piper, 52 Tex. Civ. App. 568, 115 S. W. 107.

The fact that the effect of the Carmack Amendment is to deny to a carrier receiving in one state goods for transportation for a point in another state beyond its own lines the right to make a contract limiting its liability to its own line, is not a denial of the liberty of contract secured by the Fifth Amendment to the Federal Constitution. *Atlantic C. L. R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 Sup. Ct. Rep. 164, 31 L. R. A. (N. S.) 7, affirming 168 Fed. 990; *Louisville & N. R. Co. v. Scott*, 219 U. S. 209, 55 L. ed. 83, 31 Sup. Ct. Rep. 171, affirming 133 Ky. 724, 118 S. W. 990, 19 Ann. Cas. 392.

#### Interference With State Rights.

The Carmack Amendment does not unconstitutionally interfere with the rights of the several states. *Galveston, H. & S. A. R. Co. v. Piper*, 52 Tex. Civ. App. 568, 115 S. W. 107; *Galveston, H. & S. A. R. Co. v. Wallace*, — Tex. Civ. App. —, 117 S. W. 169; *Galveston, H. & S. A. R. Co. v. Crow*, — Tex. Civ. App. —, 117 S. W. 170, both cases affirmed 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205.

#### Who May Question Validity.

The fact that a contract for a through interstate shipment is presumed to be based on contracts between the various carriers, since it cannot otherwise be undertaken, removes from an action against the initial carrier under the Carmack Amendment, the questions whether the primary liability clause of such act unconstitutionally takes the private property of the initial carrier, makes a new contract for it or forces upon it liability for an insolvent intermediate carrier. *Cleveland, C. & St. L. R. Co. v. Hayes*, 181 Ind. 87, 102 N. E. 34, 103 N. E. 839, S. C. on rehearing — Ind. —, 104 N. E. 581.

Since a contract for the through transportation of an interstate shipment is presumed to be made by virtue of contracts between the several carriers, an initial carrier cannot question the constitutionality of the primary liability clause of the Carmack Amendment as applied to a case of routing by a shipper, when not a through shipment, but one under the local rates of each connecting carrier. *Cleveland, C. & St. L. R. Co. v. Hayes*, 181 Ind. 87, 102 N. E. 34, 103 N. E. 839, S. C. on rehearing — Ind. —, 104 N. E. 581.

An initial carrier is not, when sued for damages occasioned by a connecting carrier, in a position to question the validity of that portion of the Carmack Amendment which makes the receipt, judgment or transcript in such action, evidence in its

favor against the negligent carrier. *Central of Ga. R. Co. v. Sims*, 169 Ala. 295, 53 So. 826.

#### C. Construction.

##### Legislative Intent.

The intent of Congress in enacting the Carmack Amendment was to take possession of the entire subject of the liability of carriers under contracts for the interstate transportation of property. *Missouri, K. & T. R. Co. v. Walston*, 37 Okla. 517, 133 Pac. 42.

##### Federal Decisions Binding on State Courts.

The construction placed by the Federal courts on the Carmack Amendment is binding on all state courts. *Louisville & N. R. Co. v. Miller*, 156 Ky. 677, 162 S. W. 73, 50 L. R. A. (N. S.) 819; *St. Louis & S. F. R. Co. v. Woodruff Mills*, 105 Miss. 214, 62 So. 171; *United Lead Co. v. Lehigh V. R. Co.*, 156 App. Div. 525, 141 N. Y. Supp. 310; *Washington Horse Exchange v. Louisville & N. R. Co.*, — N. C. —, 87 S. E. 941; *Stevens v. St. Louis S. W. R. Co.*, — Tex. Civ. App. —, 178 S. W. 810; *Atchison, T. & S. F. R. Co. v. Word*, — Tex. Civ. App. —, 159 S. W. 575.

The rules of the Federal courts must be followed by state courts in determining the validity of stipulations in contract for interstate shipments. *Bledsoe v. Missouri, K. & T. R. Co.*, 177 Mo. App. 153, 168 S. W. 183; *McElvain v. St. Louis & S. F. R. Co.*, 176 Mo. App. 379, 158 S. W. 464; *Donoho v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 141.

#### D. Effect.

##### 1. In General.

(No decisions.)

##### Exclusiveness of Remedy.

With respect to the liability of carriers for property transported in interstate commerce, the Carmack Amendment is supreme. *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556, reversing 36 Okla. 435, 129 Pac. 20; *Atchison, T. & S. F. R. Co. v. Moore*, 233 U. S. 182, 58 L. ed. 906, 34 Sup. Ct. Rep. 558, reversing 36 Okla. 433, 129 Pac. 24.

All interstate shipments of freight or express are controlled by the Carmack Amendment to the exclusion of all state laws. *Baldwin v. Chicago, R. I. & P. R. Co.*, — Ia. —, 156 N. W. 17; *Johnson v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 282; *Pacific Express Co. v. Krower*, — Tex. —, 163 S. W. 9; *Texas & P. R. Co. v. Langbehn*, — Tex. Civ. App. —, 158 S. W. 244; *Atchison, T. & S. F. R. Co. v. Word*, — Tex. Civ. App. —, 159 S. W. 575; *Southern P. Co. v. Weatherford Cotton Mills*, — Tex. Civ. App. —, 134 S. W. 778.



The effect of the Carmack Amendment was to give to the Federal jurisdiction control over interstate commerce, and to make supreme the Federal legislation regulating liability for property transported by common carriers in such commerce. *Nashville, C. & St. L. R. Co. v. Truitt Co.*, 17 Ga. App. 263, 86 S. E. 421, S. C. 14 Ga. App. 767, 82 S. E. 465; *Central of Ga. R. Co. v. Curtis*, 14 Ga. App. 716, 82 S. E. 318; *Atlantic C. L. R. Co. v. Thomasville Live Stock Co.*, 13 Ga. App. 102, 276, 78 S. E. 1019, 79 S. E. 162.

The Carmack Amendment controls interstate shipments, and, as between the initial and other carriers, makes it one contract of carriage. *Pittsburgh, C., C. & St. L. R. Co. v. Mitchell*, 175 Ind. 196, 211, 91 N. E. 735, 93 N. E. 996.

Rights and liabilities respecting an interstate shipment are governed by the Act of Congress, the bill of lading and the common-law rules as accepted and applied by the Federal courts. *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. ed. —, 36 Sup. Ct. Rep. 555.

Since the adoption of the Carmack Amendment all questions of a common carrier's liability for loss or damage to interstate shipments of freight are to be determined thereunder, and the rules declared by the Federal courts. *Olivit v. Penn. R. Co.*, 88 N. J. L. 241, 96 Atl. 582; same v. same, 88 N. J. L. 376, 377, 96 Atl. 587; *Spada v. Penn. R. Co.*, 88 N. J. L. 388, 96 Atl. 587; *Albrecht v. Penn. R. Co.*, 88 N. J. L. 367, 96 Atl. 587.

The remedy given by the Carmack Amendment is in addition to and concurrent with any other existing Federal remedy. *Bichlmeier v. Minneapolis, St. P. & S. S. M. R. Co.*, 159 Wis. 404, 150 N. W. 408.

## 2. On State Laws.

### (a) In General.

#### State Laws Superseded.

The effect of the Carmack Amendment was to supersede and nullify all state laws and regulations relating to the interstate transportation of freight and express. *Atlantic C. L. R. Co. v. Thomasville Live Stock Co.*, 13 Ga. App. 102, 276, 78 S. E. 1019, 79 S. E. 162; *Mitchell v. Atlantic C. L. R. Co.*, 15 Ga. App. 797, 84 S. E. 227; *Wabash R. Co. v. Priddy*, 179 Ind. 483, 494, 101 N. E. 724; *Toledo, St. L. & W. R. Co. v. Milner*, — Ind. App. —, 110 N. E. 756; *Heilman v. Chicago & N. W. R. Co.*, 167 Ia. 313, 149 N. W. 436; *Miller v. Atchison, T. & S. F. R. Co.*, — Kan. —, 156 Pac. 780; *St. Louis & S. F. R. Co. v. Woodruff Mills*, 105 Miss. 214, 62 So. 171; *Donovan v. Wells, Fargo & Co.*, 265 Mo. 291, 177 S. W. 839; *Conley v. Chicago, B.*

*& Q. R. Co.*, — Mo. App. —, 183 S. W. 1111; *American Silver Mfg. Co. v. Wabash R. Co.*, 174 Mo. App. 184, 156 S. W. 830; *Joseph v. Chicago, B. & Q. R. Co.*, 175 Mo. App. 18, 157 S. W. 837; *Bledsoe v. Missouri, K. & T. R. Co.*, 177 Mo. App. 153, 164 S. W. 183; *Wright v. Southern P. Co.*, 181 Mo. App. 137, 167 S. W. 1137; *Bailey v. Missouri P. R. Co.*, 184 Mo. App. 457, 171 S. W. 44; *Dunlap v. Chicago & A. R. Co.*, 187 Mo. App. 201, 172 S. W. 1178; *Kent v. Chicago, B. & Q. R. Co.*, 189 Mo. App. 424, 176 S. W. 1105; *Banka v. Missouri P. R. Co.*, — Mo. App. —, 186 S. W. 7; *Donoho v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 141; *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131; *Johnson v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 282; *Olivit v. Penn. R. Co.*, 88 N. J. L. 241, 96 Atl. 582; same v. same, 88 N. J. L. 376, 377, 96 Atl. 587; *Spada v. Penn. R. Co.*, 88 N. J. L. 388, 96 Atl. 587; *Albrecht v. Penn. R. Co.*, 88 N. J. L. 367, 96 Atl. 587; *Missouri, K. & T. R. Co. v. Walston*, 37 Okla. 517, 133 Pac. 42; *Piper v. Boston & M. R. Co.*, — Vt. —, 97 Atl. 508.

Under the Carmack Amendment it was the clear intent of Congress to remove from the realm of state regulations and restrictions all contracts involving interstate shipments. *Cook v. Northern P. R. Co.*, — N. Dak. —, 155 N. W. 867.

Since the enactment of the Carmack Amendment the several states have ceased to have authority, under their police power, to pass laws relating to contracts between shippers and carriers with respect to interstate shipments of property. *Ford v. Chicago, R. I. & P. R. Co.*, 123 Minn. 87, 143 N. W. 249; *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 135 Pac. 406, 6 N. C. A. 717; *St. Louis & S. F. R. Co. v. Bilby*, 35 Okla. 589, 130 Pac. 1089; *St. Louis & S. F. R. Co. v. Peery*, 40 Okla. 258, 138 Pac. 144; *St. Louis & S. F. R. Co. v. Wynn*, — Okla. —, 156 Pac. 346; *Chicago, R. I. & P. R. Co. v. Bruce*, — Okla. —, 150 Pac. 880.

While the Carmack Amendment, although fixing the liability of the initial carrier to the holder of the bill of lading, expressly preserves in his favor or that of the owner of the goods, all remedies and rights of actions otherwise existing, yet, when the terms of the act are directly applicable, they become the paramount law on the subject, and pro tanto supersede state laws to the contrary. *Southern P. Co. v. Cranshaw Bros.*, 5 Ga. App. 675, 63 S. E. 865.

Since the passage of the Carmack Amendment the Federal laws, supplemented by the common law as declared by the Federal courts, have superseded all state laws pertaining to the substantive rights of the parties to an interstate ship-

ment. *St. Louis & S. F. R. Co. v. Mounts*, — Okla. —, 144 Pac. 1036.

### Recovery Under State Law.

Although the Carmack Amendment superseded all state laws, a shipper may recover under such amendment for the breach of a contract for an interstate shipment, notwithstanding that he treats the action as one under a state law. *Conley v. Chicago, B. & Q. R. Co.*, — Mo. App. —, 183 S. W. 1111.

### (b) Laws Relating to Particular Subjects.

#### In General.

The application by a state court of a local rule of law investing an innocent holder of a bill of lading for an interstate shipment, with rights not available to the shipper, is in violation of the Carmack Amendment, which governs such shipments, the bills of lading and the rights thereunder to the exclusion of all state laws. *Atchison, T. & S. F. R. Co. v. Harold*, 241 U. S. 371, 60 L. ed. —, 36 Sup. Ct. Rep. 665, reversing 93 Kan. 456, 144 Pac. 823.

#### Limitation of Liability in General.

A state statute prohibiting contracts limiting a common carrier's liability was superseded by the Carmack Amendment with respect to interstate shipments of freight. *Chicago, R. I. & P. R. Co. v. Cramer*, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383, reversing 153 Ia. 103, 133 N. W. 387.

A law or policy of a state, forbidding carriers from contracting against liability for loss or damage to freight, is inapplicable to interstate shipments, since the liability of the carrier therefor is governed by the Carmack Amendment. *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397, reversing — Tex. Civ. App. —, 128 S. W. 932.

A state statute regulating contracts limiting carrier's liability for the loss of or injury to shipments was superseded, with respect to interstate shipments, by the Carmack Amendment. *Walker v. St. Louis & S. F. R. Co.*, 162 Mo. App. 374, 142 S. W. 729.

State statutes prohibiting carriers from limiting or restricting their common-law liability do not apply to interstate shipments. *Gulf, C. & S. F. R. Co. v. Brackett-Feilder M. & G. Co.*, — Tex. Civ. App. —, 162 S. W. 1191.

A state statute permitting a common carrier to limit its liability to its own lines, being in conflict with the Carmack Amendment, must give way to that act. *Fry v. Southern P. Co.*, 247 Ill. 564, 93 N. E. 906.

A state statutory and constitutional prohibition against contracts, rules or regulations exempting carriers from the liability that would exist in the absence of such contract, etc., was not superseded, with respect to interstate shipments, by the Carmack Amendment or other Federal legislation. *Miller v. Chicago, B. & Q. R. Co.*, 85 Neb. 458, 123 N. W. 449, reversed 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 115.

State laws declaring void agreements in contracts for the transportation of live stock limiting a carrier's liability for injury or loss, apply to interstate shipments, notwithstanding the provisions of the Carmack Amendment. *Missouri, K. & T. R. Co. v. Harriman*, — Tex. Civ. App. —, 128 S. W. 932, reversed 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397.

A state statute restricting the right of common carriers to limit their liability for interstate shipments was not superseded by the Carmack Amendment. *Atchison, T. & S. F. R. Co. v. Rodgers*, 16 N. Mex. 120, 113 Pac. 805.

#### Agreed Valuation.

The provisions of a state constitution and statute forbidding contracts limiting a carrier's liability to a stipulated value for loss or damage to property were, with respect to interstate shipments, superseded by the Carmack Amendment. *Chicago, B. & Q. R. Co. v. Miller*, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 115, reversing 85 Neb. 458, 123 N. W. 449. *Chicago, St. P., M. & O. R. Co. v. Latta*, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155, reversing 106 C. C. A. 664, 184 Fed. 987, S. C. 97 C. C. A. 198, 172 Fed. 850; *Adams Express Co. v. Cronniger*, 226 U. S. 491, 57 L. ed. 314, 33 Sup. Ct. Rep. 148, 44 L. R. A. (N. S.) 257; *Missouri, K. & T. R. Co. v. Walston*, 37 Okla. 517, 133 Pac. 42.

The Carmack Amendment superseded a statute constitutional provision declaring that a shipper was not bound by a recital of a value in a contract of shipment, but that he might show and recover the full value in the event of loss. *Louisville & N. R. Co. v. Miller*, 156 Ky. 677, 162 S. W. 73, 50 L. R. A. (N. S.) 819.

An agreement limiting a carrier's liability for an interstate shipment to a designated sum is void, both at common law and under a state statute, and such a rule is not affected by the Carmack Amendment. *Winn v. American Express Co.*, 149 Ia. 259, 128 N. W. 663.

Since neither the Carmack Amendment nor other Federal legislation superseded a state statutory and constitutional prohibition against contracts, rules or regulations exempting carriers from the liability that would have existed in the absence

of such restriction, a shipper is not bound by a valuation contained in a contract for the interstate transportation of live stock. *Miller v. Chicago, B. & Q. R. Co.*, 85 Neb. 458, 123 N. W. 449, reversed 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 115.

The Carmack Amendment does not deprive a state court of power to enforce a local rule of law declaring contracts limiting a carrier's liability for negligence to a stipulated value, contrary to public policy and void. *Howard v. American Express Co.*, 47 Pa. Sup. Ct. Rep. 416; *Windolph v. Adams Express Co.*, 48 id. 304; *Dodge v. Adams Express Co.*, 54 id. 422; *Wright v. Adams Express Co.*, 230 Pa. 635, 79 Atl. 760, affirming 43 Pa. Sup. Ct. Rep. 40, reversed 229 U. S. 629, 57 L. ed. 1358, 33 Sup. Ct. Rep. 776.

Since the Carmack Amendment does not attempt to legislate as to the rights of carriers to limit by contract their liability for injury to interstate shipments, a state statute forbidding such contracts is applicable to an interstate shipment, and invalidates a stipulation, although made in consideration of a reduced rate of transportation, limiting a carrier's liability for injury to live stock to an agreed amount. *Elliott v. Atlantic C. L. R. Co.*, 94 S. C. 129, 75 S. E. 886, 77 S. E. 718.

#### Notice of Claim for Damage.

A provision of a state constitution declaring null and void any contract or agreement, express or implied, stipulating for notice or demand, other than that provided by law, as a condition precedent to the establishment of any claim, demand or liability, does not, since the passage of the Carmack Amendment, apply to a contract for the interstate carriage of property. *St. Louis & S. F. R. Co. v. Bilby*, 35 Okla. 589, 130 Pac. 1089; *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717; *St. Louis & S. F. R. Co. v. Peery*, 40 Okla. 258, 138 Pac. 144; *Chicago, R. I. & P. R. Co. v. Harrington*, 44 Okla. 41, 143 Pac. 325; *Chicago, R. I. & P. R. Co. v. Bruce*, — Okla. —, 150 Pac. 880; *St. Louis & S. F. R. Co. v. Wood*, — Okla. —, 152 Pac. 848; *St. Louis & S. F. R. Co. v. Wynn*, — Okla. —, 153 Pac. 1156; *St. Louis & S. F. R. Co. v. Wynn*, — Okla. —, 156 Pac. 346.

State laws prohibiting stipulations for notice of loss or damage within prescribed time were superseded with respect to interstate shipments by the Carmack Amendment. *Galveston, H. & S. A. R. Co. v. Sparks*, — Tex. Civ. App. —, 162 S. W. 943; *San Antonio & A. P. R. Co. v. Bracht*, — Tex. Civ. App. —, 172 S. W. 1116.

#### Failure to Pay Damages or to Trace Lost Shipments.

A state law imposing a penalty on carrier for failing to pay within a designated

time damages for injury to a shipment, or to trace it and inform the consignee when, where and by which carrier it was damaged, is applicable to an action against a terminal carrier, although the shipment in question was made in interstate commerce, since the Carmack Amendment applies only to the liability of the initial and not that of the terminal carrier. *DuPre v. Columbia, N. & L. R. Co.*, 98 S. C. 468, 79 S. E. 310; *Stukes v. Southern Express Co.*, 96 S. C. 383, 80 S. E. 612; *Varnville Furniture Co. v. Charleston & W. C. R. Co.*, 98 S. C. 63, 79 S. E. 700, reversed 237 U. S. 597, 59 L. ed. 1137, 35 S. E. 715.

A state statute imposing a penalty on a carrier for failing to pay a claim for injury to a shipment within 40 days from the filing of the claim with the carrier's agent was superseded, with respect to interstate shipments, by the Carmack Amendment. *Spencer v. Southern R. Co.*, 101 S. C. 436, 85 S. E. 1058; *Meetze v. Southern Express Co.*, 91 S. C. 379, 74 S. E. 823.

A state statute imposing a penalty on shippers for failing to trace lost shipments, or to give information to shippers regarding the same, when adopted after the enactment of the Carmack Amendment, is not within the proviso of that law preserving to shippers all rights and remedies under existing laws. *Meetz v. Southern Express Co.*, 91 S. C. 379, 74 S. E. 823.

A state statute providing that initial, intermediate or terminal carriers who fail, within 40 days from notice, to inform the notifying party when, where and by which carrier property was injured in shipment, shall be liable for the amount of the claim, as well as for a penalty of \$50, although it may escape liability by proving that after using due diligence it was unable to trace the property, and also imposing liability on such carriers for failing to pay claims for freight overcharges or for damages to property within 40 days after the filing of claims therefor, in case of shipments from without the state, conflicts with the Act of Congress of June 18, 1910, 36 Stat. at L. 539, ch. 309, Comp. Stat. 1913, 8563, and it cannot be saved either by calling it an exercise of the police power or by the provision of the Carmack Amendment preserving the rights of holders of bills of lading under existing laws. *Charleston & W. C. R. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 59 L. ed. 1137, 35 Sup. Ct. Rep. 715, reversing 98 S. C. 63, 79 S. E. 700.

#### Binding Effect of Weights Stated in Bills of Lading.

A state law binding a carrier to the weights expressed in a bill of lading issued by it is not applicable to an inter-

state shipment, which is controlled by the terms of the Carmack Amendment. *Southern R. Co. v. North State Cotton Co.*, 107 Miss. 71, 64 So. 965; *St. Louis & S. F. R. Co. v. Woodruff Mills*, 105 Miss. 214, 62 So. 171.

### Remedies and Procedure.

Remedies and procedure in an action in a state court on the Carmack Amendment are regulated by the law of the forum. *St. Louis & S. F. R. Co. v. Mounts*, — Okla. —, 144 Pac. 1036.

### Time for Bringing Suit.

A state statute which precludes the making of contracts requiring that actions against carriers to enforce liability shall be brought in less than the statutory period was superseded with respect to interstate shipments by the Carmack Amendment. *Missouri, K. & T. R. Co. v. Harri-man*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397, reversing — *Tex. Civ. App.* —, 128 S. W. 932.

### Presumption of Negligence.

A state statute providing that the carrier receiving freight from another carrier under a contract for continuous transportation shall, when the property reaches destination in an injured condition, be presumed to have caused the damage unless, within 30 days after demand, it shall furnish the consignee with true copies of all notations, exceptions, records and memorandums entered on the books of each carrier, touching the receipt and handling of such freight while in transit, was superseded, with respect to interstate shipments, by the Carmack Amendment. *Louisville & N. R. Co. v. Price*, — Miss. —, 71 So. 161.

A state rule that proof of the delivery in good order of live stock or other goods to an initial carrier for a continuous transportation, and their delivery by the final carrier in a damaged condition, establishes a prima facie case against the defendant carrier which will permit the plaintiff to go to the jury on the question of the carrier's liability, is applicable to an action under the Carmack Amendment. *Mewborn v. Louisville & N. R. Co.*, — N. C. —, 87 S. E. 37.

### Burden of Proof.

Where, on the arrival of an interstate shipment at destination, the consignee paid the charges, receipted for the property, removed a portion, and, with the consent of the carrier, left the remainder for subsequent removal at his own convenience, the carrier's liability as a warehouseman for the subsequent destruction of the property by fire is controlled by the bill of lading issued under the Car-

mack Amendment, and a state law casting on the carrier the burden of showing freedom from negligence does not apply. *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. ed. —, 36 Sup. Ct. Rep. 469, reversing 99 S. C. 422, 83 S. E. 781.

A state statute requiring a common carrier to show that a contract limiting its liability is based on a sufficient consideration, is reasonable, and was entered into by a shipper after being given a bona fide and full opportunity to ship at a fair and reasonable rate without a limitation of the carrier's liability, was superseded with respect to interstate shipments, by the Carmack Amendment. *Wabash R. Co. v. Priddy*, 179 Ind. 483, 494, 101 N. E. 724.

### Statute Giving Lien on Railway.

Liability incurred by an initial carrier under the Carmack Amendment, while in the hands of a receiver, is not within a state statute making the property of the company in the hands of purchasers subject to subsisting liability and claims for injury or death sustained in the operation of the road by previous owners or receivers. *Hudgins v. International & G. N. R. Co.*, — *Tex. Civ. App.* —, 162 S. W. 1016.

### Interest and Attorney Fees.

A state law relating to interest and attorneys' fees in actions against carriers for the loss of freight, does not apply to an action based on the Carmack Amendment. *Fornel v. Florida E. C. R. Co.*, 65 Fla. 102, 61 So. 194.

A state statute allowing attorney fees in action against carrier for shortage in shipments of grain, seed or hay is not when applied to interstate shipments, obnoxious to the Carmack Amendment. *Harold v. Atchison, T. & S. F. R. Co.*, 93 Kan. 456, 144 Pac. 823, reversed 241 U. S. 371, 60 L. ed. —, 36 Sup. Ct. Rep. 665.

## 3. On Common-Law Rights and Remedies.

### In General.

Although Federal legislation upon the liability of carrier in interstate commerce superseded all state regulations and policies on the subject, it did not destroy, but was intended to continue in force any rights a shipper had under the general common law when not inconsistent with the Federal laws. *Bowles v. Quincy, O. & K. C. R. Co.*, — *Mo. App.* —, 187 S. W. 131.

The common-law doctrine of a carrier's liability for a loss or injury to freight occurring on its own line, was not affected by the Carmack Amendment. *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. ed. —, 36 Sup. Ct. Rep. 555.

The common-law rule as to the liability of a carrier of freight was not altered by the Carmack Amendment. *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 187 S. W. 149.

#### 4. Of Saving Clause in Carmack Amendment.

##### In General.

Federal laws only are within the provision of the Carmack Amendment saving to the holder of a bill of lading any remedy or right of action under existing laws. *Stubblefield v. St. Louis & S. F. R. Co.*, — Mo. App. —, 184 S. W. 149.

##### Effect on State Law.

A limitation of a carrier's liability for the injury or loss of an interstate live stock shipment, even though made in consideration of the lesser of two rates, is void under a state constitutional provision, since the Carmack Amendment preserves to a shipper all rights and remedies under existing laws. *Latta v. Chicago, St. P., M. & O. R. Co.*, 97 C. C. A. 198, 172 Fed. 850, S. C. 106 C. C. A. 664, 184 Fed. 987, reversed 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155.

Rights and remedies conferred by existing state laws were not preserved, with respect to interstate shipments of freight, by the provision of the Carmack Amendment preserving to the holder of a receipt or bill of lading any remedy or right of action he had under existing laws, since rights and remedies under Federal laws only are with such proviso. *Southern R. Co. v. Bennett*, 17 Ga. App. 162, 80 S. E. 418, overruling *Atlantic C. L. R. Co. v. Thomasville L. S. Co.*, 13 Ga. App. 102, 111, 78 S. E. 1019; but see *Central of Ga. R. Co. v. Maxelbaum*, — Ga. App. —, 89 S. E. 638, overruling *Southern R. Co. v. Bennett*, supra.

A state statute providing that initial, intermediate or terminal carriers who fail, within 40 days from notice, to inform the notifying party when, where and by which carrier property was injured in shipment, shall be liable for the amount of the claim, as well as for a penalty of \$50, although it may escape liability by proving that after using due diligence it was unable to trace the property, and also imposing liability on such carriers for failing to pay claims for freight overcharges or for damages to property within 40 days after the filing of claims therefor, in case of shipments from without the state, conflicts with the Act of Congress of June 18, 1910, 36 Stat. at L. 539, ch. 309, Comp. Stat. 1913, 8563, and it cannot be saved either by calling it an exercise of the police power or by the provision of the Carmack amendment preserving the rights of holders of bills of lading under exist-

ing laws. *Charleston & W. C. R. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 59 L. ed. 1137, 35 Sup. Ct. Rep. 715, reversing 98 S. C. 63, 79 S. E. 700.

A state statute imposing a penalty on shippers for failing to trace lost shipments, or to give information to shippers regarding the same, when adopted after the enactment of the Carmack Amendment, is not within the proviso of that law preserving to shippers all rights and remedies under existing laws. *Meetz v. Southern Express Co.*, 91 S. C. 379, 74 S. E. 823.

##### E. What Carriers Within Act.

###### 1. In General.

(No decisions.)

###### 2. Initial Carriers.

##### Who is Initial Carrier.

###### — Carrier Moving Car at Terminal.

A carrier that receives a loaded car for interstate transportation is an initial carrier within the meaning of the Carmack Amendment, where, under the directions of the shipper, it places a route card on the car and merely moves it from its own yards to that of a connecting carrier. *Aton Piano Co. v. Chicago, M. & St. P. R. Co.*, 152 Wis. 156, 139 N. W. 743, writ of error dismissed without opinion 235 U. S. 715, 59 L. ed. 438, 35 Sup. Ct. Rep. 282.

A common carrier receiving goods for interstate transportation is an initial carrier, within the meaning of the Carmack Amendment, although it only switches the loaded car to the lines on another common carrier for transportation from the state. *Barrett v. Northern P. R. Co.*, — Idaho —, 157 Pac. 1016.

###### — Intrastate Carrier Moving Interstate Traffic.

An intrastate railway company moving an interstate shipment wholly within one state and delivering it to a connecting carrier for transportation to another state, is an initial carrier within the meaning of the Carmack Amendment. *Keithley v. Lusk*, 190 Mo. App. 458, 177 S. W. 756; *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131; *Shultz v. Skaneateles R. Co.*, 66 Misc. 9, 122 N. Y. Supp. 445, affirmed 145 App. Div. 906, 129 N. Y. Supp. 1146; *Southern P. Co. v. Meadors*, — Tex. Civ. App. —, 129 S. W. 170, reversed on other grounds 104 Tex. 469, 140 S. W. 427; *Texas C. R. Co. v. Hico Oil Co.*, — Tex. Civ. App. —, 132 S. W. 381; *Galveston, H. & S. A. R. Co. v. Johnson*, — Tex. Civ. App. —, 133 S. W. 725; *Galveston, H. & S. A. R. Co. v. Carmack*, — Tex. Civ. App. —, 176 S. W.

158; *Michelson v. Judson Freight F. Co.*, 268 Ill. 546, 109 N. E. 281, affirming 189 Ill. App. 568.

An intrastate railway company that accepts property for through shipment to an interstate point, is an initial carrier within the meaning of the Carmack Amendment, although it does not issue a through bill of lading, and only moves the shipment within the state of origin to a point on its own line for delivery to a connecting carrier for interstate transportation. *Keithley v. Lusk*, 190 Mo. App. 458, 177 S. W. 756; *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131; *Shultz v. Skaneateles R. Co.*, 66 Misc. 9, 122 N. Y. Supp. 445, affirmed 145 App. Div. 905, 129 N. Y. Supp. 1146; *Southern P. Co. v. Meadors*, — Tex. Civ. App. —, 129 S. W. 170, reversed on other grounds 104 Tex. 469, 140 S. W. 427; *Texas C. R. Co. v. Hico Oil Co.*, — Tex. Civ. App. —, 132 S. W. 381; *Galveston, H. & S. A. R. Co. v. Johnson*, — Tex. Civ. App. —, 133 S. W. 725; *Galveston, H. & S. A. R. Co. v. Carmack*, — Tex. Civ. App. —, 176 S. W. 158.

A local express company operating only in one state, which accepts goods for transportation to another state, becomes an initial carrier and liable as such under the Carmack Amendment, for a loss occurring on the lines of connecting carriers. *Florman v. Dodd & Childs Express Co.*, 79 N. J. L. 63, 74 Atl. 446.

An electric railway company that handles express within a state for a flat rate is an initial carrier within the meaning of the Carmack Amendment, although it has no established through rate, and it is liable for any loss or damage to an interstate shipment occurring on the lines of a connecting carrier, notwithstanding a condition of the bill of lading issued by the initial carrier limiting its liability to loss or damage occurring on its own road. *Glenlyon Dye Works v. Interstate Express Co.*, 36 R. I. 588, 91 Atl. 5.

An intrastate electric railway company is an initial carrier within the meaning of the Carmack Amendment, when it did not issue a through bill of lading for an interstate shipment, but issued one for its own line only, and the connecting carrier advanced to the former its proportion of the through tariff rate, since such fact was some evidence of a common control, management or arrangement for a continuous carriage of shipment. *Ross v. Maine C. R. Co.*, 112 Me. 63, 90 Atl. 711, S. C. 114 Me. 287, 96 Atl. 223.

### 3. Intermediate and Terminal Carriers.

Liability of intermediate or terminal carrier as initial carrier, see *infra*, XI, M, 3, (c).

### 4. Electric Railway Company.

#### In General.

An intrastate electric railway company that undertakes to carry express matter to an interstate destination, is engaged in interstate commerce and subject to the Carmack Amendment. *Glenlyon Dye Works v. Interstate Express Co.*, 36 R. I. 588, 91 Atl. 5.

An intrastate electric railway company is an initial carrier within the meaning of the Carmack Amendment, when it did not issue a through bill of lading for an interstate shipment, but issued one for its own line only, and the connecting carrier advanced to the former its proportion of the through tariff rate, since such fact was some evidence of a common control, management or arrangement for a continuous carriage of shipment. *Ross v. Maine C. R. Co.*, 112 Me. 63, 90 Atl. 711, S. C. 114 Me. 287, 96 Atl. 223.

### 5. Truckmen.

#### In General.

A truckman moving goods to a carrier's terminal for transportation in interstate commerce, is not an initial carrier within the meaning of the Carmack Amendment. *Hirsch v. New England N. Co.*, 129 App. Div. 178, 113 N. Y. Supp. 395.

### 6. Connecting or Terminal Carrier as Initial Carrier's Agent.

#### In General.

Under the provisions of the Carmack Amendment the connecting carrier becomes the agent of the initial carrier for the purpose of completing an interstate transportation and delivery of property. *Northern P. R. Co. v. Wall*, 241 U. S. 87, 60 L. ed. —, 36 Sup. Ct. Rep. 493, reversing 50 Mont. 122, 145 Pac. 291; *Ft. Smith & W. R. Co. v. Awbrey*, 39 Okla. 270, 134 Pac. 1117; *St. Louis, B. & M. R. Co. v. Gould*, — Tex. Civ. App. —, 165 S. W. 13.

### F. What Shipments Within Act.

#### 1. In General.

(No decisions.)

#### 2. Interstate Shipments.

#### In General.

The Carmack Amendment applies only to shipments between the several states of the Union. *Houston, E. & W. T. R. Co. v. Inman*, — Tex. Civ. App. —, 134 S. W. 275; *Hamlen v. Illinois C. R. Co.*, 212 Fed. 324.



A bill of lading is for a through shipment, within the meaning of the Carmack Amendment, notwithstanding that it mentions the intermediate carriers over whose lines an interstate shipment is to pass. *Kemendo v. Fruit Dispatch Co.*, — Tex. Civ. App. —, 131 S. W. 73.

#### **Intrastate Shipment Passing Through Another State.**

When goods are shipped between points within the same state, and, in order to reach the carrier's yards at destination, they are moved into and out of another state, the shipment is one in interstate commerce. *Howard v. Chicago, R. I. & P. R. Co.*, — Mo. App. —, 184 S. W. 906.

A shipment of live stock becomes interstate, within the meaning of the Carmack Amendment, when accepted for transportation between points in the same state, where, for a portion of the way, the line of the carrier passes through an adjoining state where the stock was unloaded and fed. *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131.

When the place of origin and destination of a shipment are within the same state, it does not become interstate, within the meaning of the Carmack Amendment, because in transit it passes through another state. *Wichita Falls & W. R. Co. v. Asher*, — Tex. Civ. App. —, 171 S. W. 1114.

#### **Interstate Shipments Over Line of Single Carrier.**

The Carmack Amendment does not apply to an action against a carrier for injuries to an interstate shipment over its own line, since the common-law liability governs. *Storm Lake T. & T. F. v. Minneapolis & St. L. R. Co.*, 209 Fed. 895.

Where an interstate shipment is made over the line of one carrier only, the Carmack Amendment does not change the common-law rule making the carrier liable only for the failure to discharge some duty incumbent on it. *St. Louis & S. F. R. Co. v. L. Zickafoose*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717.

The common-law doctrine of a carrier's liability for a loss or injury to freight occurring on its own line was not affected by the Carmack Amendment. *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. ed. —, 36 Sup. Ct. Rep. 555.

#### **3. Shipments to Foreign Countries.**

##### **In General.**

A shipment from a point within the United States to a foreign country is not within the purview of the Carmack Amendment. *Hamlen v. Illinois C. R. Co.*, 212 Fed. 324, *Burk v. Gulf, C. & S. F. R. Co.* (Municipal Ct. N. Y. C.), 147 N. Y.

Supp. 794; *Aldrich v. Atlantic C. L. R. Co.*, — S. C. —, 89 S. E. 315; *Houston, E. & W. T. R. Co. v. Inman*, — Tex. Civ. App. —, 134 S. W. 275.

A shipment on a local bill of lading within a state to a seaport is within the Carmack Amendment, although the property is destined for transportation to a foreign country. *Texas & P. R. Co. v. Langbehn*, — Tex. Civ. App. —, 158 S. W. 244.

#### **Shipments to Dominion of Canada.**

The primary liability clause of the Carmack Amendment does not apply to a shipment over the lines of connecting carriers from a point in a state to a point in the Dominion of Canada. *Best v. Great N. R. Co.*, 159 Wis. 429, 150 N. W. 484.

#### **4. Interstate Shipment Diverted to Intrastate Point.**

##### **In General.**

An initial carrier is answerable under the Carmack Amendment for injury to a shipment billed to a point in another state, notwithstanding that the loss occurred after the shipment had been diverted by the consignee for delivery to a point within the state of origin. *Lanski v. Chicago & N. W. R. Co.*, 181 Ill. App. 565.

#### **G. Delivery to Carrier.**

##### **What Constitutes.**

The provisions of the Interstate Commerce act apply when freight is tendered a carrier for interstate transportation instead of when it actually passes into its possession. *Southern R. Co. v. Reid*, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140, reversing 153 N. C. 490, 69 S. E. 618.

Where a car furnished a shipper and loaded by him for interstate shipment was destroyed at night by fire while on his siding, there was a sufficient delivery to the carrier although the bill of lading or receipt required by the Carmack Amendment was not to be issued until the next day. *Morrison Grain Co. v. Missouri P. R. Co.*, 182 Mo. App. 339, 170 S. W. 404.

A clause in a uniform bill of lading, prescribed by the Carmack Amendment, providing that property should remain at the owner's risk when received from or delivered on private or other sidings, includes a public siding near a shipper's factory on which cars were customarily placed for the convenience of himself and other shippers in loading. *Standard Combed Thread Co. v. Penn. R. Co.*, 88 N. J. L. 257, 95 Atl. 1002.

The loading of goods for interstate shipment in a detached box car at a pub-

lic siding distant from a railway station and freight office, with no participation by railway employees beyond placing the car, custom allowing the shipper 48 hours to load the car and then notify the agent at the nearest freight station, did not constitute a delivery to the carrier, within the meaning of the Carmack Amendment, when the loading was completed within less than 48 hours, without notice to the company. *Standard Combed Thread Co. v. Penn. R. Co.*, 88 N. J. L. 257, 95 Atl. 1002.

## H. Contracts of Affreightment.

### 1. In General.

#### Contracts for Through Transportation.

A carrier contracting for a through shipment in interstate commerce is deemed to have contracted for through transportation to destination, using the connecting carriers as its agents. *Louisville & N. R. Co. v. Scott*, 219 U. S. 209, 55 L. ed. 183, 31 Sup. Ct. Rep. 171; *Atlantic C. L. R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 Sup. Ct. Rep. 164, 31 L. R. A. (N. S.) 57; *Gibson v. Little Rock & H. S. R. Co.*, 93 Ark. 439, 124 S. W. 1033; *Nashville, C. & St. L. R. Co. v. Truitt*, 17 Ga. App. 263, 86 S. E. 421; *Hogan Milling Co. v. Union P. R. Co.*, 91 Kan. 783, 139 Pac. 397; *Travis v. Wells, F. & Co.*, 79 N. J. L. 83, 74 Atl. 444; *Greenwald v. Weir*, 130 App. Div. 696, 115 N. Y. Sup. 311; *Earnest v. Delaware, L. & W. R. Co.*, 149 App. Div. 330, 134 N. Y. Sup. 323; *Missouri, K. & T. R. Co. v. Stark Grain Co.*, 103 Tex. 542, 131 S. W. 412.

#### Effect of Contract for Through Shipment.

The contract made by the initial carrier under the Carmack Amendment is the one that fixes the liability of the parties, including that of connecting carriers. *Atchison, T. & S. F. R. Co. v. Word*, — Tex. Civ. App. —, 159 S. W. 575.

### 2. Written Contracts.

#### Duty to Issue.

The Carmack Amendment requires an initial carrier to issue a written bill of lading for an interstate shipment. *Kent v. Chicago, B. & Q. R. Co.*, 189 Mo. App. 424, 176 S. W. 1105; *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. 187 S. W. 131.

#### For Baggage.

The provision of the Carmack Amendment that a railway receiving property for interstate transportation shall issue a receipt or bill of lading therefor, does not require the issuance to a passenger for

his baggage of anything other than the ordinary baggage check. *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. ed. 868, 34 Sup. Ct. Rep. 526, L. R. A. 1915 B. 450, Ann. Cas. 1915 D. 593, reversing 209 Mass. 598, 95 N. E. 945, Ann. Cas. 1912 B. 669.

#### Ratification of Void Contract.

A contract between a shipper and a connecting carrier relating to an interstate shipment, void because made after delivery of the shipment to such carrier and the payment of the freight charges, cannot be ratified by the shipper's subsequent conduct, where the agreement was without consideration. *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131.

#### Waiver of Terms of Contract.

The parties to a shipment made under the terms of the Carmack Amendment cannot waive the terms of the contract of affreightment. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541, reversing on this point 15 Ga. App. 142, 82 S. E. 784.

#### Denying Issue of Bill of Lading.

A shipper will not be heard to say that an interstate shipment was not made on a written contract, in view of his signature to one, since the Carmack Amendment requires the carrier to reduce the contract to writing. *Johnson v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 28.

### 3. Parole Contracts.

#### Validity.

A parole contract for the interstate transportation of property is not void under the Carmack Amendment. *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131; *Panhandle & S. F. R. Co. v. Jones*, — Tex. Civ. App. —, 182 S. W. 1; *Standard Combed Thread Co. v. Penn. R. Co.*, 88 N. J. L. 257, 95 Atl. 1092.

An oral contract for an interstate shipment of property is not prohibited by the Carmack Amendment unless in conflict with the published schedules and rates of a carrier. *Gulf, C. & S. F. R. Co. v. Vashbinder*, — Tex. Civ. App. —, 172 S. W. 763.

#### Recovery On.

The Carmack Amendment does not preclude a recovery on a verbal contract for the interstate transportation of property where no valid written agreement was executed. *Panhandle & S. F. R. Co. v. Jones*, — Tex. Civ. App. —, 182 S. W. 1.

#### Merger.

There can be no recovery under the Carmack Amendment on a parole contract for

interstate shipment, where it appears that a written bill of lading was issued. *Idaho Sheep Co. v. Oregon S. L. R. Co.*, 188 Ill. App. 591.

An oral contract for the interstate transportation of live stock was not merged in a written agreement which the shipper was compelled to sign just as he boarded the train containing the shipment, and which he did not have time to read. *Panhandle & S. F. R. Co. v. Jones*, — Tex. Civ. App. —, 182 S. W. 1.

#### 4. Fraudulent Issue of Bill of Lading.

##### In General.

Where a station agent fraudulently issued a bill of lading for a purported interstate shipment, a railway company is not answerable under the Carmack Amendment to a person who paid a draft in reliance on the bill of lading. *Fitch v. Atchison, T. & S. F. R. Co.*, 170 App. Div. 222, 155 N. Y. Supp. 1079.

#### 5. Effect of Failure to Issue Bill of Lading.

##### In General.

Although the Carmack Amendment requires that the initial carriers shall issue a written receipt or bill of lading for an interstate shipment, the failure to do so does not avoid a parole contract. *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131.

Under the Carmack Amendment and the regulations of the Interstate Commerce Commission respecting tariffs and uniform bills of lading, the rights of the parties to an interstate shipment, when the delivery of goods to a carrier is complete, are regulated by the provisions of such uniform bills, although none was in fact issued to the shipper. *Standard Combed Thread Co. v. Penn. R. Co.*, 88 N. J. L. 257, 95 Atl. 1002.

##### Effect on Liability of Initial Carrier.

The failure of an initial carrier to issue a receipt or bill of lading for an interstate shipment, as required by the Carmack Amendment, does not relieve it from the primary liability imposed by that act, since the law applies to all cases where a carrier receives goods under either an oral or written agreement for transportation to another state. *Aton Piano Co. v. Chicago, M. & St. P. R. Co.*, 152 Wis. 156, 139 N. W. 743, writ of error dismissed without opinion 235 U. S. 715, 59 L. ed. 438, 35 Sup. Ct. Rep. 282.

A carrier that receives goods for interstate transportation is, by virtue of the Carmack Amendment, liable to the consignee for a loss caused by it or any connecting carrier, although the initial carrier fails to issue a bill of lading therefor. In-

ternational Watch Co. v. Delaware, L. & W. R. Co., 80 N. J. L. 553, 78 Atl. 49.

An initial carrier cannot escape liability under the Carmack Amendment for the misconduct of subsequent carriers, by failing or refusing to issue a bill of lading for an interstate shipment. *Idaho Sheep Co. v. Oregon S. L. R. Co.*, 188 Ill. App. 591.

##### Effect on Liability of Subsequent Carriers.

The failure of an initial carrier to issue a bill of lading, as required by the Carmack Amendment, for an interstate shipment, is not available to a connecting carrier when sued for its wrongful diversion of the goods from the route selected by the shipper, unless such carrier knew of and relied upon the bill of lading to be issued by a succeeding connecting carrier. *Saxon Mills v. New York, N. H. & H. R. Co.*, 214 Mass. 383, 101 N. E. 1075.

#### 6. Bill of Lading for Intrastate Portion of Interstate Shipment.

##### Effect.

An intrastate carrier is answerable as an initial carrier under the Carmack Amendment when it receives an interstate shipment, although it bills it only to an intrastate point on its own line, where it is delivered to a connecting carrier, since the law requires the first carrier to issue a through bill of lading. *Michaelson v. Judson Freight F. Co.*, 268 Ill. 546, 109 N. E. 281, affirming 189 Ill. App. 566; *Keitley v. Lusk*, 190 Mo. App. 458, 177 S. W. 756; *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131; *Galveston, H. & S. A. R. Co. v. Carmack*, — Tex. Civ. App. —, 176 S. W. 158; *Galveston, H. & S. A. R. Co. v. Johnson*, — Tex. Civ. App. —, 133 S. W. 725; *Texas C. R. Co. v. Hico Oil Co.*, — Tex. Civ. App. —, 132 S. W. 381.

#### 7. Construction of Contracts of Affreightment.

##### In General.

The terms of the Carmack Amendment enter into and form a part of a contract for the interstate transportation of property by a common carrier. *Northern P. R. Co. v. Wall*, 241 U. S. 87, 60 L. ed. —, 36 Sup. Ct. Rep. 493, reversing 50 Mont. 122, 145 Pac. 291.

Contracts for the interstate transportation of property are to be construed under the Carmack Amendment to the exclusion of all state laws. *Miller v. Atchison, T. & S. F. R. Co.*, — Kan. —, 156 Pac. 780; *Hamilton v. Chicago & A. R. Co.*, 177 Mo. App. 145, 164 S. W. 248.

The validity of any stipulation of a contract for the interstate carriage of freight and of any limitation upon the liability

thereby imposed, is a Federal question to be determined under the general common law, and is withdrawn from the field of state law or legislation. *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397, reversing — *Tex. Civ. App.* —, 128 S. W. 932.

The construction of a bill of lading issued for an interstate shipment presents a Federal question even in the absence of affirmative proof that the carrier has complied with the requirements of the Interstate Commerce Act. *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. ed. —, 36 Sup. Ct. Rep. 555.

Federal statutes touching interstate commerce and the decisions of the Supreme Court of the United States construing them, afford a state court an exclusive rule in determining contracts pertaining to interstate shipments. *Stubblefield v. St. Louis & S. F. R. Co.*, — *Mo. App.* —, 184 S. W. 149.

The proper construction of a bill of lading issued under the Carmack Amendment is a Federal question. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541, affirming 15 *Ga. App.* 142, 82 S. E. 784.

The effect to be given to the provisions of a contract for the interstate transportation of property is governed by the decisions of the Federal courts, which state courts are bound to follow. *Thompson v. Atchison, T. & S. F. R. Co.*, — *Mo. App.* —, 185 S. W. 1145.

The validity of the conditions of a contract for interstate transportation of freight are to be determined under the Federal laws and decisions instead of state laws. *McElvain v. St. Louis & S. F. R. Co.*, 176 *Mo. App.* 379, 158 S. W. 464.

The Federal law controls a state court in determining questions of a carrier's liability arising out of interstate shipments of property. *St. Louis & S. F. R. Co. v. Zickafoose*, 39 *Okla.* 302, 135 *Pac.* 406, 6 *N. C. C. A.* 717.

The liability of a carrier for damages under an interstate contract of shipment is not dependent on state legislation, but involves the construction of Federal enactments upon the subject, and is to be determined under the general common law. *Harrington v. Wichita F. & N. W. R. Co.*, — *Okla.* —, 156 *Pac.* 634.

The validity of a stipulation that a carrier should not be liable for loss or injury to live stock moved in interstate commerce unless notice is given it within 10 days from the removal of the animals from the car, is to be determined in a state court according to the common law as declared by the Supreme Court of the United States. *Armstrong v. Illinois C. R. Co.*, 162 *Ky.* 539, 172 S. W. 947.

The validity of a stipulation of a contract for the interstate transportation of live stock, that written notice of damages should be given the carrier within 5 days from the removal of the stock from the cars, is to be determined under the Act of Congress regulating interstate commerce. *Crawford v. Southern R. Co.*, — *S. C.* —, 86 S. E. 19.

### 8. Varying Original Contract of Affreightment.

#### New Agreements with Subsequent Carriers.

The parties to an interstate shipment of freight cannot, where the property is retained by the carrier for more than 48 hours after notice to the consignee of its arrival, substitute a special agreement for the stipulations as to the carrier's liability contained in the bill of lading issued under the Carmack Amendment. *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. ed. —, 36 Sup. Ct. Rep. 469, reversing 99 *S. C.* 422, 83 S. E. 781.

Where, on account of the destruction of a bridge, a connecting carrier and shipper stipulated that an interstate shipment of live stock should be accepted subject to delay, the interstate character of the shipment was not altered, since such agreement merely added a new feature to and became a part of the original contract of carriage. *Bowles v. Quincy, O. & K. C. R. Co.*, — *Mo. App.* —, 187 S. W. 131.

Since the Interstate Commerce Act entitles a shipper to accompany an interstate shipment of live stock, the fact that a conductor of a connecting carrier refused to transport a caretaker unless he signed a further contract, did not furnish a consideration therefor. *Bowles v. Quincy, O. & K. C. R. Co.*, — *Mo. App.* —, 187 S. W. 131.

#### Assumption of Additional Risk.

The Carmack Amendment precludes a carrier from making special contracts to compensate it for assuming the additional risk that the notice of special damages flowing from the failure to deliver property within a certain time, would place upon it. *Chicago, R. I. & P. R. Co. v. Planters Gin Co.*, 88 *Ark.* 77, 113 S. W. 352.

#### Decreasing Liability.

When an initial carrier issues a bill of lading for an interstate shipment, connecting carriers cannot enter into new contracts with the shipper by which the liability of the latter carriers is lessened in case of loss or damage. *Missouri, O. & G. R. Co. v. French*, — *Okla.* —, 152 *Pac.* 591.

### Varying by Parole.

In so far as a written bill of lading issued under the Carmack Amendment is a contract of shipment and not a mere receipt for the property, it cannot be varied by prior or contemporaneous agreements between the parties. *Sturges v. Detroit, G. H. & M. R. Co.*, 166 Mich. 231, 131 N. W. 706.

## 9. Possession of Contract as Prerequisite to Recovery.

### In General.

The holding of the bill of lading is not a prerequisite to the right of a shipper to recover for the loss of goods moved in interstate commerce, since the Carmack Amendment expressly extends its remedy in behalf of the shipper, or one who succeeds to his rights, directly against the carrier to whom the goods are delivered for shipment. *Aultman v. Atlantic C. L. R. Co.*, — Fla. —, 71 So. 283.

In the absence of the issuance of a bill of lading for an interstate shipment the owner of the property may, on proving his right, maintain an action under the Carmack Amendment against the initial carrier. *Idaho Sheep Co. v. Oregon S. L. R. Co.*, 188 Ill. App. 591.

A shipper may maintain an action, under the Carmack Amendment, against an initial carrier for injuries to an interstate shipment of live stock, notwithstanding that he surrendered the original bill of lading to the terminal carrier in order to obtain return transportation for himself, since the act does not require the person suing to have the manual possession of the bill of lading as a prerequisite to his right to maintain the action. *Pecos & N. T. R. Co. v. Meyer*, — Tex. Civ. App. —, 155 S. W. 309, 6 N. C. C. A. 146.

In an action under the Carmack Amendment the plaintiff must produce the bill of lading, if one was issued, or he cannot recover. *Burtless v. Oregon S. L. R. Co.*, 180 Ill. App. 249.

### I. Contracts Limiting Liability of Carriers.

Reasonableness of stipulations limiting carrier's liability as question of law or fact, see *infra* XIII, J.

#### 1. In General.

### Unauthorized Stipulations.

Any stipulation in the receipt issued by a carrier for an interstate shipment of freight is ineffectual in so far as it is not authorized by the Carmack Amendment, whether intended for the benefit of the initial or succeeding carrier. *Kansas C. S.*

*R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 227, reversing 91 Ark. 97, 121 S. W. 932, 134 Am. St. Rep. 56; *Atchison, T. & S. F. R. Co. v. Word*, — Tex. Civ. App. —, 159 S. W. 575.

### Avoidance of Liability Imposed by Act.

The provisions of the Carmack Amendment forbidding and annulling contracts exempting the initial carrier from liability for loss or damage arising after an interstate shipment has passed into the control of subsequent carriers, is derogatory to the common law. *Southern P. R. Co. v. Crenshaw Bros.*, 5 Ga. App. 675, 63 S. E. 865.

Neither the Carmack Amendment nor the Elkins Act conferred authority on carriers to limit their liability by contract. *Adams Express Co. v. Mellichamp*, 138 Ga. 443, 75 S. E. 596, Ann Cas. 1913 D. 967.

An initial carrier cannot exempt itself by contract from the liability imposed by the Carmack Amendment. *Shidlovsky v. Mallory S. S. Co.*, 60 Misc. 67, 111 N. Y. Supp. 778.

The prohibition of the Carmack Amendment against contracts, receipts, rules or regulations exempting carriers from the liability imposed by the act, has reference to attempts to relieve the initial carrier from loss, damage or injury caused by it or any connecting carrier. *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717.

### Limitation of Common-Law Liability.

When alternative freight rates, fairly based on value, are offered, a carrier may limit its liability for an interstate shipment by special contract. *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. ed. —, 36 Sup. Ct. Rep. 555.

The Carmack Amendment precludes a carrier, even in consideration of a reduced rate, from exempting itself from the full burden of its common-law duties. *Holland v. Chicago, R. I. & P. R. Co.*, 139 Mo. App. 702, 123 S. W. 987.

Notwithstanding the Carmack Amendment the common-law liability of carriers for the safe carriage of interstate shipments may be limited by special contracts with shippers, when supported by a consideration, when reasonable, and when fairly entered into by the shipper, and when they do not attempt to cover losses caused by the negligence or misconduct of the carrier. *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397, reversing — Tex. Civ. App. —, 128 S. W. 932; *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717; *St. Louis & S. F. R. Co. v. Peery*, 40 Okla. 258, 138 Pac. 144.

The common-law liability of carriers for

the safe transportation of interstate shipments may be limited by special contracts with shippers if based on a consideration, when reasonably and fairly entered into without intent to cover losses due to the negligence or misconduct of the shipper. *St. Louis & S. F. R. Co. v. Bilby*, 35 Okla. 589, 130 Pac. 1089.

The Carmack Amendment does not prohibit a carrier from placing any limit whatever upon its common-law liability, but merely precludes a limitation of its liability for damages caused by the respective carriers without reference to whether it was the result of negligence. *St. Louis S. W. R. Co. v. Ray*, — Tex. Civ. App. —, 127 S. W. 281.

#### **Avoidance of Liability of Common Carrier.**

A carrier cannot, in consideration of the acceptance of the lower of two regularly established rates, divest itself of the obligation of a common carrier, with respect to an interstate shipment, and create that of a forwarder only. *Missouri, O. & G. R. Co. v. French*, — Okla. —, 152 Pac. 591.

A release of a carrier of live stock from its liability as a common carrier, in consideration of the lower of two established freight rates, and a stipulation that its liability should be that of a private carrier for hire, is, when applied to an interstate shipment, void under the Carmack Amendment. *Wabash R. Co. v. Priddy*, 179 Ind. 483, 494, 101 N. E. 724.

#### **Liability for Injury to Live Stock Before Loading.**

A stipulation in a contract of shipment relieving a carrier from liability for injuries to live stock while in cattle pens and before they were loaded for interstate shipment, does not violate the Carmack Amendment. *St. Louis, I. M. & S. R. Co. v. Jones*, 93 Ark. 537, 125 S. W. 1025.

#### **Damage Occasioned by Failure of Owner to Accompany Shipment.**

There is nothing in the Carmack Amendment prohibiting a carrier of live stock from stipulating against liability resulting from the failure of a shipper to accompany and care for stock on an interstate journey, or from entering into any other reasonable stipulation which does not amount to a contractual exemption from liability on account of the carrier's negligence. *Cranor v. Southern R. Co.*, 13 Ga. App. 86, 78 S. E. 1014.

#### **Risk and Expense of Caring for Live Stock.**

The Carmack Amendment avoids a condition of a contract of affreightment to the effect that a shipper shall assume all risk and expense of feeding, watering, bedding,

and otherwise caring for live stock in the cars, yards, pens or elsewhere, and that he shall load and unload the same at his own expense and risk, since the effect was to alter the carrier's common-law duty. *Chicago, R. I. & G. R. Co. v. Scott*, — Tex. Civ. App. —, 156 S. W. 294; *Chicago, R. I. & G. R. Co. v. Linger*, — Tex. Civ. App. —, 156 S. W. 298.

#### **When Contract of Carriage Void.**

Stipulations in a bill of lading for an interstate shipment of live stock are not binding on the shipper where the contract of shipment was oral, and at the demand of the carrier he was compelled to sign the bill without having time to read it, just as he boarded the train containing the stock. *Panhandle & S. F. R. Co. v. Jones*, — Tex. Civ. App. —, 182 S. W. 1.

#### **2. For Negligence.**

##### **In General.**

Contracts releasing a common carrier from liability for its negligence are within the prohibition of the Carmack Amendment, although made in consideration of the lower of two established freight rates or some other special service. *Wabash R. Co. v. Priddy*, 179 Ind. 483, 494, 101 N. E. 724.

The Carmack Amendment precludes contracts stipulating against the negligence of a carrier or its servants in the movement of an interstate shipment. *Piper v. Boston & M. R. Co.*, — Vt. —, 97 Atl. 508.

Limitation of a carrier's liability for its own negligence or that of any connecting carrier, is precluded by the Carmack Amendment. *Ray v. Missouri, K. & T. R. Co.*, 90 Kan. 244, 133 Pac. 847, S. C. 96 Kan. 8, 149 Pac. 397.

A contract for the interstate transportation of freight is not avoided in toto because of a number of invalid stipulations in the agreement by which the carrier sought, in violation of the Carmack Amendment, to limit its liability for its own negligence. *Miller v. Atchison, T. & S. F. R. Co.*, — Kan. —, 156 Pac. 780.

A stipulation of a contract for the interstate transportation of live stock relieving a carrier from liability for delays caused by the "failure of engines, cars or machinery or obstructions to the track, or from any cause whatsoever," does not relieve it from liability for delays resulting from negligence or any act of omission or misconduct. *St. Louis & S. F. R. Co. v. Peery*, 40 Okla. 258, 138 Pac. 144.

A stipulation of a bill of lading exempting both the initial and connection carriers from liability for damages to or the destruction of an interstate shipment by fire, is void under the Carmack Amend-

ment and does not apply where a fire was due to negligence. *Southern P. Co. v. Weatherford Cotton Mills*, — Tex. Civ. App. —, 134 S. W. 778.

### Time for Transportation.

A stipulation of a shipping contract that a carrier does not undertake to transport live stock within any specified time nor to deliver at any particular hour nor in season for any particular market, or that the carrier shall not be responsible for delays caused by storm, failure of machinery or cars, or from obstruction on tracks from any cause, or any injury caused by fire from any cause whatever, does not on its face attempt to cover losses caused by negligence or misconduct on the part of the carrier which are within the prohibition of the Carmack Amendment. *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717.

Where it is shown that a carrier's failure to reach a particular market or to deliver live stock at a particular time was occasioned by negligence or acts of omission on the part of the carrier it will be liable regardless of a stipulation of the contract of interstate carriage to the effect that it did not undertake to transport the stock within any particular time, nor to deliver at any particular hour nor in season for any particular market. *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717.

### 3. To Lines of Particular Carrier.

#### Initial Carrier.

A carrier voluntarily accepting property for transportation to another state to a point beyond its own line is precluded by the Carmack Amendment from contracting against liability for loss or injury occurring on the lines of the connecting carriers. *Atlantic C. L. R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 Sup. Ct. Rep. 164, 31 L. R. A. (N. S.) 7, affirming 168 Fed. 990; *Louisville & N. R. Co. v. Scott*, 219 U. S. 209, 55 L. ed. 183, 31 Sup. Ct. Rep. 171, affirming 133 Ky. 724, 118 S. W. 990, 19 Ann. Cas. 392; *Smeltzer v. St. Louis & S. F. R. Co.*, 158 Fed. 649; *Central of Ga. R. Co. v. Sims*, 169 Ala. 295, 53 So. 826; *Atlantic C. L. R. Co. v. Ward*, 4 Ala. App. 374, 58 So. 677; *Robertson v. Southern R. Co.*, 4 Ala. App. 385, 59 So. 232; *Chicago, R. I. & P. R. Co. v. Miles*, 92 Ark. 573, 123 S. W. 775; *St. Louis S. W. R. Co. v. Grayson*, 89 Ark. 154, 115 S. W. 933; *St. Louis & S. F. R. Co. v. Heyser*, 95 Ark. 412, 130 S. W. 562, Ann. Cas. 1912 A. 610; *Pittsburgh, C. C. & St. L. R. Co. v. Mitchell*, 175 Ind. 196, 211, 91 N. E. 735, 93 N. E. 996; *Pittsburgh, C. C. & St. L. R. Co. v. Knox*, 177 Ind. 344, 98 N. E. 295; *Dodge v. Chicago, St. P. M. & O. R. Co.*, 111 Minn. 123, 126 N. W. 627;

*Southern P. R. Co. v. Lyon*, 107 Miss. 777, 54 So. 784; *Travis v. Wells, Fargo & Co.*, 79 N. J. L. 83, 74 Atl. 444; *Glenlyon Dye Works v. Interstate Express Co.*, 36 R. I. 388, 91 Atl. 5; *International & G. N. R. Co. v. Wilbourne*, — Tex. Civ. App. —, 115 S. W. 111; *Galveston, H. & S. A. R. Co. v. Wallace*, — Tex. Civ. App. —, 117 S. W. 169; *Galveston, H. & S. A. R. Co. v. Crow*, — Tex. Civ. App. —, 117 S. W. 170, both cases affirmed 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205; *Southern P. Co. v. Meadors*, — Tex. Civ. App. —, 129 S. W. 170, reversed on other grounds 104 Tex. 469, 140 S. W. 427; *Kemendo v. Fruit Dispatch Co.*, — Tex. Civ. App. —, 131 S. W. 73; *Pecos & N. T. R. Co. v. Crews*, — Tex. Civ. App. —, 139 S. W. 1049; *Pecos & N. T. R. Co. v. Cox*, — Tex. Civ. App. —, 150 S. W. 265; *Gulf, C. & S. F. R. Co. v. Brackett-Feilder M. & G. Co.*, — Tex. Civ. App. —, 162 S. W. 1191; *Old Dominion S. S. Co. v. Flannery*, 111 Va. 816, 69 S. E. 1107.

The effect of the Carmack Amendment was to annul the stipulations usually found in bills of lading limiting the liability of each successive carrier to damages occurring on its own line, and in cases where the shipper accompanies a shipment, to throw the burden on the carrier of exonerating itself from liability. *Pecos & N. T. R. Co. v. Meyer*, — Tex. Civ. App. —, 155 S. W. 300, 6 N. C. C. A. 146.

An interstate carrier cannot, under the Carmack Amendment, relieve itself from liability for injury caused by a connecting carrier, although the bill of lading provides that the initial carrier shall be exempt from all liability after it has safely and promptly transported and delivered the property to the connecting carrier. *Southern P. R. Co. v. Lyon*, 107 Miss. 777, 54 So. 209.

An initial carrier cannot, under the Carmack Amendment, restrict its liability to that of an agent for that portion of the route beyond its own line, since such amendment treats the connecting carrier as the agent of the initial carrier and holds the latter liable as principal for the former's acts. *Perkett v. Manistee & N. E. R. Co.*, 175 Mich. 253, 141 N. W. 607.

The fact that, in violation of the Carmack Amendment, a bill of lading for an interstate shipment restricts the initial carrier's liability to loss or damage occurring on its own line, does not prevent the holder of the bill from recovering from such carrier for its own negligence, or that of any connecting carrier, in failing to safely transmit and deliver the goods. *Central of Ga. R. Co. v. Sims*, 169 Ala. 295, 53 So. 826.

#### Shipments to Foreign Countries.

Since the Carmack Amendment does not apply to shipments from the United States

to a foreign country, a carrier is not thereby precluded from limiting its liability for loss or damage occurring on its own line. *Aldrich v. Atlantic C. L. R. Co.*, — S. C. —, 89 S. E. 315; *Houston, E. & W. T. R. Co. v. Inman*, — Tex. Civ. App. —, 134 S. W. 275.

#### 4. Agreed Valuation.

##### (a) In General.

##### In Bills of Lading Issued Subsequent to Shipment.

Notwithstanding that under the Carmack Amendment an initial carrier may limit its liability for an interstate shipment to an agreed valuation, a bill of lading containing such a limitation is of no effect when issued after a shipment under a parol agreement, where such contract was not signed by any person authorized to bind the shipper. *Swift v. Louisville & N. R. Co.*, 180 Ill. App. 104.

##### As Contract Against Negligence.

A limitation of the liability of an interstate carrier, based upon a declared value of a shipment, is not a contract exempting the carrier from liability for its own negligence. *Enderstein v. Atchison, T. & S. F. R. Co.*, — N. Mex. —, 157 Pac. 670.

A stipulation of a bill of lading limiting to an agreed valuation the liability of a carrier for the loss of an interstate shipment, is valid, even where loss is due to the carrier's negligence, if the shipper expressly or by implication declares the value and it is accepted by the carrier in good faith as its real worth, and the freight rate is based on the declared value. *St. Louis & S. F. R. Co. v. Mounts*, — Okla. —, 144 Pac. 1036.

##### (b) Validity.

##### In General.

A verbal contract for an interstate shipment of freight which does not limit the carrier's liability to an agreed amount is void when inconsistent with the published tariffs. *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556, reversing 36 Okla. 435, 129 Pac. 20; *Atchison, T. & S. F. R. Co. v. Moore*, 233 U. S. 182, 58 L. ed. 906, 34 Sup. Ct. Rep. 558, reversing 36 Okla. 433, 129 Pac. 24.

When a shipper exercises his option in choosing the rate under which he will ship goods in interstate commerce, his rights as to damages or loss will be determined in accordance with any reasonable stipulations accompanying the rate under which the shipment is made, when filed with and approved by the Interstate Commerce Commission. *Toledo, St. L. & W. R. Co. v. Milner*, — Ind. App. —, 110 N. E. 756.

The Carmack Amendment merely precludes a receiving carrier from contracting against liability for loss or injury occurring on the lines of connecting carriers, and not from limiting its liability in accordance with the amount paid for carriage. *Travis v. Wells, Fargo & Co.*, 79 N. J. L. 83, 74 Atl. 444.

A limitation of a carrier's liability in consideration of a lower rate is valid under the Carmack Amendment, when made with the knowledge of a shipper. *De Rochemont v. Boston & M. R. Co.*, — App. Div. —, 157 N. Y. Supp. 177.

For interstate transportation a carrier may provide two rates open to all, one with full common-law liability and a lesser rate based on an agreed or declared valuation. *Stubblefield v. St. Louis & S. F. R. Co.*, — Mo. App. —, 184 S. W. 149.

Since the Carmack Amendment does not specifically refer to agreements limiting the liability of carriers for interstate shipments to an agreed valuation, but supersedes all state statutes on that subject, the validity of such agreements is to be determined by the common law as declared by the Federal courts. *Adams Express Co. v. Welborn*, — Ind. App. —, 108 N. E. 163.

##### Avoidance of Liability as Common Carrier.

While an interstate carrier may, by fair, open and reasonable agreement, limit the amount recoverable by the shipper in case of injury or loss to the property, to an agreed valuation made for the purpose of obtaining a lower of two legal rates, it cannot divest itself of the obligations of a common carrier and change itself into a forwarder only. *Missouri, O. & G. R. Co. v. French*, — Okla. —, 152 Pac. 591.

##### Stipulated Amount.

The provisions of the Carmack Amendment that no contract, receipt, rule or regulation shall exempt an initial carrier from the liability thereby imposed, does not preclude a fair, just and reasonable contract between a shipper and a carrier, when freely made in consideration of the lower of two duly established tariff rates, limiting to an agreed valuation the liability of such carrier for the loss of or injury to an interstate shipment of property. *Kansas City S. R. Co. v. Mixon-McClintock Co.*, 107 Ark. 48, 154 S. W. 205; *Ann. Cas.* 1914 C. 1247; *Appel v. Platt*, 55 Colo. 45, 132 Pac. 71; *Cohn v. Adams Express Co.*, 170 Ill. App. 174; *Clingan v. Cleveland, C. C. & St. L. R. Co.*, 184 Ill. App. 202; *Shaffer v. Chicago, R. I. & P. R. Co.*, 185 Ill. App. 615; *Christensen v. Chicago, M. & St. P. R. Co.*, 194 Ill. App. 562; *Heilman v. Chicago & N. W. R. Co.*, 167 Ia. 313, 149 N. W. 437; *Southern Nursery Co. v. Winfield Nursery Co.*, 89 Kan.



522, 132 Pac. 149; Kirby v. Union P. R. Co., 94 Kan. 485, 146 Pac. 1183; Cincinnati, N. O. & T. P. R. Co. v. Rankin, 153 Ky. 730, 156 S. W. 400, 45 L. R. A. (N. S.) 529; Cincinnati, N. O. & T. P. R. Co. v. Dodd, 153 Ky. 845, 156 S. W. 894; Robinson v. Louisville & N. R. Co., 160 Ky. 235, 169 S. W. 831; Bernard v. Adams Express Co., 205 Mass. 254, 91 Atl. 325, 28 L. R. A. (N. S.) 293, 18 Ann. Cas. 351; Harrison Granite Co. v. Grand Trunk R. Co., 175 Mich. 144, 141 N. W. 642; McElvain v. St. Louis & S. F. R. Co., 151 Mo. App. 126, 131 S. W. 736; Wyatt v. Missouri P. R. Co., 173 Mo. App. 210, 158 S. W. 720; Ball v. Lusk, 189 Mo. App. 297, 175 S. W. 238; Jones v. Louisville & N. R. Co., — Mo. App. —, 182 S. W. 1064; Donoho v. Missouri P. R. Co., — Mo. App. —, 187 S. W. 141; Travis v. Wells, Fargo & Co., 79 N. J. L. 83, 74 Atl. 444; Florman v. Dodd & Childs Express Co., 79 N. J. L. 63, 74 Atl. 446; Greenwald v. Barrett, 199 N. Y. 170, 92 N. E. 218, affirming 130 App. Div. 696, 115 N. Y. Supp. 311, which reversed 59 Misc. 431, 111 N. Y. Supp. 235, S. C. 131 App. Div. 903, 115 N. Y. Supp. 1121; United Lead Co. v. Lehigh V. R. Co., 156 App. Div. 525, 141 N. Y. Supp. 310; Missouri, K. & T. R. Co. v. Walston, 37 Okla. 517, 133 Pac. 42; Missouri, O. & G. R. Co. v. French, — Okla. —, 152 Pac. 591; Zoller Hop Co. v. Southern P. R. Co., 73 Oreg. 262, 143 Pac. 931; Rather v. Nashville, C. & St. L. R. Co., 131 Tenn. 289, 174 S. W. 1113; Pacific Express Co. v. Ross, — Tex. Civ. App. —, 154 S. W. 340; Kansas City, M. & O. R. Co. v. Corn, — Tex. Civ. App. —, 186 S. W. 807; St. Louis, I. M. & S. R. Co. v. Dunn, 94 Ark. 407, 127 S. W. 464; St. Louis, I. M. & S. R. Co. v. Pape, 100 Ark. 269, 140 S. W. 265; Greenwald v. Weir, 59 Misc. 431, 111 N. Y. Supp. 225, reversed 130 App. Div. 696, 115 N. Y. Supp. 311, 199 N. Y. 170, 92 N. E. 218; Schutte v. Weir, 59 Misc. 438, 111 N. Y. Supp. 240; Silverman v. Weir, 114 N. Y. Supp. 6; Vigouroux v. Platt, 130 App. Div. 696, 115 N. Y. Supp. 311.

The Carmack Amendment does not forbid a limitation of a carrier's liability for the loss or damage to goods shipped in interstate commerce, to a valuation agreed upon for the purpose of determining which of two alternative lawful rates shall apply to a particular shipment. *Kansas City S. R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 227, reversing 91 Ark. 97, 121 S. W. 932, 134 Am. St. Rep. 56.

The provision of the Carmack Amendment that no contract, receipt, rule or regulation shall exempt an interstate carrier from the liability thereby imposed, does not forbid a limitation of liability in case of loss to a valuation agreed upon in the contract of shipment, for the purpose of determining which of two alternative rates shall apply to the shipment. *Nashville, C. & St. L. R. Co. v. Truitt Co.*, 14 Ga. App.

767, 82 S. E. 465, S. C. 17 Ga. App. 236, 86 S. E. 421.

A carrier may, by a fair, just, open and reasonable agreement, limit the amount recoverable by a shipper, in case of loss or damage, to an agreed value made for the purpose of obtaining the lower of two rates of charges, according to the amount of the risk. *Nashville, C. & St. L. R. Co. v. Truitt Co.*, 17 Ga. App. 263, 86 S. E. 421, S. C. 14 Ga. App. 767, 82 S. E. 465.

The Carmack Amendment does not inhibit an interstate carrier from limiting the amount of its liability for the loss of or damage to an interstate shipment, by an agreement with the shipper as to its value, when entered into in good faith and not procured by misrepresentation as to value. *Fielder v. Adams Express Co.*, 69 W. Va. 138, 71 S. E. 99.

The common-law right of a carrier to contract with respect to the value of an article to be transported, upon the character and value of which a rate may depend, and the right to contract against loss beyond the carrier's control, are unaffected by the Interstate Commerce Act, when the contract is made upon a sufficient consideration after the shipper is given an opportunity to choose between the common-law right and rate and the special contract rate and limited liability. *Pittsburgh, C. C. & St. L. R. Co. v. Mitchell*, 175 Ind. 196, 211, 91 N. E. 735, 93 N. E. 996.

A provision of a bill of lading issued by an initial carrier for an interstate shipment, that in computing the amount of loss, if a value lower than the actual value had been agreed on or was determined by the classification on which the rate was based, such lower value should control, is applicable, although such carrier did not have an established interstate rate but handled the shipment for a flat rate plus the rate of a connecting carrier, where the interstate tariff of the latter carrier, as filed with the Interstate Commerce Commission, limited its liability to \$50 unless a greater value was declared by the shipper and a higher rate paid. *Glenlyon Dye Works v. Interstate Express Co.*, 36 R. I. 588, 91 Atl. 5.

A contract limiting a carrier's liability in consideration of the lower of two established rates, and stating that the shipper had the right to ship under a higher rate without such limitation, is valid on its face and a defense to an action under the Carmack Amendment for the full value of the property, unless the shipper shows the invalidity of the stipulation. *Thomas v. St. Louis & S. F. R. Co.*, 188 Mo. App. 22, 173 S. W. 96.

A provision of a contract for the interstate transportation of property to the effect that the rate charged was less than if the property were shipped without a

limitation of the carrier's liability, and that the shipper had the right to elect whether he would ship under the lower rate with a restriction of the liability of the carrier or at the higher rate with unlimited liability, is not void under but is required by the Carmack Amendment. *Thomas v. St. Louis & S. F. R. Co.*, 188 Mo. App. 22, 173 S. W. 96.

Arbitrary limitations of value and pre-adjustments of damages in contracts for interstate transportation of property are invalid under the Carmack Amendment. *Louisville & N. R. Co. v. Warfield*, 6 Ga. App. 550, 65 S. E. 308.

#### As Limitation on Recovery.

A shipper who declares the value of an interstate shipment, or by not declaring any value at all, obtains the lower of two rates, is estopped from recovering a greater amount for the loss of the property. *American Brake S. & F. Co. v. Pere Marquette R. Co.*, 223 Fed. 1018.

When there is an unlawfully declared or agreed valuation of goods in fixing an interstate freight rate without the actual knowledge of the carrier, the shipper is estopped, in event of loss, to recover more than the agreed amount. *St. Louis & S. F. R. Co. v. Mounts*, — Okla. —, 144 Pac. 1036.

The valuation declared or agreed upon as evidenced by a contract for the shipment of interstate freight on which the published tariff rate is applied, is conclusive in an action for the loss of or damage to the property. *Kansas City S. R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 227, reversing 91 Ark. 97, 121 S. W. 932, 134 Am. St. Rep. 56.

When a shipper of interstate freight, in order to obtain a lower established rate, agrees to a valuation less than the actual worth of the property, he cannot recover a greater amount for its loss. *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397, reversing — Tex. Civ. App. —, 128 S. W. 932.

#### (c) Consideration.

##### In General.

A stipulation limiting a carrier's liability to the invoice price of goods shipped in interstate commerce is void under the Carmack Amendment, where it does not appear that there was any consideration for the agreement either by a reduction of rates or other benefit to the shipper. *International & G. N. R. Co. v. Rathblath*, — Tex. Civ. App. —, 167 S. W. 751.

##### Recital of Consideration.

Recitals of a contract of shipment that lower rates were obtained by a declaration of value, and that such reduction

formed the consideration for a limitation of carrier's liability, are sufficient to establish that fact. *Galveston, H. & S. A. R. Co. v. Sparks*, — Tex. Civ. App. —, 162 S. W. 943.

#### (d) Effect of Limitation in Tariffs and Schedules.

##### In General.

A shipper is bound to take notice of the filed freight tariffs of an interstate carrier. *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556, reversing 36 Okla. 435, 129 Pac. 20.

The fact that a shipper was not aware that there were two rates for an interstate shipment of live stock does not relieve him from the terms of a contract of carriage limiting the carrier's liability when carried at the lesser rate, since the published tariffs were notice to him. *Miller v. Atchison, T. & S. F. R. Co.*, — Kan. —, 156 Pac. 780.

Where a shipper who, although stating the true value of property to a carrier's agent at the time of shipment, paid the lower rate and accepted a receipt stipulating that the damages in case of loss should be the true invoice price of the goods, unless a lower value was determined by the classifications or tariffs on which the rate was based, in which event the lower value should be the limit of recovery, he can recover the limited value prescribed by the tariffs and classifications for a loss of the shipment. *American Silver Mfg. Co. v. Wabash R. Co.*, 174 Mo. App. 184, 156 S. W. 830.

The shipper of an interstate shipment is conclusively presumed to know the shipping rate according to the printed and posted tariffs filed with the Interstate Commerce Commission, and that such rates automatically attach to each shipment according to the declared value thereof. *Enderstein v. Atchison, T. & S. F. R. Co.*, — N. Mex. —, 157 Pac. 670.

Since a shipper is conclusively presumed to know the rate for an interstate shipment, according to the tariffs posted and filed with the Interstate Commerce Commission, and as such rate automatically attaches to each shipment according to the declared value of the property, it is not necessary that such rate should be stated in a bill of lading by which the carrier's liability is released to a designated amount. *Enderstein v. Atchison, T. & S. F. R. Co.*, — N. Mex. —, 157 Pac. 670.

If a shipper was not asked to and did not declare the value of an interstate express shipment, the liability of the carrier for damages thereto was not limited to \$50 unless a greater value was declared and a higher rate paid, as prescribed by the bill

of lading or receipt and the carrier's schedules filed with the Interstate Commerce Commission, where such schedules were not posted at the place of shipment as required by the Federal law, since the shipper was not chargeable with notice of the valuation on which the rate of carriage was based. *United States Horseshoe Co. v. American Express Co.*, 250 Pa. 527, 95 Atl. 706.

Under the Federal law a regulation filed with the Interstate Commerce Commission limiting the liability of an express company to a specified amount in the absence of a declaration of a greater value, is conclusively presumed a part of the contract of interstate carriage and governs the liability of the carrier. *Colby v. American Express Co.*, 77 N. H. 548, 94 Atl. 198.

Where a carrier has properly made, published and filed with the Interstate Commerce Commission two rates for the transportation of live stock, one based upon the execution of a special contract referred to in the rate sheet so filed, and a second and higher rate based upon the unrestricted liability of the carrier, a shipper is charged with knowledge of the existence of the two rates, and that he has the right to exercise his option as to which he will pay, and under which he will ship. *St. Louis & S. F. R. Co. v. Taliaferro*, — Okla. —, 156 Pac. 359.

A shipper is not bound by a stipulation of an express receipt that the carrier's liability for an interstate shipment should not exceed \$50 unless a greater value was stated and a higher rate paid, when a shipper did not declare and was not requested to declare the value of a shipment, and he did not have actual notice of the carrier's intention to limit its liability, where by the terms of the receipt such limitation did not apply to shipments of live stock. *United States Horseshoe Co. v. American Express Co.*, 250 Pa. 527, 95 Atl. 706.

Where an intrastate electric railway company that had no through rate to an interstate point on file with the Interstate Commerce Commission, carried express wholly within a state for a flat rate plus the charges of a connecting carrier, the tariffs of which, as filed with the Interstate Commerce Commission, contained a provision limiting its liability to \$50 unless a greater value was declared by the shipper and a higher rate paid, the liability of the initial carrier for the loss of the goods on the line of the connecting carrier is controlled by such limitation, although in the bill of lading issued by the former and filled out by the shipper, no rate was named nor value declared, it directed that the goods be shipped to destination through such connecting carrier. *Glenlyon Dye Works v. Interstate Express Co.*, 38 R. I. 588, 91 Atl. 5.

### Liability for Baggage.

An interstate passenger is charged with notice of a provision of the published tariffs of a carrier as filed with the Interstate Commerce Commission, limiting the carrier's liability for the loss of baggage to \$100 unless a greater value is declared and stipulated for by the owner and an excess charge paid at the time of checking. *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. ed. 868, 34 Sup. Ct. Rep. 526, L. R. A. 1915 B. 450, Ann. Cas. 1915 D. 593, reversing 209 Mass. 598, 95 N. E. 945, Ann. Cas. 1912 B. 669.

A rule of an interstate carrier limiting its liability for the loss of a passenger's baggage to a stated amount unless a greater value is declared and stipulated for by the owner and an excess charge paid at the time of checking, is determinative of the rate to be charged, and does not affect the service to be rendered the passenger, and therefore is a regulation of the carrier's tariffs which must be filed with the Interstate Commerce Commission. *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. ed. 868, 34 Sup. Ct. Rep. 526, L. R. A. 1915 B. 450, Ann. Cas. 1915 D. 593, reversing 209 Mass. 598, 95 N. E. 945, Ann. Cas. 1912 B. 669.

A limitation in a carrier's schedules, as filed with the Interstate Commerce Commission, of its liability for a passenger's baggage to \$100 unless a greater value is stated and an extra charge paid, is binding on an interstate passenger although his attention was not called to nor was he informed of such limitation. *Ford v. Chicago, R. I. & P. R. Co.*, 123 Minn. 87, 143 N. W. 249.

### (e) Effect of Absence of Knowledge of Limitation.

#### In General.

A condition of the published tariff of an interstate carrier, as filed with the Interstate Commerce Commission, limiting its liability for the baggage of a passenger to \$100 unless a greater value is declared and stipulated for by the owner and an excess charge paid at the time of checking, is valid and binding on the owner regardless of his knowledge of the existence of the rule or of inquiry by the carrier. *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. ed. 868, 34 Sup. Ct. Rep. 526, L. R. A. 1915 B. 450, Ann. Cas. 1915 D. 593, reversing 209 Mass. 598, 95 N. E. 945, Ann. Cas. 1912 B. 669.

The knowledge of a shipper that the rate for the interstate transportation of an express package was based on its declared value will be presumed from the terms of his receipt and the published tariffs, especially where there was printed across the top of the receipt in bold type a statement that the carrier's charge was based on

such value. *Adams Express Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 33 Sup. Ct. Rep. 148, 44 L. R. A. (N. S.) 257.

When there are two rates for an interstate shipment of freight based on valuation, the value declared by the shipper determines the legal rate of which he must take notice, and actual want of knowledge is no excuse, since the rates made and filed are notice although not actually posted. *Kansas City S. R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 227, reversing 91 Ark. 97, 121 S. W. 932, 134 Am. St. Rep. 56.

Under the Carmack Amendment the acceptance by a shipper of a bill of lading constitutes a binding contract on his part as to the valid provisions of the bill, even though he did not have knowledge of the stipulations and did not by any act, other than the mere acceptance of the bill, signify his assent to them. *Spada v. Penn. R. Co.*, 86 N. J. L. 187, 92 Atl. 379; *Albrecht v. Penn. R. Co.*, 86 N. J. L. 355, 92 Atl. 381.

A shipper who for 6 years has had in his possession and used a book of express receipts containing a limitation on the amount of a carrier's liability based on the rate charged unless a greater valuation was declared, in an action based on the Carmack Amendment, must, in the absence of any proof to the contrary, be charged with knowledge of the contents of such receipt. *Greenwald v. Barrett*, 199 N. Y. 170, 92 N. E. 218, affirming 130 App. Div. 696, 115 N. Y. Supp. 311, S. C. 131 App. Div. 903, 115 N. Y. Supp. 1121.

Where a shipper does not elect which rate he desires and goods are billed for interstate transportation at the lowest rate under the published and approved tariffs, he is bound by a limitation of liability in the bill of lading, although he was ignorant of the existence or contents of the tariffs and classifications. *Missouri, K. & T. R. Co. v. Walston*, 37 Okla. 517, 133 Pac. 42.

In the absence of fraud on the part of a carrier, the shipper of an interstate shipment of live stock cannot, by showing that he executed the contract of carriage hurriedly, or without due care, or that he failed to read it, avoid the limitations of the carrier's liability contained in such contract. *Chicago, R. I. & P. R. Co. v. Craig*, — Okla. —, 157 Pac. 87.

The fact that a shipper did not read the conditions of a bill of lading for an interstate shipment of freight before signing the same, or that the conditions were not read to him or called to his attention, does not, in the absence of fraud or oppression on the part of the carrier, relieve him from the effect of such conditions, where he had blank bills in his possession and was in the habit of filling them out

and taking them to the carrier's agent for signing. *Atchison, T. & S. F. R. Co. v. Cozart*, — Okla. —, 158 Pac. 933.

Since a shipper is bound to know that there can be at least two rates for a through interstate shipment, one with and one without limited liability, where such rates have been filed with and approved by the Interstate Commerce Commission, although not posted by the carrier, the shipper cannot show in an action against the initial carrier under the Carmack Amendment, that he was not informed of the existence of the two rates. *Cleveland, C. C. & St. L. R. Co. v. Hayes*, 181 Ind. 87, 102 N. E. 34, 103 N. E. 839, S. C. on rehearing — Ind. —, 104 N. E. 581.

A contract for an interstate express shipment limiting a carrier's liability to an agreed valuation in consideration of the rate paid was not fraudulently obtained by reason of the fact that the shipper, who had made many similar shipments and who had in his possession many identical contracts, none of which he had ever read, hurriedly signed the agreement without reading it because the carrier's agent was in a hurry to go home. *Lefebvre v. American Express Co.*, 160 Iowa 54, 139 N. W. 1117.

Since it is the duty of a shipper to know the contents of a contract for interstate shipment before signing the same, a bill of lading limiting a carrier's liability in consideration of the lower of two rates, is binding on the shipper although not read by him, in the absence of fraud or deceit on the part of the carrier. *Stubblefield v. St. Louis & S. F. R. Co.*, — Mo. App. —, 184 S. W. 149.

#### (f) Rates Not Approved by Interstate Commerce Commission.

##### In General.

A shipper is not bound by a limitation of the value of goods, although based on the acceptance of the lower of two freight rates, where such rates were not based on a schedule filed with and approved by the Interstate Commerce Commission. *Yazoo & M. V. R. Co. v. Peebles*, 106 Miss. 604, 64 So. 262.

#### (g) Validity When But One Tariff Rate.

##### In General.

Where there was but one tariff rate for an interstate shipment, which a shipper paid without any reduction, there was no consideration for a stipulation of the bill of lading fixing the measure of damages, other than that of the common law, in the event of loss or injury to the property. *Kansas City & M. R. Co. v. Oakley*, 115 Ark. 20, 170 S. W. 565.

**(h) Effect of Refusal to Permit Shipment Without Limitation.**

**In General.**

When a shipper is not given a choice of rates, a carrier's limitation of its liability for an interstate shipment only while in its possession, is void. *Southern Express Co. v. Meyer*, 94 Ark. 103, 125 S. W. 642.

A provision of a bill of lading and the published tariffs of a carrier, as filed with the Interstate Commerce Commission, to the effect that if a shipper should elect not to have property carried subject to all the terms and stipulations of the bill of lading, an excess rate would be charged, does not apply to an interstate shipment, when there was no such election by the shipper so as to bring into effect a stipulation of the bill of lading that no carrier was bound to transport the property by any particular train or in time for any particular market unless by special agreement. *New York, P. & N. R. Co. v. Peninsular Produce Co.*, 122 Md. 215, 89 Atl. 433, affirmed 240 U. S. 34, 60 L. ed. —, 36 Sup. Ct. Rep. 230.

A common-law action for damages to an interstate shipment may be maintained by a shipper against a carrier, where he was compelled to ship under a special contract restricting the carrier's liability, and was denied the privilege of paying the higher authorized rate and shipping under the unrestricted common-law liability as permitted by the Federal statute. *Toledo, St. L. & W. R. Co. v. Milner*, — Ind. App. —, 110 N. E. 756.

A shipper is not bound by a limitation of a carrier's liability in contract for interstate shipment of live stock, although based on the lower of two established freight rates, where the shipper's demand to ship under an unrestricted rate was refused by the carrier's agent, and the shipper was compelled to sign a contract with restricted liability. *Chicago, R. I. & P. R. Co. v. Core*, — Tex. Civ. App. —, 176 S. W. 778.

Where the agent of an initial carrier is not authorized to contract for an interstate shipment with unlimited liability, and a shipper is not given an opportunity to elect between two rates, one with and the other without limited liability, a contract for a limitation of the carrier's liability is void. *Cleveland, C. C. & St. L. R. Co. v. Hayes*, 181 Ind. 87, 102 N. E. 34, 103 N. E. 839, S. C. on rehearing — Ind. —, 104 N. E. 581.

When a shipper is given an opportunity to place the true valuation on an animal shipped in interstate transportation, he is bound by the value declared by him in the contract of carriage, and which fixed the rate for transportation, notwithstanding

that the carrier's agent did not have authority to contract for an unlimited liability or to accept shipment under a contract other than one of limited liability. *Adams Express Co. v. Welborn*, — Ind. App. —, 108 N. E. 163.

**(i) Effect of Accepting Contract with Limitation.**

**In General.**

By accepting for interstate shipment a receipt reciting that an express company's liability was limited to \$50, at which the property was "hereby valued, unless a different value" was stated in the receipt, a shipper declared and represented that the value of the goods did not exceed such sum, where he thereby obtained a rate which he was assumed to know was based upon such valuation as the actual value, and the carrier may, under the Carmack Amendment, limit its liability to the declared amount. *Wells, Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267, reversing — Tex. Civ. App. —, 125 S. W. 614.

The fact that a shipper was not asked to state the value of an interstate shipment, and made no declaration, but signed a contract which was handed him, does not prevent the stated value of live stock from being voluntary and binding on him, where he thereby obtained a lower established freight rate. *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397, reversing — Tex. Civ. App. —, 128 S. W. 932.

Where a shipper receives from an initial carrier a receipt or bill of lading for an interstate shipment, conditioned that the carrier's liability should not exceed \$50 unless a greater value was declared, a prima facie presumption arises, in the absence of evidence on the subject, that he read the receipt and that he is bound by such condition. *Florman v. Dodd & Childs Express Co.*, 79 N. J. L. 63, 74 Atl. 446.

A shipper who knowingly accepts an express receipt for an interstate shipment reciting that the declared value of the property fixed the rate of charge, is bound by such limitation of the carrier's liability. *Greenwald v. Barrett*, 199 N. Y. 170, 92 N. E. 218, 35 L. R. A. (N. S.) 971, affirming 130 App. Div. 696, 115 N. Y. Supp. 311, S. C. 131 App. Div. 903, 115 N. Y. Supp. 1121.

Where a shipper signs a limited liability contract for the interstate transportation of live stock, without reading the agreement and without protest, no such fraud or oppression is shown as will relieve him from its terms, where a notice was printed on the contract in large black letters calling attention to the fact that there was a limited and an unlimited liability for the

transportation of live stock. *St. Louis & S. F. R. Co. v. Taliaferro*, — Okla. —, 156 Pac. 359.

A shipper who signs and accepts a bill of lading for an interstate shipment is bound by a limitation of the carrier's liability for loss, when made in consideration of the lower of two rates. *Texas & N. O. R. Co. v. Hancock*, — Tex. Civ. App. —, 178 S. W. 654.

#### (j) Particular Valuations.

##### In General.

A person who by billing cut granite as building stone obtains a lower freight rate for an interstate shipment, and releases the carrier's liability to 20 cents per cubic foot, cannot complain that a judgment for its loss was based on such valuation, where he had the option of shipping at a higher rate with unrestricted liability. *Harrison Granite Co. v. Grand Trunk R. Co.*, 175 Mich. 144, 141 N. W. 642.

Where there is neither an agreed value nor a representation of value made in writing by a shipper, and the bill of lading issued for an interstate shipment released the value of a shipment to \$5 per hundred-weight, and, without fraud on the part of the carrier, such bill was accepted by the shipper, and at destination he paid the freight charges on such released valuation, his recovery for a loss is limited to the stipulated value. *Missouri, K. & T. R. Co. v. Walston*, 37 Okla. 517, 133 Pac. 42.

#### (k) In Express Receipts.

##### In General.

A provision of an express receipt limiting a carrier's liability for the loss of or injury to an interstate shipment to \$50 unless a greater value was declared at the time of shipment and a higher rate paid, does not violate the Carmack Amendment when reasonably and fairly made for the purpose of obtaining the lower of two duly established rates. *Adams Express Co. v. Cronniger*, 226 U. S. 491, 57 L. ed. 314, 33 Sup. Ct. Rep. 148, 44 L. R. A. (N. S.) 257; *Wells, Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267, reversing — Tex. Civ. App. —, 125 S. W. 614; *Bernard v. Adams Express Co.*, 205 Mass. 254, 91 N. E. 325, 28 L. R. A. (N. S.) 293, 18 Ann. Cas. 351; *Carpenter v. United States Express Co.*, 120 Minn. 59, 139 N. W. 154; *Jones v. Southern Express Co.*, 104 Miss. 126, 61 So. 165; *American Express Co. v. Burke*, 104 Miss. 275, 61 So. 312; *Pacific Express Co. v. Krower*, — Tex. —, 163 S. W. 9.

When a shipper of property worth \$15,000 deliberately and purposely, without imposition or fraud, accepts from an ex-

press company a contract for an interstate shipment which limits the amount of recovery in case of loss to \$50, the sum named in the filed tariffs as the amount of recovery in the absence of the declaration of a greater value by the shipper, who was given the privilege of paying an increased rate and having the liability for the full value of the goods, his recovery for the liability imposed on the initial carrier by the Carmack Amendment is limited to \$50. *Pierce v. Wells, Fargo Co.*, 236 U. S. 278, 59 L. ed. 576, 35 Sup. Ct. Rep. 351, affirming 110 C. C. A. 675, 189 Fed. 561.

Where a vendor, without stating their value, delivered goods to an express company for transportation at the vendee's expense, and the express receipt limited the carrier's liability to \$50 unless a greater value was declared and a higher rate paid in accordance with its schedules and tariffs on file with the Interstate Commerce Commission, under the Carmack Amendment the vendee's right to recover for the loss of the shipment is limited to the declared value. *United States Express Co. v. Cohn*, 108 Ark. 115, 157 S. W. 144.

The fact that no inquiry was made by an express company as to the actual value of the contents of a package at the time it was accepted for interstate transportation is not vital to the fairness of a stipulation of a receipt restricting the carrier's liability for loss or damage to \$50, where the receipt showed that the rate made was based on such valuation unless a greater sum was stated. *Adams Express Co. v. Cronniger*, 226 U. S. 491, 57 L. ed. 314, 33 Sup. Ct. Rep. 148, 44 L. R. A. (N. S.) 257.

A contract of shipment limiting an express company's liability for a stallion moved in interstate commerce, to \$100, when fairly and openly made, is not precluded by the Carmack Amendment. *LeFebure v. American Express Co.*, — Iowa —, 139 N. W. 1117.

A shipper of a valuable horse by express is bound by a valuation placed thereon by his agent, although the former disclosed the true value to the carrier's agent at destination when arranging for the shipment. *Donovan v. Wells, Fargo & Co.*, 265 Mo. 291, 177 S. W. 839.

#### (l) Circus Property.

##### In General.

A contract exempting a carrier from liability for negligence in transporting a circus is not precluded by the Carmack Amendment, since a railway company is not a common carrier with respect to such property. *Ferrari v. New York C. & H. R. R. Co.*, 162 App. Div. 6, 147 N. Y. Supp. 376.

**(m) Live Stock.**

**In General.**

The Carmack Amendment does not prevent a shipper and carrier, in consideration of the lesser of two established rates, from stipulating for a fixed value of live stock beyond which the carrier shall not be answerable for loss or damage. *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397, reversing — *Tex. Civ. App.* —, 128 S. W. 932; *Missouri P. R. Co. v. Harper*, 121 C. C. A. 570, 201 Fed. 671; *Southern R. Co. v. Bynum*, — *Ala.* —, 69 So. 820; *Norfolk & W. R. Co. v. Steele*, 117 Va. 788, 86 S. E. 124.

A bill of lading for an interstate shipment of live stock does not offend against the Carmack Amendment by stipulating, in consideration of the lower of two established rates, for a valuation of \$30 per head for each ox, steer or bull and \$20 per head for each cow, nor does it fix a valuation that is subject to impeachment because arbitrary and unreasonable on its face, where the shipper agreed to such valuation and the carrier was not aware that the animals were grossly undervalued. *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397, reversing — *Tex. Civ. App.* —, 128 S. W. 932.

A contract limiting a carrier's liability for an interstate shipment of hogs to \$10 per head, which gave the shipper the benefit of the lowest published rate, is valid under the Carmack Amendment, notwithstanding a state statute prohibiting contracts restricting the liability of common carriers. *Chicago, R. I. & P. R. Co. v. Cramer*, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383, reversing 153 Iowa 103, 133 N. W. 387.

The Carmack Amendment does not preclude a carrier, in consideration of a reduced rate for the interstate shipment of a stallion, from limiting its liability in a bill of lading to \$100. *Chicago, B. & Q. R. Co. v. Miller*, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 115, reversing 85 Neb. 458, 123 N. W. 449; *Chicago, St. P., M. & O. R. Co. v. Latta*, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155, reversing 106 C. C. A. 664, 184 Fed. 987, S. C. 97 C. C. A. 198, 172 Fed. 850.

**Cost of Feed and Water When Cattle Delayed in Transit.**

A provision of a contract for the interstate shipment of live stock, that in the event of any unusual delay or detention in transit, as the result of the negligence of the initial or any connecting carrier, the shipper shall accept as full compensation the amount actually expended by him in the purchase of feed and water for the stock while detained, is unreasonable and

void under the Carmack Amendment as a contract exempting the carrier from liability for negligence. *Norfolk & W. R. Co. v. Steele*, 117 Va. 788, 86 S. E. 124.

A condition of a uniform live stock contract for interstate transportation to the effect that in the event of any unusual delay or detention of the stock as the result of the negligence of the carrier, its connecting carriers or their employees, the shipper should accept in full compensation for all loss or damage sustained the amount actually expended by him for food and water during the time of detention, is void under the Carmack Amendment, as an arbitrary preadjustment of the damages for the carriers' negligence. *Piper v. Boston & M. R. Co.*, — *Vt.* —, 97 Atl. 508.

**(n) Household Goods.**

**In General.**

A release of a carrier from all liability in excess of a designated sum per 100 pounds for the loss of or damage to household goods shipped in interstate commerce, when made in good faith in order to obtain the lower of two published rates which was applicable to a shipment of the declared value, does not upon its face offend against the Carmack Amendment or release the carrier from liability for its negligence. *Kansas City S. R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 227, reversing 91 Ark. 97, 121 S. W. 932, 134 Am. St. Rep. 56; *Great N. R. Co. v. O'Connor*, 232 U. S. 508, 58 L. ed. 703, 34 Sup. Ct. Rep. 380, 8 N. C. C. A. 53, reversing 118 Minn. 223, 136 N. W. 743, S. C. 126 Minn. 359, 139 N. W. 618; *Michelson v. Judson Freight Forwarding Co.*, 268 Ill. 546, 109 N. E. 281, affirming 189 Ill. App. 568; *Larsen v. Oregon S. L. R. Co.*, 38 Utah 130, 110 Pac. 983.

**(o) Value at Particular Time or Place.**

**Place of Shipment.**

The Interstate Commerce Act does not prevent a carrier from contracting that the value of an interstate shipment, in the event of loss or damage, shall be that at the time and place of shipment instead of the place of delivery. *Pittsburgh, C., C. & St. L. R. Co. v. Mitchell*, 175 Ind. 196, 211, 91 N. E. 735, 93 N. E. 996; *Spada v. Penn. R. Co.*, 86 N. J. L. 187, 92 Atl. 379; *Albrecht v. Penn. R. Co.*, 86 N. J. L. 355, 92 Atl. 381.

A stipulation in a bill of lading for the interstate shipment of live stock that in case of loss from any cause for which the carrier was liable the value of the animals should be their actual cash value at the time and place of shipment, not exceeding \$100 per head, does not violate the Carmack Amendment. *Galveston, H.*

& S. A. R. Co. v. Carmack, — Tex. Civ. App. —, 176 S. W. 158.

A provision of a bill of lading that in the event of loss the value or cost of property at the point of shipment should govern the settlement, did not establish the measure of damages in an action under the Carmack Amendment against the initial carrier for a delay on the lines of connecting carriers. *Ft. Smith & W. R. Co. v. Awbrey*, 39 Okla. 270, 134 Pac. 1117.

#### Invoice Price.

The Carmack Amendment does not avoid a stipulation of a bill of lading to the effect that in event of loss the true invoice price of the goods should limit the recovery unless a lower value was determined by the tariffs or classifications on which the rate was based, in which event the lower value should control. *American Silver Mfg. Co. v. Wabash R. Co.*, 174 Mo. App. 184, 156 S. W. 830.

### 5. Limiting Liability for Baggage.

Effect of tariffs and schedules on limitation of liability for baggage, see *supra*, XI, I, 4, (d).

#### In General.

A limitation of liability for baggage to \$100 contained in a ticket for interstate transportation is valid under the Carmack Amendment. *Barstow v. New York, N. H. & H. R. Co.*, 158 App. Div. 665, 143 N. Y. Supp. 983.

Under the Carmack Amendment, a provision of a baggage check for an interstate trip limiting a carrier's liability to \$100 unless a greater value was declared and an excess charge paid at the time of checking, when such regulation is approved by the Interstate Commerce Commission, is valid. *Missouri, K. & T. R. Co. v. Hailey*, — Tex. Civ. App. —, 156 S. W. 1119; *Louisville & N. R. Co. v. Miller*, 156 Ky. 677, 162 S. W. 73, 50 L. R. A. (N. S.) 819.

A provision of a ticket for an interstate trip limiting a carrier's liability for the loss of a passenger's baggage to \$100 unless a greater value was stated and an excess charge paid, when in accordance with the tariffs on file with the Interstate Commerce Commission, is valid under the Carmack Amendment. *Wright v. Southern P. Co.*, 181 Mo. App. 137, 167 S. W. 1137.

### 6. What Losses Within Terms of Limitations.

#### (a) In General.

#### Expense of Caring for Injured Live Stock.

Under the Carmack Amendment, an initial carrier is not liable beyond the amount

of its limited liability for the expense of caring for an injured animal after its delivery to the consignee, merely because an agent of the terminal carrier agreed that such item should be paid. *Jones v. Louisville & N. R. Co.*, — Mo. App. —, 182 S. W. 1064.

#### (b) Losses Due to Negligence.

Effect of limitation of liability in case of conversion of shipment by carrier, see *infra* XI, I, 6, (d).

Effect of limitation of liability when shipment wrongfully diverted by carrier, see *infra* XI, I, 6, (e).

#### (c) Unavoidable Delays and Losses.

#### In General.

The Carmack Amendment does not invalidate a stipulation of a shipping contract that a carrier does not undertake to transport live stock within any specific time, nor to deliver at any particular hour, nor in season for any particular market, or that the carrier shall not be responsible for any delay caused by storm, failure of machinery or cars, or from obstructions of tracks from any cause or for injury resulting from fire from any cause whatever. *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717.

A contract exempting a carrier from liability for the destruction of an interstate shipment by fire or other causes beyond its control is not in violation of the Carmack Amendment. *St. Louis S. W. R. Co. v. Ray*, — Tex. Civ. App. —, 127 S. W. 281.

The Carmack Amendment does not avoid a provision of a contract of shipment relieving a carrier from liability for the destruction of property by flood or fire not due to its own negligence; since the prohibition of the act against exemptions from liability refer to the liability thereby imposed for loss or damage caused by the receiving or connecting carriers. *Central of Ga. R. Co. v. Patterson*, 12 Ala. App. 369, 68 So. 513, S. C. 6 Ala. App. 494, 60 So. 465.

In an action under the Carmack Amendment for the destruction of an interstate shipment by fire, the carrier may show that it was within a condition of the bill of lading relieving it from liability for loss by fire or other causes beyond its control. *St. Louis S. W. R. Co. v. Ray*, — Tex. Civ. App. —, 127 S. W. 281.

#### (d) Conversion of Property by Carrier.

#### Limitation Not Applicable.

Where, in the course of interstate transportation of live stock by a common car-



rier, inferior animals are substituted for some of those originally shipped, a conversion on the part of the carrier may be presumed, and the recovery of actual damages permitted, notwithstanding a limitation of liability in the contract of shipment, unless the explanation offered by the carrier, in an action under the Carmack Amendment, is sufficient to negative the idea of a wrongful conversion or of negligence amounting to gross or wanton neglect on the part of the carrier. *Nashville, C. & St. L. R. Co. v. Truitt Co.*, 14 Ga. App. 767, 82 S. E. 465, S. C. 17 Ga. App. 236, 86 S. E. 421.

Where a shipment of mules on arrival at destination contained three animals that had been substituted for a portion of those shipped, the carrier, in an action under the Carmack Amendment, will be deemed to have abandoned the contract of shipment, and cannot insist on a stipulation limiting its liability for loss or damage to a fixed sum, nor insist on the binding effect of such stipulation, when the negligence which occasioned the loss was wanton or wilful. *Nashville, C. & St. L. R. Co. v. Truitt Co.*, 17 Ga. App. 263, 86 S. E. 421, S. C. 14 Ga. App. 767, 82 S. E. 465.

#### (e) Wrongful Diversion of Shipment.

##### In General.

An initial carrier is answerable under the Carmack Amendment for the full amount of damages where an interstate shipment was lost by reason of its wrongful diversion by a connecting carrier, notwithstanding that the bill of lading limited the liability of the carrier to a stipulated amount. *Drake v. Nashville, C. & St. L. R. Co.*, 125 Tenn. 627, 148 S. W. 214.

#### (f) Wrongful Delivery.

(No decisions.)

### 7. Payment of Damages in Excess of Agreed Amount.

##### In General.

Where, in consideration of the lower of two freight rates, property is shipped in interstate commerce under a contract limiting the carrier's liability to a designated sum, after a loss the carrier cannot change the limitation and pay the shipper a greater amount, since to do so would amount to an unlawful discrimination. *Donohoo Horse & M. Co. v. Missouri, K. & T. R. Co.*, 95 Kan. 681, 149 Pac. 436.

### J. Notice of Claim for Loss or Damage.

Application of state law pertaining to notice of claims, see *supra* XI, D, 2, (b).

### 1. In General.

#### As Exemption from Liability for Negligence.

A provision of a contract for the interstate transportation of live stock that the carrier should not be liable for injury thereto unless written notice of claim for damage should be given it within 5 days after the removal of the animals from the car, does not exempt the carrier from liability for negligence. *Crawford v. Southern R. Co.*, — S. C. —, 86 S. E. 19.

### 2. Validity of Requirement For.

#### (a) In General.

##### Validity.

A requirement of a contract for the interstate transportation of freight, that written notice of claim for damages shall be given the carrier within a specified time as a condition precedent to its liability, is not prohibited by the Carmack Amendment, and the failure of a shipper to comply with such condition precludes a recovery against the carrier. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541, affirming 15 Ga. App. 142, 82 S. E. 784; *Post v. Atlantic C. L. R. Co.*, 138 Ga. 763, 76 S. E. 45; *Ray v. Missouri, K. & T. R. Co.*, 90 Kan. 244, 133 Pac. 847; *Bledsoe v. Missouri, K. & T. R. Co.*, 177 Mo. App. 153, 168 S. W. 183; *Spada v. Penn. R. Co.*, 86 N. J. L. 187, 92 Atl. 379; *Albrecht v. Penn. R. Co.*, 86 N. J. L. 355, 92 Atl. 381; *Galveston, H. & S. A. R. Co. v. Sparks*, — Tex. Civ. App. —, 162 S. W. 943.

A stipulation of a contract for the interstate carriage of live stock that as a condition precedent to any recovery of damages for loss, injury or delay, the shipper should give notice in writing of his claim to some general officer of the carrier, the nearest station agent or the agent at destination, before mingling the stock with other animals, and that the failure to do so should be a bar to any recovery, is valid. *St. Louis & S. F. R. Co. v. Wynn*, — Okla. —, 156 Pac. 346; *St. Louis & S. F. R. Co. v. Taliaferro*, — Okla. —, 156 Pac. 359.

A shipper's action under the Carmack Amendment is barred by his failure to comply with a requirement of a bill of lading that written notice of claim for damages to live stock should be made within a designated time after the arrival of the stock at destination and before they are removed and mingled with others. *Johnson v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 282.

Stipulations in bills of lading covering interstate shipments of live stock, requiring the giving to the carrier of written

notice of claims for damage before the stock is removed from the possession of the carrier, are valid. *Baldwin v. Atlantic C. L. R. Co.*, 170 N. C. 12, 86 S. E. 776.

A provision of a bill of lading requiring, as a condition precedent to liability, that the shipper give, within one day after delivery at destination, written notice of his claim for damages to live stock to the nearest station agent, or the agent at destination, before the stock is removed and mingled with others, is unreasonable and void where it does not appear that the carrier had an agent at the point of destination, or that it would have been practical under the circumstances to have given notice within the designated time. *Hovey v. Tankersley*, — Tex. Civ. App. —, 177 S. W. 153.

The failure of a shipper to comply with a requirement of a contract of interstate shipment for written notice of claim for damages precludes a recovery by him, under the Carmack Amendment, from the initial carrier for delay in transportation not due to negligence. *Stevens v. St. Louis S. W. R. Co.*, — Tex. Civ. App. —, 178 S. W. 810.

A carrier is not liable for a negligent delay in the interstate transportation of live stock under a special contract based on a reduced rate which was published and filed with the Interstate Commerce Commission, when the contract was executed by the shipper without fraud, oppression, attempted rebating or unlawful billing, where he failed to comply with a reasonable requirement of the agreement as to giving, within a specified time, to designated officials of the carrier, notice of damages. *St. Louis & S. F. R. Co. v. Taliaferro*, — Okla. —, 156 Pac. 359.

#### **Necessity for Consideration.**

A stipulation requiring written notice of claim for damages within one day after the delivery of live stock at destination is valid under the Carmack Amendment when based on a sufficient consideration, such as a reduced rate. *St. Louis, I. M. & S. R. Co. v. Furlow*, 89 Ark. 404, 117 S. W. 517; *Chicago, R. I. & P. R. Co. v. Whaley*, — Tex. Civ. App. —, 177 S. W. 543.

A provision of a contract for the transportation of an interstate shipment, that the carrier shall not be liable for loss or damage unless written notice is given the carrier's agent at place of delivery promptly after delivery, or if the giving of such notice is delayed for more than 10 days, that the carrier shall not be liable, is valid under the Carmack Amendment, even though the carrier does not give as consideration any extra service or monetary equivalent to the shipper. *Mitchell v. Atlantic C. L. R. Co.*, 15 Ga. App. 979, 84 S. E. 227.

A stipulation in a general form of bill of lading requiring the filing of written claim of loss within a specified time is a reasonable regulation which does not require an independent consideration to support it. *Bledsoe v. Missouri, K. & T. R. Co.*, 177 Mo. App. 153, 168 S. W. 183.

A special consideration is not necessary to support a stipulation of a general form of bill of lading for the interstate transportation of live stock, to the effect that written notice of claim for damage shall be given the carrier within a specified time after the arrival of the stock at destination and before its removal and commingling with other animals. *Johnson v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 282.

A provision of a bill of lading for an interstate shipment of live stock to the effect that no claim for loss or damage should be valid unless a written and verified notice should be served on some designated official within ten days from the removal of the cattle from the cars, is unenforceable when not based on a sufficient consideration. *Yazoo & M. V. R. Co. v. Bell*, — Miss. —, 71 So. 272.

The fact that a shipper of live stock obtains a lower freight rate for an interstate shipment by accepting the valuation printed in the bill of lading does not constitute a sufficient consideration to render valid a stipulation of the bill of lading to the effect that no claim for loss or damages should be valid unless a written and verified notice should be served on some designated official within ten days from the removal of the cattle from the cars. *Yazoo & M. V. R. Co. v. Bell*, — Miss. —, 71 So. 272.

#### **When Right to Ship Without Limitation Denied.**

A carrier cannot rely on a condition of a contract for the transportation of interstate freight, relieving it from liability for loss or damages, unless written notice is given it by the shipper within five days, where the latter was not given a choice of rates but was compelled to ship at the rate named in a special contract or not at all, since, independent of state or Federal law, the carrier was answerable under the common law. *Toledo, St. L. & W. R. Co. v. Milner*, — Ind. App. —, 110 N. E. 756.

#### **(b) Particular Periods.**

##### **In General.**

The reasonableness of the time limited by a contract for the interstate shipment of live stock, for the giving to the carrier of notice of claim for damages, is to be determined upon the facts of each individual case. *Crawford v. Southern R. Co.*, — S. C. —, 86 S. E. 19.

A provision of a contract for the interstate shipment of live stock requiring the shipper to give the carrier written notice of any injury before the injured animals were removed from the place of shipment or destination and before they were mingled with other stock, and making a non-compliance therewith a bar to a recovery, is reasonable and valid and will apply where notice of injury was not given until 60 days after the injured animals had been disposed of by the shipper. *Baldwin v. Chicago, R. I. & P. R. Co.*, — Iowa —, 156 N. W. 17.

A stipulation of a contract for the interstate carriage of live stock requiring the shipper, as a condition precedent to recovery of damages for loss or injury, to give the carrier written notice of his claim before the removal of the animals at destination and their mingling with others, is valid. *Washington Horse Exchange v. Louisville & N. R. Co.*, — N. C. —, 87 S. E. 941.

A provision of a bill of lading for an interstate shipment of live stock, that as a condition precedent to the right to recover for any loss or damage a written notice of the claim should be given to the nearest station agent of the last carrier before the animals were removed or slaughtered, and three hours allowed before removal for examination and investigation by the carrier, is valid. *Thompson v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 185 S. W. 1145.

#### One Day.

A requirement of a contract for interstate shipment that written notice of claim for damages to live stock should, as a condition precedent to the carrier's liability, be given some designated official of the carrier within one day after the arrival of the stock at destination and before it was removed and mingled with others, is valid under the Carmack Amendment, and a failure to comply therewith bars a shipper's right to action. *Johnson v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 282; *Sims v. Missouri P. R. Co.*, 177 Mo. App. 18, 163 S. W. 275; *McElvain v. St. Louis & S. F. R. Co.*, 176 Mo. App. 379, 158 S. W. 464; *Smith v. St. Louis S. W. R. Co.*, 186 Mo. App. 401, 171 S. W. 635; *Donoho v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 141; *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717; *Chicago, R. I. & P. v. Bruce*, — Okla. —, 150 Pac. 880; *St. Louis & S. F. R. Co. v. Pickens*, — Okla. —, 151 Pac. 1055; *St. Louis & S. F. R. Co. v. Wynn*, — Okla. —, 153 Pac. 1156; *Chicago, R. I. & P. R. Co. v. Craig*, — Okla. —, 157 Pac. 87; *Kansas C. M. & O. R. Co. v. Gleason*, — Okla. —, 158 Pac. 365; *Chicago, R. I. & G. R. Co. v. Rich*, — Tex. Civ. App. —, 138 S. W. 223.

A provision of a bill of lading that written notice of injury to live stock transported in interstate commerce should be given within one day after their arrival at destination and before their removal and mingling with others, is unreasonable and void where such condition was not based on a reduced freight rate and the contract did not designate any agent to whom such notice could be given. *Chicago, R. I. & P. R. Co. v. Whaley*, — Tex. Civ. App. —, 177 S. W. 543.

#### Thirty Hours.

A stipulation of bill of lading barring recovery for loss or injury to an interstate shipment, unless written notice of claim for damages was given within 30 hours after the arrival of the property at destination, does not violate the Carmack Amendment. *St. Louis & S. F. R. Co. v. Keller*, 90 Ark. 308, 119 S. W. 254.

#### Five Days.

A requirement that written notice of claim for damages be given within 5 days after delivery of live stock at destination as a condition precedent to carrier's liability is valid under the Carmack Amendment. *Dunlap v. Chicago & A. R. Co.*, 187 Mo. App. 201, 172 S. W. 1178; *Hamilton v. Chicago & A. R. Co.*, 177 Mo. App. 145, 164 S. W. 248.

#### Ten Days.

A stipulation of a bill of lading relieving a carrier from liability for loss or damage to an interstate shipment unless written notice thereof is given the carrier's agent at place of delivery within a reasonable time after delivery, or if the giving of such notice is delayed for more than 10 days after the delivery of the property, or after due time for delivery, is not contrary to public policy. *Mitchell v. Atlantic C. L. R. Co.*, 15 Ga. App. 797, 84 S. E. 227.

The Carmack Amendment does not forbid stipulations in contracts for interstate shipment of live stock, providing that no claim for loss or injury shall be valid unless presented to the carrier within 10 days from the removal of the stock from the car. *Armstrong v. Illinois C. R. Co.*, 162 Ky. 539, 172 S. W. 947.

A stipulation in a bill of lading for an interstate shipment, that if claim for damages should not be made in writing within 10 days after delivery of the property the carrier should not be liable, is valid in the absence of any contention that the time limit is unreasonable, and the acceptance by the shipper of a bill of lading containing such a provision constitutes a binding contract on his part. *Olivit v. Penn. R. Co.*, 88 N. J. L. 241, 96 Atl. 582; same v. same, 88 N. J. L. 376, 97 Atl. 587; *Spada v. Penn. R. Co.*, 88 N. J. L.

388, 96 Atl. 587; *Albrecht v. Penn. R. Co.*, 88 N. J. L. 367, 96 Atl. 587.

### Thirty Days.

A provision of a contract for the interstate shipment of goods, requiring the shipper to make claim for loss or damage, in writing to the agent of the carrier at the point of delivery promptly after the arrival of the property, and exempting the carrier from liability if notice is delayed for more than 30 days, is not prohibited by the Carmack Amendment. *Old Dominion S. S. Co. v. Flannary*, 111 Va. 816, 69 S. E. 1107.

### Four Months.

The Carmack Amendment does not avoid a condition of a contract of interstate affreightment requiring the shipper to give the carrier, as a condition precedent to the latter's liability, written notice of claim for damages within 4 months after delivery of the property. *Atlantic C. L. R. Co. v. Ward*, 4 Ga. App. 374, 58 S. E. 677; *Joseph v. Chicago, B. & O. R. Co.*, 175 Mo. App. 18, 157 S. W. 837; *Banka v. Missouri P. R. Co.*, — Mo. App. —, 186 S. W. 7; *Kemper Mill Co. v. Missouri P. R. Co.*, — Mo. App. —, 186 S. W. 8; *Davenport v. Chesapeake & O. R. Co.*, 87 Misc. 303, 149 N. Y. Supp. 865.

A provision of a bill of lading that a carrier should not be liable unless claim for loss, damage or delay should be made in writing to the carrier at the point of delivery or origin within 4 months after delivery, or in case of failure to make delivery, within 4 months after the elapse of a reasonable time, is not, when applied to an interstate shipment, precluded by the Carmack Amendment. *New York, P. & N. R. Co. v. Peninsular Produce Co.*, 122 Md. 215, 89 Atl. 433.

A provision of a bill of lading for an interstate shipment of freight that any claim for any loss incurred must be filed within 4 months after delivery of the shipment, or in case of failure to deliver within 4 months after a reasonable time for delivery, when fairly entered into by the carrier and the shipper, and when not unjust or unreasonable under the circumstance of the particular case, is valid; and a failure of the shipper to comply with such requirement, when such condition is properly pleaded and not waived by the carrier, bars a recovery. *Atchison, T. & S. F. R. Co. v. Cozart*, — Okla. —, 158 Pac. 933.

The Carmack Amendment does not avoid a provision of a bill of lading for an interstate shipment to the effect that the carrier should not be liable for loss, damage or delay unless written claim was made at the point of delivery within 4 months after delivery or after the expiration of a reasonable time for delivery, al-

though not based on an independent consideration. *Stevens v. St. Louis, S. W. R. Co.*, — Tex. Civ. App. —, 178 S. W. 810; *St. Louis S. W. R. Co. v. Overton*, — Tex. Civ. App. —, 178 S. W. 814.

## 3. What Losses Within Requirement for Notice.

### (a) In General.

#### Delays.

A loss resulting from a negligent delay in the movement of an interstate shipment is within a requirement for the giving of written notice within a designated period. *St. Louis & S. F. R. Co. v. Taliaferro*, — Okla. —, 156 Pac. 359.

### (b) Death of Live Stock in Transit.

#### In General.

A provision of a contract for the interstate shipment of live stock requiring the shipper to give the carrier written notice of any loss or damage to the animals before their removal and mingling with other stock at destination does not apply to an action under the Carmack Amendment against an initial carrier for the value of animals that died in transit and were not delivered at destination. *Louisville & N. R. Co. v. Warfield*, 6 Ga. App. 550, 65 S. E. 308.

### (c) Conversion of Property by Carrier.

#### In General.

A carrier that, by a conversion of the property received for interstate transportation, abandons the contract of carriage, cannot, in an action under the Carmack Amendment, insist upon a stipulation that claim for loss or damage must be made in writing within a specified time to the carrier's agent at point of delivery. *Nashville, C. & St. L. R. Co. v. Truitt Co.*, 17 Ga. App. 263, 86 S. E. 421; *S. C. 14 Ga. App. 767*, 82 S. E. 465.

### (d) Loss of Particular Market from Delay.

#### In General.

Loss of market price resulting from a delay in the interstate transportation of live stock is not within a stipulation of a contract of carriage requiring written notice of claim of damages before the stock is removed at destination and mingles with others. *Ray v. Missouri, K. & T. R. Co.*, 90 Kan. 244, 133 Pac. 847, *S. C. 96 Kan. 8*, 149 Pac. 397.

Damages from a decline in the market sustained by reason of the delay in the delivery of an interstate shipment of live stock is within a provision of the contract of carriage to the effect that as a condition precedent to a recovery for any damage for delay, loss or injury the ship-

per shall give the carrier, within one day after the arrival of the stock at destination a written claim of damages. *St. Louis & S. F. R. Co. v. Zickafoos*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717.

#### (e) Shrinkage.

##### In General.

Loss by shrinkage resulting from delay in the transportation of live stock is not within a stipulation of the bill of lading for notice to the carrier of damages before the removal and mingling of the stock with others at destination. *Ray v. Missouri, K. & T. R. Co.*, 90 Kan. 244, 133 Pac. 847, S. C. 96 Kan. 8, 149 Pac. 397.

#### (f) Undeveloped Injuries or Diseases of Stock.

##### In General.

A condition of a shipping contract that an action for injuries to live stock transported in interstate commerce should be commenced within 60 days from the time of the injury is unreasonable and void when considered in connection with a further requirement that written notice of the injury should be given the carrier before the animals were removed from the point of destination, where it was impossible for the shipper to ascertain the extent of the animals' injuries within such period of time. *Cook v. Northern P. R. Co.*, — N. Dak. —, 155 N. W. 867.

A stipulation of a contract for interstate shipment that, as a condition precedent to liability, a written notice of claim for injury to live stock should be given the carrier within one day after arrival at destination and before their removal, is void under the Carmack Amendment, where a horse died of pneumonia which did not develop until several days after its delivery at destination. *McKinstry v. Chicago, R. I. & P. R. Co.*, 153 Mo. App. 546, 134 S. W. 1061.

A provision of a contract for the interstate transportation of live stock requiring the giving of written notice of claim for damages to the carrier within 5 days after the removal of the animals from the car is unreasonable and void where the nature and extent of the injuries cannot be ascertained within such time. *Crawford v. Southern R. Co.*, — S. C. —, 86 S. E. 19.

Notwithstanding that a stipulation of a contract for the interstate transportation of live stock, requiring the giving of written notice of claim for damages to the carrier within 5 days from the removal of the animals from the car, is unreasonable and void when the nature and extent of the injuries cannot be ascertained within that time, yet notice of the claim should be given within a reasonable time thereafter. *Crawford v. Southern R. Co.*, — S. C. —, 86 S. E. 19.

#### (g) Wrongful Delivery.

##### In General.

Where a shipper seeks to hold a terminal carrier for a wrongful delivery of an interstate shipment made under an order bill of lading issued by the initial carrier under the Carmack Amendment, the terminal carrier is entitled to notice under a provision of the contract of carriage requiring written notice of claim for damages from failure to make delivery. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541, reversing on this point 15 Ga. App. 142, 82 S. E. 784.

A wrongful delivery by a terminal carrier of an interstate shipment made under an order bill of lading is not such a conversion amounting to an abandonment or waiver of the contract of carriage issued under the Carmack Amendment, as will relieve the shipper from complying with a stipulation of contract for written notice of claim for damages from a failure to make delivery; since the terms of the contract cannot be waived so as to hold the carrier to a different responsibility than that fixed by the contract of carriage. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541, reversing on this point 15 Ga. App. 142, 82 S. E. 784.

A wrongful delivery by a terminal carrier of an interstate shipment made under an order bill of lading issued under the Carmack Amendment, falls within a requirement of the contract for written notice of claim for loss or damage in case of failure to make delivery. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541, reversing on this point 15 Ga. App. 142, 82 S. E. 784.

Requirement that written notice of claim for loss or damage to interstate shipment shall be given within a designated time, applies to a claim for a wrongful delivery by a terminal carrier, notwithstanding that it was indemnified for doing so; and initial carrier is not answerable therefor under Carmack Amendment in the absence of such notice. *Kemper Mill Co. v. Missouri P. R. Co.*, — Mo. App. —, 186 S. W. 8.

#### 4. Form of Notice.

##### (a) In General.

##### No Particular Form Required.

A requirement of a bill of lading issued under the Carmack Amendment, for written notice of damage claim for loss, injury, delay or failure to make delivery, does not call for any particular form of document, as such requirement must be construed in

a practical manner. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541, affirming 15 Ga. App. 142, 82 S. E. 784.

### Telegrams.

Where a shipper, in response to a telegram from a terminal carrier stating that the consignee refused to accept an interstate shipment because of its damaged condition, replied in the same manner that a claim would be made against the carrier for the value of the shipment, there was a sufficient compliance with a requirement of the bill of lading issued under the Carmack Amendment, for written notice of a damage claim for failure to make delivery. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541, affirming 15 Ga. App. 142, 82 S. E. 784.

### Notations on Freight Bills.

Notations on a freight bill showing that freight was in bad order, do not take the place of the written notice of claim for damage which the bill of lading for an interstate shipment of live stock, required to be given within a designated time after the arrival of the stock at destination and before its removal and commingling with others. *Johnson v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 282.

A notation made by a delivering carrier's agent on an expense bill, that an interstate shipment of fruit was more or less damaged, does not take the place of a written notice required by the bill of lading as a condition precedent to a carrier's liability. *St. Louis S. W. R. Co. v. Overton*, — Tex. Civ. App. —, 178 S. W. 814.

### What Must Be Stated.

#### — Cause of Injury.

The cause of the damage need not be stated in a written notice required by a contract for the interstate transportation of freight, since such provision calls for nothing beyond notice that a claim for loss will be made. *Gess Commission Co. v. Illinois C. R. Co.*, — Mo. App. —, 186 S. W. 1136.

#### Variance.

A written notice setting up delay as the cause of damage to an interstate shipment of fruit, when given a carrier within the time limited by the bill of lading, will permit a recovery against an initial carrier under the Carmack Amendment for the damaged condition of the fruit, especially where such carrier was not misled by the notice. *Gess Commission Co. v. Illinois C. R. Co.*, — Mo. App. —, 186 S. W. 1136.

### (b) Verbal Notice.

#### In General.

Oral notice to a station agent at destination of a claim for damage to an interstate shipment of live stock is not a compliance with a requirement of the bill of lading that written notice should be given within a designated time after the arrival at destination and before the stock was removed and mingled with others. *Johnson v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 282.

Verbal notice given the claim agent of a delivering carrier that a claim for damages to an interstate shipment would be made is not a compliance with a requirement of a bill of lading for written notice. *St. Louis S. W. R. Co. v. Overton*, — Tex. Civ. App. —, 178 S. W. 814.

### 5. To Whom Given.

#### Initial Carrier.

The giving of notice to an initial carrier of loss or injury to live stock occurring on the line of a connecting carrier is sufficient, under the Carmack Amendment, if notice to the connecting carrier is at all necessary. *Norfolk & W. R. Co. v. Steele*, 117 Va. 788, 86 S. E. 124.

#### Connecting or Terminal Carrier.

A stipulation of a bill of lading for the interstate shipment of live stock that as a condition precedent to the right to recover for injury while in transit, the shipper should give written notice of his claim to some officer or agent of "said carrier" before the removal of the animals at destination and their mingling with others, when applied to a shipment over the lines of several carriers, contemplates that such notice shall be given to an officer or agent of the terminal carrier instead of to that of the initial carrier, especially where the bill of lading further provides that its terms and stipulations shall inure to the benefit of any connecting carrier. *Northern P. R. Co. v. Wall*, 241 U. S. 87, 60 L. ed. —, 36 Sup. Ct. Rep. 493, reversing 50 Mont. 122, 145 Pac. 291.

Notice to an agent of a terminal carrier is notice to an initial carrier when given in compliance with a stipulation of a contract for interstate shipment of live stock requiring written notice of claim for injury to be given to some officer or agent of "said carrier" before the animals were removed from destination and mingled with others. *Northern P. R. Co. v. Wall*, 241 U. S. 87, 60 L. ed. —, 36 Sup. Ct. Rep. 493, reversing 50 Mont. 122, 145 Pac. 291.

Under the Carmack Amendment notice to a connecting carrier is a sufficient compliance with a requirement that written

notice of claim for damages shall be given the initial carrier, since under such law the connecting carrier is the latter's agent. *Overton v. Chicago, R. I. & G. R. Co.*, — Tex. Civ. App. —, 160 S. W. 111.

Notice to a connecting carrier is sufficient, under the Carmack Amendment, to satisfy a requirement of a bill of lading for written notice to the initial carrier of claim for loss or damage to live stock, since the connecting carrier is, under such act, the initial carrier's agent. *Chicago, R. I. & G. R. Co. v. Linger*, — Tex. Civ. App. —, 156 S. W. 298.

#### 6. Extension of Time for Giving.

##### In General.

The time limited by a bill of lading for presenting written claim for damages to an interstate shipment was held extended by a written endorsement by the carrier's agent to that effect on the bill. *Clingan v. Cleveland, C. C. & St. L. R. Co.*, 184 Ill. App. 202.

#### 7. Waiver.

When waiver of stipulation question for jury, see *infra* XIII, J.

##### (a) In General.

##### When Requirement for Notice May Be Waived.

There cannot be a waiver of a shipper's failure to give written notice of a claim for damage to an interstate shipment of live stock, as required by the terms of the bill of lading, within a designated time after their arrival at destination and before their removal and mingling with other animals. *Johnson v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 282.

The contractual provisions of a bill of lading for an interstate shipment of freight as to notice of loss or damage is valid and cannot be waived. *Donoho v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 141.

A carrier may waive a provision of a contract for the interstate transportation of live stock requiring that it be given written notice of claim for damage within 5 days from the removal of the animals from the car. *Crawford v. Southern R. Co.*, — S. C. —, 86 S. E. 19.

##### Waiver as Unlawful Preference.

Since the Interstate Commerce Act prohibits the giving of preferences by means of consent judgments or the waivers of defenses open to a carrier, where a bill of lading, in case of an interstate shipment, contained a condition that "if claims for damages be not made within 10 days after delivery of the property the carrier

shall not be liable," the liability of the carrier cannot be predicated upon the mere fact that it rejected the claim for other reasons than that it was presented out of time. *Olivit v. Pennsylvania R. Co.*, 88 N. J. L. 241, 96 Atl. 582; same v. same, 88 N. J. L. 376, 377, 96 Atl. 587; *Spada v. Pennsylvania R. Co.*, 88 N. J. L. 388, 96 Atl. 587; *Albrecht v. Pennsylvania R. Co.*, 88 N. J. L. 367, 96 Atl. 587.

A carrier cannot waive a requirement of a bill of lading requiring written notice of claim for injury to or a loss of an interstate shipment to be given within a designated time, since to do so would amount to an unlawful discrimination between shippers. *Banka v. Missouri P. R. Co.*, — Mo. App. —, 186 S. W. 7.

The prohibition of the Interstate Commerce Act against unjust discriminations precludes the waiver by a carrier of a stipulation of a bill of lading for an interstate shipment of live stock, requiring notice of loss or damages to be given to designated officials within a designated time and before injured animals are removed. *Thompson v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 185 S. W. 1145.

The prohibition of the Interstate Commerce Act against unjust discrimination precludes the waiver by a carrier of a stipulation of a bill of lading for an interstate shipment of property, requiring actions for loss or damage to be brought within 6 months. *Thompson v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 185 S. W. 1145.

A ruling of the Interstate Commerce Commission dealing with the form of written notice of injury to live stock in interstate transportation does not preclude a waiver of such notice by a carrier. *Schloss-Bear-Davis Co. v. Louisville & N. R. Co.*, — N. C. —, 88 S. E. 476.

No unlawful preference is created by a carrier's waiver of a provision of a contract for the interstate shipment of live stock, requiring, as a condition precedent to a shipper's right to recover, the giving of a written notice of the claim for damages before the removal of the animals at destination and before they are mingled with others. *Mewborn v. Louisville & N. R. Co.*, — N. C. —, 87 S. E. 37.

Permitting actual knowledge on the part of a carrier of live stock moved in interstate commerce, to supply the written notice of injury required by the terms of the bill of lading, is not a discrimination between railroads nor a preference in favor of one shipper at the expense of others, since merely a mode of proof applicable alike to all carriers and in favor of all shippers, and it will be enforced against a carrier who has possession of stock with every opportunity to know the extent of the injury and its cause. *Bald-*

win v. Atlantic C. L. R. Co., 170 N. C. 12, 86 S. E. 776.

Permitting actual knowledge of a carrier's agent to constitute a waiver of a stipulation for written notice does not amount to a discrimination between railroads or to a preference in favor of one shipper at the expense of others in violation of the Interstate Commerce Act. *Schloss-Bear-Davis Co. v. Louisville & N. R. Co.*, — N. C. —, 88 S. E. 476.

#### **Who May Bind Carrier by Waiver.**

An agent of the delivering carrier, who was also the agent of the initial carrier and authorized to bind the latter by an agreement properly coming within the scope of his duties in connection with the shipment, could waive a requirement of the contract of shipment that notice of loss should be in writing. *Nashville, C. & St. L. R. Co. v. Truitt Co.*, 17 Ga. App. 263, 86 S. E. 421, S. C. 14 Ga. App. 767, 82 S. E. 465.

#### **What Constitutes**

##### **—Rejection of Claim on Merits.**

Rejection on the merits of a claim for damages to an interstate shipment is not a waiver by a carrier of a defense that written notice of the claim was not filed within the stipulated time. *Davenport v. Chesapeake & O. R. Co.*, 87 Misc. 303, 149 N. Y. Supp. 865.

When a claim for damages to an interstate shipment is denied by a carrier on the ground that delivery of the property was made in due time, it waives the failure of the shipper to make written claim for damages within four months as required by the bill of lading. *New York, P. & N. R. Co. v. Peninsular Produce Co.*, 122 Md. 215, 89 Atl. 433.

##### **—Requesting Information from Shipper.**

A waiver by a carrier of a requirement of a contract of interstate shipment for written notice of damages is not shown by a letter from the carrier to the shipper requesting further particulars of his claim, where the shipper did not reply to the communication or comply with such request. *Stevens v. St. Louis S. W. R. Co.*, — Tex. Civ. App. —, 178 S. W. 810.

##### **—Tracing Lost Shipment.**

The fact that tracers were sent after a lost shipment does not show a waiver by a carrier of a requirement of a bill of lading for written notice of claim for damage. *Old Dominion S. S. Co. v. Flannery*, 111 Va. 816, 69 S. E. 1107.

##### **—Failure to Raise Question at Trial.**

An initial carrier, in an action based on the Carmack Amendment, will be held to

have waived the condition of a bill of lading requiring the giving, within 4 months, of notice of loss or damage to an interstate shipment, where such question was not raised at the trial. *Ross v. Maine C. R. Co.*, 112 Me. 63, 90 Atl. 711, S. C. 114 Me. 287, 96 Atl. 223.

##### **—When Conversion by Carrier.**

A carrier that, by a conversion of property moved in interstate commerce, abandons the contract of carriage, cannot insist on a stipulation of the bill of lading that claims for loss or damage must be made in writing within a specified time to the carrier's agent at the point of delivery. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 15 Ga. App. 142, 82 S. E. 784, overruled on this point 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541.

##### **(b) Effect of Actual Knowledge.**

##### **In General.**

The fact that a carrier's veterinary surgeon examined injured live stock and reported its condition to the carrier, does not warrant a reasonable inference of a waiver by the carrier of a requirement of a contract for the interstate shipment of live stock that written notice of claim for damages should be given the carrier within 5 days from the removal of the animals from the car. *Crawford v. Southern R. Co.*, — S. C. —, 86 S. E. 19.

Knowledge on the part of a station agent at destination that live stock was injured in interstate transportation, does not render it unnecessary for the shipper to present a written notice of claim for damages within a designated time as required by the bill of lading, and before the stock was removed and commingled with others. *Johnson v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 282.

A waiver of a condition of a bill of lading requiring written notice to the carrier of injury to live stock shipped in interstate commerce, before its removal from the possession of the carrier, is shown by proof of the carrier's actual knowledge of the injury. *Baldwin v. Atlantic C. L. R. Co.*, 170 N. C. 12, 86 S. E. 776.

A provision of a contract for the interstate carriage of live stock, requiring, as a condition precedent to a recovery of damages, that written notice of the claim should be given the carrier at destination before the removal and mingling of the animals with others, will be deemed waived, where the company or its agents in charge had knowledge of the damage and injury at the time the stock was unloaded at the point of destination. *Mewborn v. Louisville & N. R. Co.*, — N. C. —, 87 S. E. 37.



A provision of a bill of lading requiring written notice of a claim for damages will be deemed waived on proof of the carrier's actual knowledge of an injury to an interstate shipment. *Schloss-Bear-Davis Co. v. Louisville & N. R. Co.*, — N. C. —, 88 S. E. 476.

Actual knowledge on the part of the last carrier at the place of delivery of the damaged condition of live stock, will, in law, be ascribed to the initial and other carriers in the interstate transportation of live stock, notwithstanding a provision of the bill of lading declaring that written notice was a condition precedent to a right of recovery. *Washington Horse Exchange v. Louisville & N. R. Co.*, — N. C. —, 87 S. E. 941.

## K. Limitation of Time for Action.

### 1. In General.

#### What Shipments Within Requirement for Notice.

When goods are shipped between points in the same state, and in order to reach the carrier's yards at destination, they are moved into and out of another state, the shipment is in interstate commerce so as to render valid a stipulation requiring actions for damages to the property to be brought within 6 months from the date of delivery at its destination. *Howard v. Chicago, R. I. & P. R. Co.*, — Mo. App. —, 184 S. W. 906.

### 2. Validity in General.

#### In General.

Under the Carmack Amendment a carrier may by contract require an action against it for loss of or injury to an interstate shipment, to be brought within a reasonable stated time. *Nashville, C. & St. L. R. Co. v. Truitt Co.*, 17 Ga. App. 263, 86 S. E. 421, S. C. 14 Ga. App. 767, 82 S. E. 465; *Ray v. Missouri, K. & T. R. Co.*, 90 Kan. 244, 133 Pac. 847.

The failure of a shipper to bring suit for injury to an interstate shipment within the time specified by the contract of carriage, is fatal to his right to recover. *Miller v. Atchison, T. & S. F. R. Co.*, — Kan. —, 156 Pac. 780.

The validity of a stipulation in a contract for the interstate shipment of freight, limiting the time within which suit for damages must be brought, is not dependent upon state legislation, but involves the construction of Federal enactments, and is to be determined by the general common law. *Harrington v. Wichita F. & N. W. R. Co.*, — Okla. —, 156 Pac. 634.

## 3. Validity of Particular Periods.

### Ninety Days.

A provision of a contract for the interstate transportation of freight requiring suit for its loss or damage to be brought within 90 days does not conflict with the Carmack Amendment. *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397, reversing — *Tex. Civ. App.* —, 128 S. W. 932; *Watt v. Missouri, K. & T. R. Co.*, 90 Kan. 466, 135 Pac. 600; *Harrington v. Wichita F. & N. W. R. Co.*, — Okla. —, 156 Pac. 634.

A provision of contract for interstate shipment that an action for loss or damage should be brought within 91 days after the loss or damage is valid when applied to an interstate shipment. *Ray v. Missouri, K. & T. R. Co.*, 96 Kan. 8, 149 Pac. 397, S. C. 90 Kan. 244, 133 Pac. 847.

### Six Months.

A condition of a contract for the interstate carriage of live stock that the carrier should not be answerable for loss or damage unless action was begun within 6 months, is reasonable and not precluded by the Carmack Amendment. *Baldwin v. Chicago, R. I. & P. R. Co.*, — Ia. —, 156 N. W. 17; *Enright v. Atchison, T. & S. F. R. Co.*, 96 Kan. 546, 152 Pac. 629; *Sims v. Missouri P. R. Co.*, 177 Mo. App. 18, 163 S. W. 275; *Thompson v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 185 S. W. 1145; *Donoho v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 141; *St. Louis & S. F. R. Co. v. Pickens*, — Okla. —, 151 Pac. 1055.

A provision of a contract for the interstate transportation of freight requiring an action for damages thereto to be commenced within 6 months from the time of injury, is not avoided because of other stipulations by which the carrier sought, in violation of the Carmack Amendment, to limit its liability for its own negligence, since the contract was divisible. *Miller v. Atchison, T. & S. F. R. Co.*, — Kan. —, 156 Pac. 780.

A stipulation of a contract for the interstate transportation of live stock, that no suit or action for the recovery of any claim for damages for death, loss, injury or delay shall be sustainable unless begun within 6 months next after the cause of action shall accrue, and if begun later, that the lapse of time shall be conclusive evidence against the validity of such claim, statutes of limitation to the contrary notwithstanding, is valid. *St. Louis & S. F. R. Co. v. Taliaferro*, — Okla. —, 156 Pac. 359.

A carrier is not liable for a negligent delay in the interstate transportation of live stock moved under a special written

contract based on a reduced rate which was published and filed with the Interstate Commerce Commission, when the contract was executed by the shipper without fraud, oppression, attempted rebating or unlawful billing where the shipper failed to comply with a reasonable requirement of the contract that action for damages should be begun within 6 months from the time the right of action accrued. *St. Louis & S. F. R. Co. v. Taliaferro*, — Okla. —, 156 Pac. 359.

The validity of a stipulation for the interstate transportation of property by a carrier requiring suit for damages thereto to be brought within 6 months after the cause of action accrues, is to be determined under the common law regardless of the statute of limitations of the state in which the action is begun. *St. Louis, I. M. & S. R. Co. v. Patterson*, — Okla. —, 156 Pac. 216 (reported in advance sheets only).

#### Two Years.

A stipulation of contract of carriage requiring suits for damage to be brought within 2 years is valid under the Carmack Amendment. *Texas & P. R. Co. v. Lagnbehn*, — Tex. Civ. App. —, 158 S. W. 244.

#### 4. Waiver.

##### Failure of Shipper to Act on Claim.

The failure of a shipper to bring action against a carrier for injury to live stock transported in interstate commerce, within 60 days from the time of the injury, as required by the contract of carriage, is waived by the conduct of the carrier in not taking action on the shipper's written notice of the injury within the prescribed period. *Cook v. Northern P. R. Co.*, — N. Dak. —, 155 N. W. 867.

##### Negotiations for Settlement.

Mere negotiations toward a settlement of a claim for damages is not a waiver by a carrier of a stipulation of a contract of interstate affreightment, requiring action for damages or loss to be brought within 91 days thereafter. *Ray v. Missouri, K. & T. R. Co.*, 96 Kan. 8, 149 Pac. 397, S. C. 90 Kan. 244, 133 Pac. 847.

The fact that a shipper by reason of negotiations conducted by correspondence with connecting carriers was induced not to bring an action against the initial carrier for damages to an interstate shipment of freight until after the expiration of the 90 days limit provided by the contract of shipment, does not amount to an implied waiver by the initial carrier of such condition where it was not informed of such correspondence. *Harrington v.*

*Wichita, F. & N. W. R. Co.*, — Okla. —, 156 Pac. 634.

#### L. Liability of Initial Carrier.

Applicability of Carmack Amendment to losses occurring on line of initial carrier, see *supra* XI, D, 3, and XI, F, 2.

Presumption of negligence from receipt of property by carrier in good and delivery in bad condition, see *infra* XII. G. 4.

#### 1. In General.

##### Nature of Liability.

The liability of any carrier for loss or damage to property on the lines over which freight is routed for interstate transportation is that imposed by the Carmack Amendment and as measured by the original contract of shipment in so far as it is valid under such act. *Kansas City S. R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 227, reversing 91 Ark. 97, 121 S. W. 932, 134 Am. St. Rep. 56.

Where a shipper selected for an interstate shipment of freight a route different than the carrier would have chosen and over which it had no through route or established rates, its liability for a loss occurring on the line of a connecting carrier is controlled by the Carmack Amendment, notwithstanding a stipulation to the contrary in the bill of lading. *Norfolk & W. R. Co. v. Dixie Tobacco Co.*, 228 U. S. 593, 57 L. ed. 980, 33 Sup. Ct. Rep. 609, affirming 111 Va. 813, 69 S. E. 1106.

The provisions of the Carmack Amendment imposing primary liability on an initial carrier for loss or damage occurring on any portion of a through route, is declaratory of the common law. *Southern P. Co. v. Crenshaw Bros.*, 5 Ga. App. 675, 63 S. E. 865.

Under the Carmack Amendment a common carrier, by receiving goods for transportation in interstate commerce and routing the shipment over the lines of another common carrier, makes the latter its agent, and is liable to the owner of the goods, or his assigns, for any damage resulting from negligence or carelessness in transportation, whether occurring on its own or the line of subsequent carrier. *Barrett v. Northern P. R. Co.*, — Idaho —, 157 Pac. 1016.

A liability for some default in its common-law duties as a common carrier, is imposed on a carrier by the primary liability clause of the Carmack Amendment. *St. Louis & S. F. R. Co. v. Zickzfoose*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717.

The Carmack Amendment does not impose on an initial carrier a liability for its own conduct different from or greater than that imposed by the common law, although it does impose on it responsibility to a shipper for a common law liability incurred by connecting carriers. *Stevens v. St. Louis S. W. R. Co.*, — Tex. Civ. App. —, 178 S. W. 810.

In an action under the Carmack Amendment the plaintiff is not limited to a suit based solely on negligence, since the common-law rule of liability was not affected by such act, and the initial carrier is liable for all loss or damage not caused by the act of God or the public enemy. *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131.

When the right sought to be enforced by a shipper is one under the general common law, which the Carmack Amendment continues in force, the rights of the parties can be affected by the fact that the shipment is interstate only by reason of something in the contract of shipment which, under the Federal law, has an influence on such right. *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131.

The purpose of the Carmack Amendment was to give to shippers in interstate commerce, when their property is transported over the lines of several connecting carriers, a direct and ready remedy for the collection of damages sustained in transit, to place on the initial carrier the burden of locating the guilty carrier and to annul the presumption that the injury resulted from the act of the last carrier. *Pecos & N. T. R. Co. v. Meyer*, — Tex. Civ. App. —, 155 S. W. 309, 6 N. C. C. A. 146.

The manifest purpose of the Carmack Amendment was to continue the previously existing liability of both initial and connecting carriers, and in addition to impose on the former in certain cases the liability that theretofore existed on the part of the connecting carriers. *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 153 Ky. 730, 156 S. W. 400, 45 L. R. G. (N. S.) 529.

When action is brought for loss of or damage to goods transported in interstate commerce, the rule of liability prescribed by the Carmack Amendment is applicable whether the suit is against the initial or one of the succeeding carriers. *Atlantic C. L. R. Co. v. Thomasville Live Stock Co.*, 13 Ga. App. 102, 78 S. E. 1019, but see *Central of Ga. R. Co. v. Maxelbaum Produce Co.*, — Ga. App. —, 89 S. E. 635.

In an action against an initial carrier under the Carmack Amendment, for injuries to an interstate shipment passing over the lines of several carriers, the plaintiff need not prove which one caused

the injury. *Lepman v. Wabash R. Co.*, 185 Ill. App. 583.

The word "caused" as used in the Carmack Amendment in imposing liability on the initial carrier for any loss or damage "caused" by it or any other carrier in the interstate transportation of property, implies not only active conduct and deeds of commission, but also includes passive neglect, deeds of omission and failure to faithfully exercise their duties. *Louisville & N. R. Co. v. Warfield*, 6 Ga. App. 550, 65 S. E. 308.

#### Exclusiveness of Remedy Against Initial Carrier.

The liability created by the Carmack Amendment for injury to or the loss of goods in interstate transportation applies to the initial carrier only. *Looney v. Oregon S. L. R. Co.*, 271 Ill. 541, 111 N. E. 509, reversing 192 Ill. App. 273.

Where the several carriers are not partners, an initial carrier is the only one liable under the Carmack Amendment for damages caused an interstate shipment on the lines of a connecting carrier. *Eastern R. of N. Mex. v. Montgomery*, — Tex. Civ. App. —, 139 S. W. 885.

#### When Negligent Carrier Identified.

The liability of an initial carrier under the Carmack Amendment for injuries to an interstate shipment occurring on the line of a connecting carrier is absolute, irrespective of the fact that a caretaker accompanies the shipment so that the shipper knows that the injury did not occur on the line of the initial carrier. *Texas Midland R. Co. v. King*, — Tex. Civ. App. —, 174 S. W. 336.

#### Act of God.

A carrier is not liable under the Carmack Amendment where a delay in transportation results in a loss of goods in an unprecedented flood, since due to an Act of God. *Seaboard A. L. R. Co. v. Mullin*, — Fla. —, 70 So. 467.

#### Unavoidable Losses.

It was not the purpose of the Carmack Amendment to make the initial carrier, or a sole carrier over whose line interstate shipment passes, liable for unavoidable losses or damage due to forces beyond its control. *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 135 Pac. 496, 6 N. C. C. A. 717.

#### Effect of Issue of Bill of Lading by Connecting Carrier.

The liability imposed on an initial carrier by the Carmack Amendment is not avoided, where it fails to issue a receipt or bill of lading for an interstate shipment, by the fact that the shipper obtained

notice of claims for damage before the stock is removed from the possession of the carrier, are valid. *Baldwin v. Atlantic C. L. R. Co.*, 170 N. C. 12, 86 S. E. 776.

A provision of a bill of lading requiring, as a condition precedent to liability, that the shipper give, within one day after delivery at destination, written notice of his claim for damages to live stock to the nearest station agent, or the agent at destination, before the stock is removed and mingled with others, is unreasonable and void where it does not appear that the carrier had an agent at the point of destination, or that it would have been practical under the circumstances to have given notice within the designated time. *Hovey v. Tankersley*, — Tex. Civ. App. —, 177 S. W. 153.

The failure of a shipper to comply with a requirement of a contract of interstate shipment for written notice of claim for damages precludes a recovery by him, under the Carmack Amendment, from the initial carrier for delay in transportation not due to negligence. *Stevens v. St. Louis S. W. R. Co.*, — Tex. Civ. App. —, 178 S. W. 810.

A carrier is not liable for a negligent delay in the interstate transportation of live stock under a special contract based on a reduced rate which was published and filed with the Interstate Commerce Commission, when the contract was executed by the shipper without fraud, oppression, attempted rebating or unlawful billing, where he failed to comply with a reasonable requirement of the agreement as to giving, within a specified time, to designated officials of the carrier, notice of damages. *St. Louis & S. F. R. Co. v. Taliaferro*, — Okla. —, 156 Pac. 359.

#### **Necessity for Consideration.**

A stipulation requiring written notice of claim for damages within one day after the delivery of live stock at destination is valid under the Carmack Amendment when based on a sufficient consideration, such as a reduced rate. *St. Louis, I. M. & S. R. Co. v. Furlow*, 89 Ark. 404, 117 S. W. 517; *Chicago, R. I. & P. R. Co. v. Whaley*, — Tex. Civ. App. —, 177 S. W. 543.

A provision of a contract for the transportation of an interstate shipment, that the carrier shall not be liable for loss or damage unless written notice is given the carrier's agent at place of delivery promptly after delivery, or if the giving of such notice is delayed for more than 10 days, that the carrier shall not be liable, is valid under the Carmack Amendment, even though the carrier does not give as consideration any extra service or monetary equivalent to the shipper. *Mitchell v. Atlantic C. L. R. Co.*, 15 Ga. App. 979, 84 S. E. 227.

A stipulation in a general form of bill of lading requiring the filing of written claim of loss within a specified time is a reasonable regulation which does not require an independent consideration to support it. *Bledsoe v. Missouri, K. & T. R. Co.*, 177 Mo. App. 153, 168 S. W. 183.

A special consideration is not necessary to support a stipulation of a general form of bill of lading for the interstate transportation of live stock, to the effect that written notice of claim for damage shall be given the carrier within a specified time after the arrival of the stock at destination and before its removal and commingling with other animals. *Johnson v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 282.

A provision of a bill of lading for an interstate shipment of live stock to the effect that no claim for loss or damage should be valid unless a written and verified notice should be served on some designated official within ten days from the removal of the cattle from the cars, is unenforceable when not based on a sufficient consideration. *Yazoo & M. V. R. Co. v. Bell*, — Miss. —, 71 So. 272.

The fact that a shipper of live stock obtains a lower freight rate for an interstate shipment by accepting the valuation printed in the bill of lading does not constitute a sufficient consideration to render valid a stipulation of the bill of lading to the effect that no claim for loss or damages should be valid unless a written and verified notice should be served on some designated official within ten days from the removal of the cattle from the cars. *Yazoo & M. V. R. Co. v. Bell*, — Miss. —, 71 So. 272.

#### **When Right to Ship Without Limitation Denied.**

A carrier cannot rely on a condition of a contract for the transportation of interstate freight, relieving it from liability for loss or damages, unless written notice is given it by the shipper within five days, where the latter was not given a choice of rates but was compelled to ship at the rate named in a special contract or not at all, since, independent of state or Federal law, the carrier was answerable under the common law. *Toledo, St. L. & W. R. Co. v. Milner*, — Ind. App. —, 110 N. E. 756.

#### **(b) Particular Periods.**

##### **In General.**

The reasonableness of the time limited by a contract for the interstate shipment of live stock, for the giving to the carrier of notice of claim for damages, is to be determined upon the facts of each individual case. *Crawford v. Southern R. Co.* — S. C. —, 86 S. E. 19.

A provision of a contract for the interstate shipment of live stock requiring the shipper to give the carrier written notice of any injury before the injured animals were removed from the place of shipment or destination and before they were mingled with other stock, and making a non-compliance therewith a bar to a recovery, is reasonable and valid and will apply where notice of injury was not given until 60 days after the injured animals had been disposed of by the shipper. *Baldwin v. Chicago, R. I. & P. R. Co.*, — Iowa —, 156 N. W. 17.

A stipulation of a contract for the interstate carriage of live stock requiring the shipper, as a condition precedent to recovery of damages for loss or injury, to give the carrier written notice of his claim before the removal of the animals at destination and their mingling with others, is valid. *Washington Horse Exchange v. Louisville & N. R. Co.*, — N. C. —, 87 S. E. 941.

A provision of a bill of lading for an interstate shipment of live stock, that as a condition precedent to the right to recover for any loss or damage a written notice of the claim should be given to the nearest station agent of the last carrier before the animals were removed or slaughtered, and three hours allowed before removal for examination and investigation by the carrier, is valid. *Thompson v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 185 S. W. 1145.

#### One Day.

A requirement of a contract for interstate shipment that written notice of claim for damages to live stock should, as a condition precedent to the carrier's liability, be given some designated official of the carrier within one day after the arrival of the stock at destination and before it was removed and mingled with others, is valid under the Carmack Amendment, and a failure to comply therewith bars a shipper's right to action. *Johnson v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 282; *Sims v. Missouri P. R. Co.*, 177 Mo. App. 18, 163 S. W. 275; *McElvain v. St. Louis & S. F. R. Co.*, 176 Mo. App. 379, 158 S. W. 464; *Smith v. St. Louis S. W. R. Co.*, 186 Mo. App. 401, 171 S. W. 635; *Donoho v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 141; *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717; *Chicago, R. I. & P. v. Bruce*, — Okla. —, 150 Pac. 880; *St. Louis & S. F. R. Co. v. Pickens*, — Okla. —, 151 Pac. 1055; *St. Louis & S. F. R. Co. v. Wynn*, — Okla. —, 153 Pac. 1156; *Chicago, R. I. & P. R. Co. v. Craig*, — Okla. —, 157 Pac. 87; *Kansas C. M. & O. R. Co. v. Gleason*, — Okla. —, 158 Pac. 365; *Chicago, R. I. & G. R. Co. v. Rich*, — Tex. Civ. App. —, 138 S. W. 223.

A provision of a bill of lading that written notice of injury to live stock transported in interstate commerce should be given within one day after their arrival at destination and before their removal and mingling with others, is unreasonable and void where such condition was not based on a reduced freight rate and the contract did not designate any agent to whom such notice could be given. *Chicago, R. I. & P. R. Co. v. Whaley*, — Tex. Civ. App. —, 177 S. W. 543.

#### Thirty Hours.

A stipulation of bill of lading barring recovery for loss or injury to an interstate shipment, unless written notice of claim for damages was given within 30 hours after the arrival of the property at destination, does not violate the Carmack Amendment. *St. Louis & S. F. R. Co. v. Keller*, 90 Ark. 308, 119 S. W. 254.

#### Five Days.

A requirement that written notice of claim for damages be given within 5 days after delivery of live stock at destination as a condition precedent to carrier's liability is valid under the Carmack Amendment. *Dunlap v. Chicago & A. R. Co.*, 187 Mo. App. 201, 172 S. W. 1178; *Hamilton v. Chicago & A. R. Co.*, 177 Mo. App. 145, 164 S. W. 248.

#### Ten Days.

A stipulation of a bill of lading relieving a carrier from liability for loss or damage to an interstate shipment unless written notice thereof is given the carrier's agent at place of delivery within a reasonable time after delivery, or if the giving of such notice is delayed for more than 10 days after the delivery of the property, or after due time for delivery, is not contrary to public policy. *Mitchell v. Atlantic C. L. R. Co.*, 15 Ga. App. 797, 84 S. E. 227.

The Carmack Amendment does not forbid stipulations in contracts for interstate shipment of live stock, providing that no claim for loss or injury shall be valid unless presented to the carrier within 10 days from the removal of the stock from the car. *Armstrong v. Illinois C. R. Co.*, 162 Ky. 539, 172 S. W. 947.

A stipulation in a bill of lading for an interstate shipment, that if claim for damages should not be made in writing within 10 days after delivery of the property the carrier should not be liable, is valid in the absence of any contention that the time limit is unreasonable, and the acceptance by the shipper of a bill of lading containing such a provision constitutes a binding contract on his part. *Olivit v. Penn. R. Co.*, 88 N. J. L. 241, 96 Atl. 582; same v. same, 88 N. J. L. 376, 377, 96 Atl. 587; *Spada v. Penn. R. Co.*, 88 N. J. L.

388, 96 Atl. 587; *Albrecht v. Penn. R. Co.*, 88 N. J. L. 367, 96 Atl. 587.

### Thirty Days.

A provision of a contract for the interstate shipment of goods, requiring the shipper to make claim for loss or damage, in writing to the agent of the carrier at the point of delivery promptly after the arrival of the property, and exempting the carrier from liability if notice is delayed for more than 30 days, is not prohibited by the Carmack Amendment. *Old Dominion S. S. Co. v. Flannary*, 111 Va. 816, 69 S. E. 1107.

### Four Months.

The Carmack Amendment does not avoid a condition of a contract of interstate affreightment requiring the shipper to give the carrier, as a condition precedent to the latter's liability, written notice of claim for damages within 4 months after delivery of the property. *Atlantic C. L. R. Co. v. Ward*, 4 Ga. App. 374, 58 S. E. 677; *Joseph v. Chicago, B. & O. R. Co.*, 175 Mo. App. 18, 157 S. W. 837; *Banka v. Missouri P. R. Co.*, — Mo. App. —, 186 S. W. 7; *Kemper Mill Co. v. Missouri P. R. Co.*, — Mo. App. —, 186 S. W. 8; *Davenport v. Chesapeake & O. R. Co.*, 87 Misc. 303, 149 N. Y. Supp. 865.

A provision of a bill of lading that a carrier should not be liable unless claim for loss, damage or delay should be made in writing to the carrier at the point of delivery or origin within 4 months after delivery, or in case of failure to make delivery, within 4 months after the elapse of a reasonable time, is not, when applied to an interstate shipment, precluded by the Carmack Amendment. *New York, P. & N. R. Co. v. Peninsular Produce Co.*, 122 Md. 215, 89 Atl. 433.

A provision of a bill of lading for an interstate shipment of freight that any claim for any loss incurred must be filed within 4 months after delivery of the shipment, or in case of failure to deliver within 4 months after a reasonable time for delivery, when fairly entered into by the carrier and the shipper, and when not unjust or unreasonable under the circumstance of the particular case, is valid; and a failure of the shipper to comply with such requirement, when such condition is properly pleaded and not waived by the carrier, bars a recovery. *Atchison, T. & S. F. R. Co. v. Cozart*, — Okla. —, 158 Pac. 933.

The Carmack Amendment does not avoid a provision of a bill of lading for an interstate shipment to the effect that the carrier should not be liable for loss, damage or delay unless written claim was made at the point of delivery within 4 months after delivery or after the expiration of a reasonable time for delivery, al-

though not based on an independent consideration. *Stevens v. St. Louis, S. W. R. Co.*, — Tex. Civ. App. —, 178 S. W. 810; *St. Louis S. W. R. Co. v. Overton*, — Tex. Civ. App. —, 178 S. W. 814.

## 3. What Losses Within Requirement for Notice.

### (a) In General.

#### Delays.

A loss resulting from a negligent delay in the movement of an interstate shipment is within a requirement for the giving of written notice within a designated period. *St. Louis & S. F. R. Co. v. Taliaferro*, — Okla. —, 156 Pac. 359.

### (b) Death of Live Stock in Transit.

#### In General.

A provision of a contract for the interstate shipment of live stock requiring the shipper to give the carrier written notice of any loss or damage to the animals before their removal and mingling with other stock at destination does not apply to an action under the Carmack Amendment against an initial carrier for the value of animals that died in transit and were not delivered at destination. *Louisville & N. R. Co. v. Warfield*, 6 Ga. App. 550, 65 S. E. 308.

### (c) Conversion of Property by Carrier.

#### In General.

A carrier that, by a conversion of the property received for interstate transportation, abandons the contract of carriage, cannot, in an action under the Carmack Amendment, insist upon a stipulation that claim for loss or damage must be made in writing within a specified time to the carrier's agent at point of delivery. *Nashville, C. & St. L. R. Co. v. Truitt Co.*, 17 Ga. App. 263, 86 S. E. 421; *S. C. 14 Ga. App. 767*, 82 S. E. 465.

### (d) Loss of Particular Market from Delay.

#### In General.

Loss of market price resulting from a delay in the interstate transportation of live stock is not within a stipulation of a contract of carriage requiring written notice of claim of damages before the stock is removed at destination and mingles with others. *Ray v. Missouri, K. & T. R. Co.*, 90 Kan. 244, 133 Pac. 847, S. C. 96 Kan. 8, 149 Pac. 397.

Damages from a decline in the market sustained by reason of the delay in the delivery of an interstate shipment of live stock is within a provision of the contract of carriage to the effect that as a condition precedent to a recovery for any damage for delay, loss or injury the ship-

per shall give the carrier, within one day after the arrival of the stock at destination a written claim of damages. *St. Louis & S. F. R. Co. v. Zickafoos*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717.

### (c) Shrinkage.

#### In General.

Loss by shrinkage resulting from delay in the transportation of live stock is not within a stipulation of the bill of lading for notice to the carrier of damages before the removal and mingling of the stock with others at destination. *Ray v. Missouri, K. & T. R. Co.*, 90 Kan. 244, 133 Pac. 847, S. C. 96 Kan. 8, 149 Pac. 397.

### (f) Undeveloped Injuries or Diseases of Stock.

#### In General.

A condition of a shipping contract that an action for injuries to live stock transported in interstate commerce should be commenced within 60 days from the time of the injury is unreasonable and void when considered in connection with a further requirement that written notice of the injury should be given the carrier before the animals were removed from the point of destination, where it was impossible for the shipper to ascertain the extent of the animals' injuries within such period of time. *Cook v. Northern P. R. Co.*, — N. Dak. —, 155 N. W. 867.

A stipulation of a contract for interstate shipment that, as a condition precedent to liability, a written notice of claim for injury to live stock should be given the carrier within one day after arrival at destination and before their removal, is void under the Carmack Amendment, where a horse died of pneumonia which did not develop until several days after its delivery at destination. *McKinstry v. Chicago, R. I. & P. R. Co.*, 153 Mo. App. 546, 134 S. W. 1061.

A provision of a contract for the interstate transportation of live stock requiring the giving of written notice of claim for damages to the carrier within 5 days after the removal of the animals from the car is unreasonable and void where the nature and extent of the injuries cannot be ascertained within such time. *Crawford v. Southern R. Co.*, — S. C. —, 86 S. E. 19.

Notwithstanding that a stipulation of a contract for the interstate transportation of live stock, requiring the giving of written notice of claim for damages to the carrier within 5 days from the removal of the animals from the car, is unreasonable and void when the nature and extent of the injuries cannot be ascertained within that time, yet notice of the claim should be given within a reasonable time thereafter. *Crawford v. Southern R. Co.*, — S. C. —, 86 S. E. 19.

### (g) Wrongful Delivery.

#### In General.

Where a shipper seeks to hold a terminal carrier for a wrongful delivery of an interstate shipment made under an order bill of lading issued by the initial carrier under the Carmack Amendment, the terminal carrier is entitled to notice under a provision of the contract of carriage requiring written notice of claim for damages from failure to make delivery. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541, reversing on this point 15 Ga. App. 142, 82 S. E. 784.

A wrongful delivery by a terminal carrier of an interstate shipment made under an order bill of lading is not such a conversion amounting to an abandonment or waiver of the contract of carriage issued under the Carmack Amendment, as will relieve the shipper from complying with a stipulation of contract for written notice of claim for damages from a failure to make delivery; since the terms of the contract cannot be waived so as to hold the carrier to a different responsibility than that fixed by the contract of carriage. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541, reversing on this point 15 Ga. App. 142, 82 S. E. 784.

A wrongful delivery by a terminal carrier of an interstate shipment made under an order bill of lading issued under the Carmack Amendment, falls within a requirement of the contract for written notice of claim for loss or damage in case of failure to make delivery. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541, reversing on this point 15 Ga. App. 142, 82 S. E. 784.

Requirement that written notice of claim for loss or damage to interstate shipment shall be given within a designated time, applies to a claim for a wrongful delivery by a terminal carrier, notwithstanding that it was indemnified for doing so; and initial carrier is not answerable therefor under Carmack Amendment in the absence of such notice. *Kemper Mill Co. v. Missouri P. R. Co.*, — Mo. App. —, 186 S. W. 8.

### 4. Form of Notice.

#### (a) In General.

#### No Particular Form Required.

A requirement of a bill of lading issued under the Carmack Amendment, for written notice of damage claim for loss, injury, delay or failure to make delivery, does not call for any particular form of document, as such requirement must be construed in

a practical manner. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541, affirming 15 Ga. App. 142, 82 S. E. 784.

### Telegrams.

Where a shipper, in response to a telegram from a terminal carrier stating that the consignee refused to accept an interstate shipment because of its damaged condition, replied in the same manner that a claim would be made against the carrier for the value of the shipment, there was a sufficient compliance with a requirement of the bill of lading issued under the Carmack Amendment, for written notice of a damage claim for failure to make delivery. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541, affirming 15 Ga. App. 142, 82 S. E. 784.

### Notations on Freight Bills.

Notations on a freight bill showing that freight was in bad order, do not take the place of the written notice of claim for damage which the bill of lading for an interstate shipment of live stock, required to be given within a designated time after the arrival of the stock at destination and before its removal and commingling with others. *Johnson v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 282.

A notation made by a delivering carrier's agent on an expense bill, that an interstate shipment of fruit was more or less damaged, does not take the place of a written notice required by the bill of lading as a condition precedent to a carrier's liability. *St. Louis S. W. R. Co. v. Overton*, — Tex. Civ. App. —, 178 S. W. 814.

### What Must Be Stated.

#### — Cause of Injury.

The cause of the damage need not be stated in a written notice required by a contract for the interstate transportation of freight, since such provision calls for nothing beyond notice that a claim for loss will be made. *Gess Commission Co. v. Illinois C. R. Co.*, — Mo. App. —, 186 S. W. 1136.

### Variance.

A written notice setting up delay as the cause of damage to an interstate shipment of fruit, when given a carrier within the time limited by the bill of lading, will permit a recovery against an initial carrier under the Carmack Amendment for the damaged condition of the fruit, especially where such carrier was not misled by the notice. *Gess Commission Co. v. Illinois C. R. Co.*, — Mo. App. —, 186 S. W. 1136.

### (b) Verbal Notice.

#### In General.

Oral notice to a station agent at destination of a claim for damage to an interstate shipment of live stock is not a compliance with a requirement of the bill of lading that written notice should be given within a designated time after the arrival at destination and before the stock was removed and mingled with others. *Johnson v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 282.

Verbal notice given the claim agent of a delivering carrier that a claim for damages to an interstate shipment would be made is not a compliance with a requirement of a bill of lading for written notice. *St. Louis S. W. R. Co. v. Overton*, — Tex. Civ. App. —, 178 S. W. 814.

### 5. To Whom Given.

#### Initial Carrier.

The giving of notice to an initial carrier of loss or injury to live stock occurring on the line of a connecting carrier is sufficient, under the Carmack Amendment, if notice to the connecting carrier is at all necessary. *Norfolk & W. R. Co. v. Steele*, 117 Va. 788, 86 S. E. 124.

#### Connecting or Terminal Carrier.

A stipulation of a bill of lading for the interstate shipment of live stock that as a condition precedent to the right to recover for injury while in transit, the shipper should give written notice of his claim to some officer or agent of "said carrier" before the removal of the animals at destination and their mingling with others, when applied to a shipment over the lines of several carriers, contemplates that such notice shall be given to an officer or agent of the terminal carrier instead of to that of the initial carrier, especially where the bill of lading further provides that its terms and stipulations shall inure to the benefit of any connecting carrier. *Northern P. R. Co. v. Wall*, 241 U. S. 87, 60 L. ed. —, 36 Sup. Ct. Rep. 493, reversing 50 Mont. 122, 145 Pac. 291.

Notice to an agent of a terminal carrier is notice to an initial carrier when given in compliance with a stipulation of a contract for interstate shipment of live stock requiring written notice of claim for injury to be given to some officer or agent of "said carrier" before the animals were removed from destination and mingled with others. *Northern P. R. Co. v. Wall*, 241 U. S. 87, 60 L. ed. —, 36 Sup. Ct. Rep. 493, reversing 50 Mont. 122, 145 Pac. 291.

Under the Carmack Amendment notice to a connecting carrier is a sufficient compliance with a requirement that written



notice of claim for damages shall be given the initial carrier, since under such law the connecting carrier is the latter's agent. *Overton v. Chicago, R. I. & G. R. Co.*, — Tex. Civ. App. —, 160 S. W. 111.

Notice to a connecting carrier is sufficient, under the Carmack Amendment, to satisfy a requirement of a bill of lading for written notice to the initial carrier of claim for loss or damage to live stock, since the connecting carrier is, under such act, the initial carrier's agent. *Chicago, R. I. & G. R. Co. v. Linger*, — Tex. Civ. App. —, 156 S. W. 298.

## 6. Extension of Time for Giving.

### In General.

The time limited by a bill of lading for presenting written claim for damages to an interstate shipment was held extended by a written endorsement by the carrier's agent to that effect on the bill. *Clingan v. Cleveland, C. C. & St. L. R. Co.*, 184 Ill. App. 202.

## 7. Waiver.

When waiver of stipulation question for jury, see *infra* XIII, J.

### (a) In General.

#### When Requirement for Notice May Be Waived.

There cannot be a waiver of a shipper's failure to give written notice of a claim for damage to an interstate shipment of live stock, as required by the terms of the bill of lading, within a designated time after their arrival at destination and before their removal and mingling with other animals. *Johnson v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 282.

The contractual provisions of a bill of lading for an interstate shipment of freight as to notice of loss or damage is valid and cannot be waived. *Donoho v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 141.

A carrier may waive a provision of a contract for the interstate transportation of live stock requiring that it be given written notice of claim for damage within 5 days from the removal of the animals from the car. *Crawford v. Southern R. Co.*, — S. C. —, 86 S. E. 19.

#### Waiver as Unlawful Preference.

Since the Interstate Commerce Act prohibits the giving of preferences by means of consent judgments or the waivers of defenses open to a carrier, where a bill of lading, in case of an interstate shipment, contained a condition that "if claims for damages be not made within 10 days after delivery of the property the carrier

shall not be liable," the liability of the carrier cannot be predicated upon the mere fact that it rejected the claim for other reasons than that it was presented out of time. *Olivit v. Pennsylvania R. Co.*, 88 N. J. L. 241, 96 Atl. 582; same v. same, 88 N. J. L. 376, 377, 96 Atl. 587; *Spada v. Pennsylvania R. Co.*, 88 N. J. L. 388, 96 Atl. 587; *Albrecht v. Pennsylvania R. Co.*, 88 N. J. L. 367, 96 Atl. 587.

A carrier cannot waive a requirement of a bill of lading requiring written notice of claim for injury to or a loss of an interstate shipment to be given within a designated time, since to do so would amount to an unlawful discrimination between shippers. *Banka v. Missouri P. R. Co.*, — Mo. App. —, 186 S. W. 7.

The prohibition of the Interstate Commerce Act against unjust discriminations precludes the waiver by a carrier of a stipulation of a bill of lading for an interstate shipment of live stock, requiring notice of loss or damages to be given to designated officials within a designated time and before injured animals are removed. *Thompson v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 185 S. W. 1145.

The prohibition of the Interstate Commerce Act against unjust discrimination precludes the waiver by a carrier of a stipulation of a bill of lading for an interstate shipment of property, requiring actions for loss or damage to be brought within 6 months. *Thompson v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 185 S. W. 1145.

A ruling of the Interstate Commerce Commission dealing with the form of written notice of injury to live stock in interstate transportation does not preclude a waiver of such notice by a carrier. *Schloss-Bear-Davis Co. v. Louisville & N. R. Co.*, — N. C. —, 88 S. E. 476.

No unlawful preference is created by a carrier's waiver of a provision of a contract for the interstate shipment of live stock, requiring, as a condition precedent to a shipper's right to recover, the giving of a written notice of the claim for damages before the removal of the animals at destination and before they are mingled with others. *Mewborn v. Louisville & N. R. Co.*, — N. C. —, 87 S. E. 37.

Permitting actual knowledge on the part of a carrier of live stock moved in interstate commerce, to supply the written notice of injury required by the terms of the bill of lading, is not a discrimination between railroads nor a preference in favor of one shipper at the expense of others, since merely a mode of proof applicable alike to all carriers and in favor of all shippers, and it will be enforced against a carrier who has possession of stock with every opportunity to know the extent of the injury and its cause. *Bald-*

win v. Atlantic C. L. R. Co., 170 N. C. 12, 86 S. E. 776.

Permitting actual knowledge of a carrier's agent to constitute a waiver of a stipulation for written notice does not amount to a discrimination between railroads or to a preference in favor of one shipper at the expense of others in violation of the Interstate Commerce Act. *Schloss-Bear-Davis Co. v. Louisville & N. R. Co.*, — N. C. —, 88 S. E. 476.

#### Who May Bind Carrier by Waiver.

An agent of the delivering carrier, who was also the agent of the initial carrier and authorized to bind the latter by an agreement properly coming within the scope of his duties in connection with the shipment, could waive a requirement of the contract of shipment that notice of loss should be in writing. *Nashville, C. & St. L. R. Co. v. Truitt Co.*, 17 Ga. App. 263, 86 S. E. 421, S. C. 14 Ga. App. 767, 82 S. E. 465.

#### What Constitutes

##### — Rejection of Claim on Merits.

Rejection on the merits of a claim for damages to an interstate shipment is not a waiver by a carrier of a defense that written notice of the claim was not filed within the stipulated time. *Davenport v. Chesapeake & O. R. Co.*, 87 Misc. 303, 149 N. Y. Supp. 865.

When a claim for damages to an interstate shipment is denied by a carrier on the ground that delivery of the property was made in due time, it waives the failure of the shipper to make written claim for damages within four months as required by the bill of lading. *New York, P. & N. R. Co. v. Peninsular Produce Co.*, 122 Md. 215, 89 Atl. 433.

##### — Requesting Information from Shipper.

A waiver by a carrier of a requirement of a contract of interstate shipment for written notice of damages is not shown by a letter from the carrier to the shipper requesting further particulars of his claim, where the shipper did not reply to the communication or comply with such request. *Stevens v. St. Louis S. W. R. Co.*, — Tex. Civ. App. —, 178 S. W. 810.

##### — Tracing Lost Shipment.

The fact that tracers were sent after a lost shipment does not show a waiver by a carrier of a requirement of a bill of lading for written notice of claim for damage. *Old Dominion S. S. Co. v. Flannery*, 111 Va. 816, 69 S. E. 1107.

##### — Failure to Raise Question at Trial.

An initial carrier, in an action based on the Carmack Amendment, will be held to

have waived the condition of a bill of lading requiring the giving, within 4 months, of notice of loss or damage to an interstate shipment, where such question was not raised at the trial. *Ross v. Maine C. R. Co.*, 112 Me. 63, 90 Atl. 711, S. C. 114 Me. 287, 96 Atl. 223.

##### — When Conversion by Carrier.

A carrier that, by a conversion of property moved in interstate commerce, abandons the contract of carriage, cannot insist on a stipulation of the bill of lading that claims for loss or damage must be made in writing within a specified time to the carrier's agent at the point of delivery. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 15 Ga. App. 142, 82 S. E. 784, overruled on this point 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541.

##### (b) Effect of Actual Knowledge.

##### In General.

The fact that a carrier's veterinary surgeon examined injured live stock and reported its condition to the carrier, does not warrant a reasonable inference of a waiver by the carrier of a requirement of a contract for the interstate shipment of live stock that written notice of claim for damages should be given the carrier within 5 days from the removal of the animals from the car. *Crawford v. Southern R. Co.*, — S. C. —, 86 S. E. 19.

Knowledge on the part of a station agent at destination that live stock was injured in interstate transportation, does not render it unnecessary for the shipper to present a written notice of claim for damages within a designated time as required by the bill of lading, and before the stock was removed and commingled with others. *Johnson v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 282.

A waiver of a condition of a bill of lading requiring written notice to the carrier of injury to live stock shipped in interstate commerce, before its removal from the possession of the carrier, is shown by proof of the carrier's actual knowledge of the injury. *Baldwin v. Atlantic C. L. R. Co.*, 170 N. C. 12, 86 S. E. 776.

A provision of a contract for the interstate carriage of live stock, requiring, as a condition precedent to a recovery of damages, that written notice of the claim should be given the carrier at destination before the removal and mingling of the animals with others, will be deemed waived, where the company or its agents in charge had knowledge of the damage and injury at the time the stock was unloaded at the point of destination. *Mewborn v. Louisville & N. R. Co.*, — N. C. —, 87 S. E. 37.

A provision of a bill of lading requiring written notice of a claim for damages will be deemed waived on proof of the carrier's actual knowledge of an injury to an interstate shipment. *Schloss-Bear-Davis Co. v. Louisville & N. R. Co.*, — N. C. —, 88 S. E. 476.

Actual knowledge on the part of the last carrier at the place of delivery of the damaged condition of live stock, will, in law, be ascribed to the initial and other carriers in the interstate transportation of live stock, notwithstanding a provision of the bill of lading declaring that written notice was a condition precedent to a right of recovery. *Washington Horse Exchange v. Louisville & N. R. Co.*, — N. C. —, 87 S. E. 941.

## K. Limitation of Time for Action.

### 1. In General.

#### What Shipments Within Requirement for Notice.

When goods are shipped between points in the same state, and in order to reach the carrier's yards at destination, they are moved into and out of another state, the shipment is in interstate commerce so as to render valid a stipulation requiring actions for damages to the property to be brought within 6 months from the date of delivery at its destination. *Howard v. Chicago, R. I. & P. R. Co.*, — Mo. App. —, 184 S. W. 906.

### 2. Validity in General.

#### In General.

Under the Carmack Amendment a carrier may by contract require an action against it for loss of or injury to an interstate shipment, to be brought within a reasonable stated time. *Nashville, C. & St. L. R. Co. v. Truitt Co.*, 17 Ga. App. 263, 86 S. E. 421, S. C. 14 Ga. App. 767, 82 S. E. 465; *Ray v. Missouri, K. & T. R. Co.*, 90 Kan. 244, 133 Pac. 847.

The failure of a shipper to bring suit for injury to an interstate shipment within the time specified by the contract of carriage, is fatal to his right to recover. *Miller v. Atchison, T. & S. F. R. Co.*, — Kan. —, 156 Pac. 780.

The validity of a stipulation in a contract for the interstate shipment of freight, limiting the time within which suit for damages must be brought, is not dependent upon state legislation, but involves the construction of Federal enactments, and is to be determined by the general common law. *Harrington v. Wichita F. & N. W. R. Co.*, — Okla. —, 156 Pac. 634.

### 3. Validity of Particular Periods.

#### Ninety Days.

A provision of a contract for the interstate transportation of freight requiring suit for its loss or damage to be brought within 90 days does not conflict with the Carmack Amendment. *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397, reversing — *Tex. Civ. App.* —, 128 S. W. 932; *Watt v. Missouri, K. & T. R. Co.*, 90 Kan. 466, 135 Pac. 600; *Harrington v. Wichita F. & N. W. R. Co.*, — Okla. —, 156 Pac. 634.

A provision of contract for interstate shipment that an action for loss or damage should be brought within 91 days after the loss or damage is valid when applied to an interstate shipment. *Ray v. Missouri, K. & T. R. Co.*, 96 Kan. 8, 149 Pac. 397, S. C. 90 Kan. 244, 133 Pac. 847.

#### Six Months.

A condition of a contract for the interstate carriage of live stock that the carrier should not be answerable for loss or damage unless action was begun within 6 months, is reasonable and not precluded by the Carmack Amendment. *Baldwin v. Chicago, R. I. & P. R. Co.*, — Ia. —, 156 N. W. 17; *Enright v. Atchison, T. & S. F. R. Co.*, 96 Kan. 546, 152 Pac. 629; *Sims v. Missouri P. R. Co.*, 177 Mo. App. 18, 163 S. W. 275; *Thompson v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 185 S. W. 1145; *Donoho v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 141; *St. Louis & S. F. R. Co. v. Pickens*, — Okla. —, 151 Pac. 1055.

A provision of a contract for the interstate transportation of freight requiring an action for damages thereto to be commenced within 6 months from the time of injury, is not avoided because of other stipulations by which the carrier sought, in violation of the Carmack Amendment, to limit its liability for its own negligence, since the contract was divisible. *Miller v. Atchison, T. & S. F. R. Co.*, — Kan. —, 156 Pac. 780.

A stipulation of a contract for the interstate transportation of live stock, that no suit or action for the recovery of any claim for damages for death, loss, injury or delay shall be sustainable unless begun within 6 months next after the cause of action shall accrue, and if begun later, that the lapse of time shall be conclusive evidence against the validity of such claim, statutes of limitation to the contrary notwithstanding, is valid. *St. Louis & S. F. R. Co. v. Taliaferro*, — Okla. —, 156 Pac. 359.

A carrier is not liable for a negligent delay in the interstate transportation of live stock moved under a special written

contract based on a reduced rate which was published and filed with the Interstate Commerce Commission, when the contract was executed by the shipper without fraud, oppression, attempted rebating or unlawful billing where the shipper failed to comply with a reasonable requirement of the contract that action for damages should be begun within 6 months from the time the right of action accrued. *St. Louis & S. F. R. Co. v. Taliaferro*, — Okla. —, 156 Pac. 359.

The validity of a stipulation for the interstate transportation of property by a carrier requiring suit for damages thereto to be brought within 6 months after the cause of action accrues, is to be determined under the common law regardless of the statute of limitations of the state in which the action is begun. *St. Louis, I. M. & S. R. Co. v. Patterson*, — Okla. —, 156 Pac. 216 (reported in advance sheets only).

#### Two Years.

A stipulation of contract of carriage requiring suits for damage to be brought within 2 years is valid under the Carmack Amendment. *Texas & P. R. Co. v. Lagnbehn*, — Tex. Civ. App. —, 158 S. W. 244.

#### 4. Waiver.

##### Failure of Shipper to Act on Claim.

The failure of a shipper to bring action against a carrier for injury to live stock transported in interstate commerce, within 60 days from the time of the injury, as required by the contract of carriage, is waived by the conduct of the carrier in not taking action on the shipper's written notice of the injury within the prescribed period. *Cook v. Northern P. R. Co.*, — N. Dak. —, 155 N. W. 867.

##### Negotiations for Settlement.

Mere negotiations toward a settlement of a claim for damages is not a waiver by a carrier of a stipulation of a contract of interstate affreightment, requiring action for damages or loss to be brought within 91 days thereafter. *Ray v. Missouri, K. & T. R. Co.*, 96 Kan. 8, 149 Pac. 397, S. C. 90 Kan. 244, 133 Pac. 847.

The fact that a shipper by reason of negotiations conducted by correspondence with connecting carriers was induced not to bring an action against the initial carrier for damages to an interstate shipment of freight until after the expiration of the 90 days limit provided by the contract of shipment, does not amount to an implied waiver by the initial carrier of such condition where it was not informed of such correspondence. *Harrington v.*

*Wichita, F. & N. W. R. Co.*, — Okla. —, 156 Pac. 634.

#### L. Liability of Initial Carrier.

Applicability of Carmack Amendment to losses occurring on line of initial carrier, see *supra* XI, D, 3, and XI, F, 2.

Presumption of negligence from receipt of property by carrier in good and delivery in bad condition, see *infra* XII, G, 4.

#### 1. In General.

##### Nature of Liability.

The liability of any carrier for loss or damage to property on the lines over which freight is routed for interstate transportation is that imposed by the Carmack Amendment and as measured by the original contract of shipment in so far as it is valid under such act. *Kansas City S. R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 227, reversing 91 Ark. 97, 121 S. W. 932, 134 Am. St. Rep. 56.

Where a shipper selected for an interstate shipment of freight a route different than the carrier would have chosen and over which it had no through route or established rates, its liability for a loss occurring on the line of a connecting carrier is controlled by the Carmack Amendment, notwithstanding a stipulation to the contrary in the bill of lading. *Norfolk & W. R. Co. v. Dixie Tobacco Co.*, 228 U. S. 593, 57 L. ed. 980, 33 Sup. Ct. Rep. 609, affirming 111 Va. 813, 69 S. E. 1106.

The provisions of the Carmack Amendment imposing primary liability on an initial carrier for loss or damage occurring on any portion of a through route, is declaratory of the common law. *Southern P. Co. v. Crenshaw Bros.*, 5 Ga. App. 675, 63 S. E. 865.

Under the Carmack Amendment a common carrier, by receiving goods for transportation in interstate commerce and routing the shipment over the lines of another common carrier, makes the latter its agent, and is liable to the owner of the goods, or his assigns, for any damage resulting from negligence or carelessness in transportation, whether occurring on its own or the line of subsequent carrier. *Barrett v. Northern P. R. Co.*, — Idaho —, 157 Pac. 1016.

A liability for some default in its common-law duties as a common carrier, is imposed on a carrier by the primary liability clause of the Carmack Amendment. *St. Louis & S. F. R. Co. v. Zickzfoose*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717.

The Carmack Amendment does not impose on an initial carrier a liability for its own conduct different from or greater than that imposed by the common law, although it does impose on it responsibility to a shipper for a common law liability incurred by connecting carriers. *Stevens v. St. Louis S. W. R. Co.*, — Tex. Civ. App. —, 178 S. W. 810.

In an action under the Carmack Amendment the plaintiff is not limited to a suit based solely on negligence, since the common-law rule of liability was not affected by such act, and the initial carrier is liable for all loss or damage not caused by the act of God or the public enemy. *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131.

When the right sought to be enforced by a shipper is one under the general common law, which the Carmack Amendment continues in force, the rights of the parties can be affected by the fact that the shipment is interstate only by reason of something in the contract of shipment which, under the Federal law, has an influence on such right. *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131.

The purpose of the Carmack Amendment was to give to shippers in interstate commerce, when their property is transported over the lines of several connecting carriers, a direct and ready remedy for the collection of damages sustained in transit, to place on the initial carrier the burden of locating the guilty carrier and to annul the presumption that the injury resulted from the act of the last carrier. *Pecos & N. T. R. Co. v. Meyer*, — Tex. Civ. App. —, 155 S. W. 309, 6 N. C. C. A. 146.

The manifest purpose of the Carmack Amendment was to continue the previously existing liability of both initial and connecting carriers, and in addition to impose on the former in certain cases the liability that theretofore existed on the part of the connecting carriers. *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 153 Ky. 730, 156 S. W. 400, 45 L. R. G. (N. S.) 529.

When action is brought for loss of or damage to goods transported in interstate commerce, the rule of liability prescribed by the Carmack Amendment is applicable whether the suit is against the initial or one of the succeeding carriers. *Atlantic C. L. R. Co. v. Thomasville Live Stock Co.*, 13 Ga. App. 102, 78 S. E. 1019, but see *Central of Ga. R. Co. v. Maxelbaum Produce Co.*, — Ga. App. —, 89 S. E. 635.

In an action against an initial carrier under the Carmack Amendment, for injuries to an interstate shipment passing over the lines of several carriers, the plaintiff need not prove which one caused

the injury. *Lepman v. Wabash R. Co.*, 185 Ill. App. 583.

The word "caused" as used in the Carmack Amendment in imposing liability on the initial carrier for any loss or damage "caused" by it or any other carrier in the interstate transportation of property, implies not only active conduct and deeds of commission, but also includes passive neglect, deeds of omission and failure to faithfully exercise their duties. *Louisville & N. R. Co. v. Warfield*, 6 Ga. App. 550, 65 S. E. 308.

#### **Exclusiveness of Remedy Against Initial Carrier.**

The liability created by the Carmack Amendment for injury to or the loss of goods in interstate transportation applies to the initial carrier only. *Looney v. Oregon S. L. R. Co.*, 271 Ill. 541, 111 N. E. 509, reversing 192 Ill. App. 273.

Where the several carriers are not partners, an initial carrier is the only one liable under the Carmack Amendment for damages caused an interstate shipment on the lines of a connecting carrier. *Eastern R. of N. Mex. v. Montgomery*, — Tex. Civ. App. —, 139 S. W. 885.

#### **When Negligent Carrier Identified.**

The liability of an initial carrier under the Carmack Amendment for injuries to an interstate shipment occurring on the line of a connecting carrier is absolute, irrespective of the fact that a caretaker accompanies the shipment so that the shipper knows that the injury did not occur on the line of the initial carrier. *Texas Midland R. Co. v. King*, — Tex. Civ. App. —, 174 S. W. 336.

#### **Act of God.**

A carrier is not liable under the Carmack Amendment where a delay in transportation results in a loss of goods in an unprecedented flood, since due to an Act of God. *Seaboard A. L. R. Co. v. Mullin*, — Fla. —, 70 So. 467.

#### **Unavoidable Losses.**

It was not the purpose of the Carmack Amendment to make the initial carrier, or a sole carrier over whose line interstate shipment passes, liable for unavoidable losses or damage due to forces beyond its control. *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 135 Pac. 496, 6 N. C. C. A. 717.

#### **Effect of Issue of Bill of Lading by Connecting Carrier.**

The liability imposed on an initial carrier by the Carmack Amendment is not avoided, where it fails to issue a receipt or bill of lading for an interstate shipment, by the fact that the shipper obtained

a bill of lading from the connecting carrier. *Aton Piano Co. v. Chicago, M. & St. P. R. Co.*, 152 Wis. 156, 139 N. W. 743, writ of error dismissed without opinion, 235 U. S. 715, 59 L. ed. 438, 35 Sup. Ct. Rep. 282.

## 2. As Insurer.

### In General.

The Carmack Amendment does not make the initial carrier an absolute insurer of the safety of an interstate shipment. *Missouri, C. & G. R. Co. v. French*, — Okla. —, 152 Pac. 591; *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717.

The liability imposed on carriers by the Carmack Amendment for the loss of or damages to property caused by them or any connecting carrier, is not that of an absolute insurer, but is a liability for some default in its common-law duties. *Adams Express Co. v. Cronniger*, 226 U. S. 491, 57 L. ed. 314, 33 Sup. Ct. Rep. 148, 44 L. R. A. (N. S.) 257.

Under the Carmack Amendment an initial carrier does not insure an interstate shipment of meat from spoiling from its inherent tendency to decay, when not influenced, affected or brought about by any failure of the carrier to perform its public duty. *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 187 S. W. 149.

The Carmack Amendment does not impose an absolute liability on the initial carrier for all injuries to an interstate shipment, but creates a liability only for injuries due to some default in the common-law duties of the connecting carriers. *Collins v. Denver & R. G. R. Co.*, 181 Mo. App. 213, 167 S. W. 1178.

By the Carmack Amendment Congress has relieved carriers of interstate shipments from the common-law liability of insurers, and imposed on them liability for any loss, injury or damage caused by any succeeding carrier to whom the property may be delivered, and plainly implies some default or negligence on the part of the initial carrier or some connecting carrier. *Missouri, O. & G. R. Co. v. French*, — Okla. —, 152 Pac. 591.

The spirit and intent of the Carmack Amendment was to make carriers of live stock insurers thereof subject to such exceptions as would relieve a carrier from liability at common law. *Chicago, R. I. & G. R. Co. v. Scott*, — Tex. Civ. App. —, 156 S. W. 249.

## 3. Effect of Failure to Issue Bill of Lading.

### On Liability of Initial Carrier.

The failure of an initial carrier to issue a bill of lading for a through interstate

shipment, as required by the Carmack Amendment, does not relieve it from liability for loss or injury occurring on the fires of succeeding carriers, since such law applies to all interstate shipments, whether under an oral or written agreement. *Idaho Sheep Co. v. Oregon S. L. R. Co.*, 188 Ill. App. 591; *International Watch Co. v. Delaware, L. & W. R. Co.*, 80 N. J. L. 553, 78 Atl. 49; *Aton Piano Co. v. Chicago, M. & St. P. R. Co.*, 152 Wis. 156, 139 N. W. 743, writ of error dismissed without opinion, 235 U. S. 715, 59 L. ed. 438, 35 Sup. Ct. Rep. 282.

## Bill of Lading for Intrastate Portion of Interstate Journey.

Under the Carmack Amendment an initial carrier's liability is the same whether a contract for an interstate shipment is limited to its own line for delivery to a connecting carrier, or is issued for through transportation. *Galveston, H. & S. A. R. Co. v. Johnson*, — Tex. Civ. App. —, 133 S. W. 725.

An intrastate carrier cannot escape liability under the Carmack Amendment as an initial carrier by billing an interstate shipment to an intrastate point on its own line and there turning it over to a connecting carrier, since under such law it is the duty of the first carrier to issue a through bill of lading. *Michelson v. Judson Freight Forwarding Co.*, 268 Ill. 546, 109 N. E. 281, affirming 189 Ill. App. 568; *Keithley v. Lusk*, 190 Mo. App. 458, 177 S. W. 756; *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131; *Galveston, H. & S. A. R. Co. v. Carmack*, — Tex. Civ. App. —, 176 S. W. 158.

A contract by an initial carrier to transport live stock wholly within one state to the end of its line and there deliver it to connecting carrier for interstate transportation is within the Carmack Amendment so as to make the initial carrier answerable for the negligence of connecting carriers, notwithstanding a stipulation in the bill of lading limiting the first carrier's liability to damage occurring on its own line. *Texas C. R. Co. v. Hico Oil Co.*, — Tex. Civ. App. —, 132 S. W. 381.

## 4. Liability for Acts of Succeeding Carriers.

### (a) In General.

### Negligence of Connecting Carriers.

The effect of the Carmack Amendment was to make an initial carrier, in accepting an interstate shipment for through transportation, liable for all losses or injuries occurring on the lines of the connecting carriers. *Atlantic C. L. R. Co. v. Ward*, 4 Ala. App. 374, 58 So. 677; *St. Louis, I. M. & S. R. Co. v. Furlow*, 89

Ark. 404, 117 S. W. 517; *Gibson v. Little Rock & H. S. W. R. Co.*, 93 Ark. 439, 124 S. W. 1033; *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 187 S. W. 149; *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717; *St. Louis & S. F. R. Co. v. Mounts*, — Okla. —, 144 Pac. 1036; *Drake v. Nashville, C. & St. L. R. Co.*, 125 Tenn. 627, 148 S. W. 214; *Missouri, K. & T. R. Co. v. Stark Grain Co.*, 103 Tex. 542, 131 S. W. 410.

Under the Carmack Amendment an initial carrier is liable as principal, not only for its own negligence, but for that of any agency it may use, and it is considered to have adopted its connecting carrier as its agent. *Burkenroad G. Co. v. Illinois C. R. Co.*, — La. —, 70 So. 44; *Jones v. Louisville & N. R. Co.*, — Mo. App. —, 182 S. W. 1064; *Louisville & N. R. Co. v. Warfield*, 8 Ga. App. 550, 65 S. E. 308.

The liability imposed by the Carmack Amendment on initial carriers for the conduct of connecting carriers refers entirely to acts and omissions which would render the latter liable as common carriers. *Patton v. Texas & P. R. Co.*, — Tex. Civ. App. —, 137 S. W. 721.

An initial carrier is answerable under the Carmack Amendment for losses occurring on the lines of a connecting carrier, where the former issued a through bill of lading for an interstate shipment and guaranteed the through rate, notwithstanding a limitation of the initial carrier's liability to losses occurring on its own line. *Houston & T. C. R. Co. v. Lewis*, 103 Tex. 452, 129 S. W. 594.

Under the Carmack Amendment an initial carrier is liable for an injury to live stock due to rough handling and delay on the line of a connecting carrier. *Texas Midland R. Co. v. Becker*, — Tex. Civ. App. —, 171 S. W. 1024.

Where a carload of feed was water-damaged in transit and the sealed car was delivered at the point of destination to a branch road for delivery to the consignee, who rejected the feed on account of its damaged condition, and the loaded car was returned to the delivering carrier, and the feed suffered further depreciation before it was sold by the latter carrier, under the Carmack Amendment the initial carrier is liable not only for the water-damage, but also for the failure of its agent, the delivering carrier, to dispose promptly of the feed to the best advantage. *Burkenroad G. Co. v. Illinois C. R. Co.*, — La. —, 70 So. 44.

#### (b) Loss of Baggage.

Limitation of liability for baggage, see generally *supra* XI, I, 4, (d).

#### In General.

An interstate carrier issuing a check for a passenger's baggage for an interstate journey is answerable under the Carmack Amendment for its loss on the line of a connecting carrier. *House v. Chicago & N. W. R. Co.*, 30 S. Dak. 321, 138 N. W. 809.

#### (c) Delay in Transit.

##### Liability in General.

Damages from delay on the lines of a connecting carrier in the transportation of fruit is, even in the absence of physical injury thereto, is within the purview of the Carmack Amendment making the initial carrier liable for loss or damage to property in transit while under the control of connecting carriers. *New York, P. & N. R. Co. v. Peninsular Produce Co.*, 240 U. S. 34, 60 L. ed. —, 36 Sup. Ct. Rep. 230, affirming 122 Md. 215, 89 Atl. 433.

A cause of action for delay in the transportation of an interstate shipment is within the terms of the Carmack Amendment, since that law is not confined to actual loss or physical injury to the property. *Norfolk Truckers' Exchange v. Norfolk S. R. Co.*, 116 Va. 466, 82 S. E. 92.

An initial carrier is answerable under the Carmack Amendment for damages caused from the delay of an interstate shipment on the lines of a connecting carrier. *Missouri, K. & T. R. Co. v. Carpenter*, — Tex. Civ. App. —, 114 S. W. 900.

The initial carrier is answerable under the Carmack Amendment where an interstate shipment is unreasonably delayed as the result of the fault of a connecting carrier. *Ft. Smith & W. R. Co. v. Awbrey*, 39 Okla. 270, 134 Pac. 1117.

The Carmack Amendment does not apply where the damages claimed is for delay in transporting an interstate shipment, without reference to the property itself. *Gulf, C. & S. F. R. Co. v. Nelson*, — Tex. Civ. App. —, 139 S. W. 81.

##### Loss of Particular Market.

Under the Carmack Amendment an initial carrier is answerable where the delay of a connecting carrier in delivering a car of fruit promptly at destination compelled the owner to accept a lower price on account of a falling market, notwithstanding there was no physical injury to the fruit. *New York, P. & N. R. Co. v. Peninsular Produce Co.*, 122 Md. 215, 89 Atl. 433, affirmed 240 U. S. 34, 60 L. ed. —, 36 Sup. Ct. Rep. 230.

When a carrier fails to transport an interstate shipment of fruit with reasonable dispatch, an initial carrier is not, under the Carmack Amendment, relieved from liability for a decline in market

value, by reason of a stipulation of the bill of lading to the effect that no carrier was bound to transport the property by any particular train, or in time for any particular market, or otherwise than with reasonable dispatch, unless by special agreement. *New York, P. & N. R. Co. v. Peninsular Produce Co.*, 122 Md. 215, 89 Atl. 433, affirmed 240 U. S. 34, 60 L. ed. —, 36 Sup. Ct. Rep. 230.

Under the Carmack Amendment a stipulation of a bill of lading for an interstate shipment of fruit, that no carrier was bound to transport it by any particular train, or in time for any particular market, or otherwise than with reasonable dispatch unless by special agreement, does not relieve an initial carrier from liability for damages occasioned by the delay of a connecting carrier in delivering the fruit at destination in time for a particular market, where the fruit was shipped on a regular train which in due course of transit should have arrived at its destination in time for the market for which the fruit was intended. *New York, P. & N. R. Co. v. Peninsular Produce Co.*, 122 Md. 215, 89 Atl. 433, affirmed 240 U. S. 34, 60 L. ed. —, 36 Sup. Ct. Rep. 230.

An initial carrier is liable under the Carmack Amendment for the unreasonable delay of a connecting carrier in delivering an interstate shipment of live stock at destination too late for the market day. *Karr v. Baltimore & O. R. Co.*, — W. Va. —, 86 S. E. 43.

That an initial carrier transported an interstate shipment of fruit over its own lines at the earliest time consistent with its published schedules is no defense to an action under the Carmack Amendment for damages caused by the delay of a terminal carrier in making delivery of the fruit at destination. *Baltimore, C. & A. R. Co. v. Sperber*, 117 Md. 595, 84 Atl. 72.

The value of a car of fruit as received by a carrier for shipment is a proper subject for inquiry in determining the liability of an initial carrier under the Carmack Amendment for the delay of a connecting carrier in making delivery at destination too late for the opening market, where the bill of lading provided that the carrier's liability for loss or damage should be computed on the value of the property at the time and place of shipment. *New York, P. & N. R. Co. v. Peninsular Produce Co.*, 122 Md. 215, 89 Atl. 433, affirmed 240 U. S. 34, 60 L. ed. —, 36 Sup. Ct. Rep. 230.

#### Consequential Damages.

A carrier that contracts to transport a car of sewer tile over its own and the lines of a connecting carrier in interstate commerce, is answerable under the Car-

mack Amendment for a delay in transportation that resulted in damage to the consignee by reason of a heavy rain causing the excavation in which the tile were to be used to cave in, where the connecting carrier had notice of the use to which the tile were to be put. *Erie R. Co. v. Hipskind*, — Ind. —, 113 N. E. 304.

#### (d) Diversion of Shipment.

##### By Initial Carrier at Shipper's Direction.

When a carrier accepted cars of fruit for interstate shipment to a point on its lines and issued bills of lading therefor, it is liable under the Carmack Amendment as an initial carrier, where, before the arrival of the cars at destination, the consignee surrendered the bills of lading, and, without the issue of new bills, such carrier agreed to and did divert the cars to points on the lines of connecting carriers under an agreement that through rates should apply. *Gamble-Robinson Commission Co. v. Union Pa. R. Co.*, 262 Ill. 400, 104 N. E. 666, Ann. Cas. 1915 B. 89, affirming 180 Ill. App. 256.

##### Failure to Divert Shipment at Shipper's Order.

An initial carrier is answerable under the Carmack Amendment for the failure of a connecting carrier to promptly obey the former's instructions, given by direction of the shipper, to divert a car of vegetables, where, as the result of such failure, they arrived at destination in a damaged condition. *Lewellyn v. Pere Marquette R. Co.*, 185 Ill. App. 171.

An initial carrier is not answerable under the Carmack Amendment for the failure of a connecting carrier to divert a shipment, where the former failed to carry out the shipper's instructions received after the car had been delivered to the connecting carrier. *Patton v. Texas & P. R. Co.*, — Tex. Civ. App. —, 137 S. W. 721.

##### Wrongful Diversion.

An initial carrier is answerable under the Carmack Amendment for damages resulting from the wrongful diversion of an interstate shipment by a connecting carrier. *Drake v. Nashville, C. & St. L. R. Co.*, 125 Tenn. 627, 148 S. W. 214; *Komendo v. Fruit Dispatch Co.*, — Tex. Civ. App. —, 131 S. W. 73.

The fact that, on the wrongful diversion of a car of merchandise shipped in the name of the seller under an order bill of lading with draft attached, the holder bank directed the draft to be sent to the new destination for collection, was held in an action against the initial carrier under the Carmack Amendment, not to show the consent of the bank or shipper



to the diversion. *Perkett v. Manistee & N. E. R. Co.*, 175 Mich. 253, 141 N. W. 607.

**(e) Conversion of Shipment by Carrier.**

**In General.**

The liability of an initial carrier for goods appropriated by it is the same under the Carmack Amendment as at the common law. *Central of Ga. R. Co. v. Dowe*, 6 Ga. App. 858, 65 S. E. 1091.

An initial carrier cannot escape liability under the Carmack Amendment on the ground that the terminal carrier converted a shipment, where it also appeared that it arrived in a damaged condition. *Lepman v. Wabash R. Co.*, 185 Ill. App. 583.

**(f) Unauthorized Inspection.**

**In General.**

An initial carrier is not answerable under the Carmack Amendment for the conduct of a terminal carrier in permitting an unauthorized inspection of a shipment, which the consignee refused to accept, where there was no damage to the property. *Earnest v. Delaware, L. & W. R. Co.*, 149 App. Div. 330, 134 N. Y. Supp. 323.

**(g) Wrongful Delivery.**

**In General.**

Under the Carmack Amendment an initial carrier is answerable for a misdelivery of an interstate shipment by a terminal carrier, as well as for injuries to or a loss of the property in transit. *Kemper Mill Co. v. Missouri P. R. Co.*, — Mo. App. —, 186 S. W. 8.

**Shipment Under Order Bill of Lading.**

An initial carrier is liable under the Carmack Amendment for a wrongful delivery by a terminal carrier of an interstate shipment made under an order bill of lading. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. —, 26 Sup. Ct. Rep. 541, affirming 15 Ga. App. 142, 82 S. E. 784; *Kansas City & M. R. Co. v. New York C. & H. R. R. Co.*, 110 Ark. 612, 163 S. W. 171.

An initial carrier is answerable under the Carmack Amendment where a connecting carrier delivered property shipped in interstate commerce, to a third person on the written order of the consignee without first requiring the surrender of the original order bill of lading as required by the terms thereof. *Thomas v. Blair*, 185 Mich. 422, 151 N. W. 1041.

Where an interstate shipment was

made in the name of the seller of goods, under an order bill of lading with draft attached, and the shipment was, at the direction of the purchaser, diverted by the terminal carrier from its original destination, the purchaser being permitted to have access to the goods in violation of the terms of the bill of lading, the property being held for two weeks by such carrier until it was attached by the purchaser in a suit against the seller, the misconduct of such carrier amounted to laches or collusion which precluded the initial carrier, when sued by the shipper under the Carmack Amendment, from relying on such process as a defense. *Perkett v. Manistee & N. E. R. Co.*, 175 Mich. 253, 141 N. W. 607.

When goods are shipped under a "straight" bill of lading, in the name of the consignor with directions to notify a third person at destination, with a notation "B. of L. attached to draft," it is the duty of the carrier to observe such direction, and, under the Carmack Amendment, the initial carrier is answerable to the shipper for a wrongful delivery of the property by the ultimate carrier without a surrender of the bill of lading. *Sturges v. Detroit, G. H. & M. R. Co.*, 166 Mich. 231, 131 N. W. 706.

An initial carrier is not answerable under the Carmack Amendment for a wrongful delivery by a terminal carrier of goods shipped under a straight bill of lading in which the consignee was described as "M. (M) C. care Western National Bank, Ft. Worth, for A. J. Cohen, 601 May St., Tex.," where the property was delivered to Cohen without the production of the bill of lading, although the shipper claimed that delivery was to be made only on payment to the bank of the purchase price of the goods. *Mayer v. Southern P. Co.* (N. Y. City Municipal Court), 159 N. Y. Supp. 93.

**Delivery After Orders to Return Goods to Shipper.**

Since the Carmack Amendment recognizes the lawful holder of a bill of lading as the person entitled to receive a shipment regardless of who may be named as consignee, an initial carrier is answerable to a shipper for a wrongful delivery by a terminal carrier to a consignee without the production of the bill of lading, which the consignor surrendered to the initial carrier with directions to return the shipment to him. *Coovert v. Spokane & P. S. R. Co.*, 80 Wash. 87, 141 Pac. 324.

Where a shipper surrendered a bill of lading to the initial carrier with directions to return a shipment to him, and the terminal carrier disregarded the initial carrier's instructions to do so, and wrongfully delivered the property to the con-

signee, the initial carrier is answerable under the Carmack Amendment, since its duty did not end by safely transporting the property to destination, but it must make delivery to the proper person or hold the goods subject to the consignor's orders. *Coovert v. Spokane & P. S. R. Co.*, 80 Wash. 87, 141 Pac. 324.

An initial carrier is liable under the Carmack Amendment where the consignor, before the arrival of a shipment at destination, surrendered the original bill of lading to the former, in which a third person was named as consignee, and directed that the shipment be returned to the consignor, and the terminal carrier disregarded the directions of the initial carrier to do so and wrongfully delivered the property to the consignee. *Coovert v. Spokane & P. S. R. Co.*, 80 Wash. 87, 141 Pac. 324.

#### **5. Liability for Injury to Goods Loaded in Interstate Car on Line of Connecting Carrier.**

##### **In General.**

Where an initial carrier issues a through bill of lading for a through carload shipment over the lines of several connecting carriers, with permission for the shipper to stop the car and complete its load at several points, the initial carrier is answerable under the Carmack Amendment for injury to property loaded on the line of a connecting carrier. *De Winters v. Texas C. R. Co.*, 150 App. Div. 612, 135 N. Y. Supp. 893.

#### **6. Breach of Special Agreements of Succeeding Carriers.**

##### **To Heat Car.**

Under the Carmack Amendment an initial carrier that is under no obligation under its general bill of lading, to heat cars of vegetables moved in interstate commerce in cold weather, is not answerable to the shipper for the breach of a special agreement between him and the connecting carrier for the heating of the cars to their destination. *Ross v. Maine C. R. Co.*, 112 Me. 63, 90 Atl. 711, S. C. 114 Md. 287, 96 Atl. 223.

#### **7. Rerouting of Shipment by Terminal Carrier.**

##### **Liability of Initial Carrier for Subsequent Injury.**

Under the Carmack Amendment an initial carrier is not liable for damages to goods occurring on other lines over which, without notice to it, a shipment was rerouted by a terminal carrier. *Barrett v. Northern P. R. Co.*, — Idaho —, 157 Pac. 1016.

An initial carrier is not liable under the Carmack Amendment where shingles delivered by it to a connecting carrier were transferred by the latter to a gondola, and the shipper, before the arrival of the car at its original destination, without notice to the initial carrier, diverted the shipment to a point in a distant state, at which the shingles arrived in a damaged condition, where the evidence failed to show that the damage occurred before the diversion of the shipment. *Parker-Bell L. Co. v. Great N. R. Co.*, 69 Wash. 123, 124 Pac. 389, 41 L. R. A. (N. S.) 1064.

#### **8. Acts of Warehousemen.**

##### **In General.**

An initial carrier is not answerable under the Carmack Amendment for the acts of a terminal carrier after it has become a warehouseman with respect to an interstate shipment. *Marcus v. Chicago, M. & St. P. R. Co.*, 167 Ill. App. 638; *Hogan Milling Co. v. Union P. R. Co.*, 91 Kan. 783, 139 Pac. 397; *Norfolk & W. R. Co. v. Stuart's Draft M. Co.*, 109 Va. 184, 63 S. E. 415.

An initial carrier is not answerable, under the Carmack Amendment, for the loss of freight after its arrival at destination on the line of the delivering carrier, where it was sold by the latter after the expiration of a reasonable time after the consignee was notified of its arrival. *Louisville & N. R. Co. v. Brewer*, 183 Ala. 172, 62 So. 698.

An initial carrier is not answerable, under the Carmack Amendment, for the destruction of goods while held by the last carrier at their destination as a warehouseman after the lapse of a reasonable time for their removal, and the exercise of reasonable diligence to locate the consignee. *Hogan Milling Co. v. Union P. R. Co.*, 91 Kan. 783, 139 Pac. 397.

Where a car of merchandise was mistakenly billed by the shipper to the wrong place, and was destroyed by fire five days after the mailing of notice by the delivering carrier and after diligent inquiry to locate the consignee, the initial carrier was not liable under the Carmack Amendment, since the delivering carrier held the car as warehouseman. *Hogan Milling Co. v. Union P. R. Co.*, 91 Kan. 783, 139 Pac. 397.

An initial carrier is answerable, under the Carmack Amendment, for the destruction of an interstate shipment 22 days after the refusal of the consignee to accept it from the terminal carrier, where the latter carrier failed to notify the consignor of such refusal. *Nashville, C. & St. L. R. Co. v. Dreyfuss*, 150 Ky. 333, 150 S. W. 321.

Where a consignee, on the arrival of an interstate shipment, paid the freight charges, receipted for the property, removed a part of it, and, with the consent of the carrier, left the remainder for subsequent removal at his convenience, and the property was afterwards destroyed by fire, the delivering carrier's liability is controlled by the terms of the bill of lading issued under the Carmack Amendment. *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. ed. —, 36 Sup. Ct. Rep. 469, reversing 99 S. C. 422, 83 S. E. 781.

When a consignee, on the arrival of interstate freight, paid the charges, receipted for the property, removed a portion thereof, and, with the consent of the carrier, left the remainder for subsequent removal at his convenience, and the property was subsequently destroyed by fire, the liability of the terminal carrier as a warehouseman is governed by the bill of lading issued under the Carmack Amendment, and the consignee has the burden of showing the carrier's negligence. *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. ed. —, 36 Sup. Ct. Rep. 469, reversing 99 S. C. 422, 83 S. E. 781.

The retention by a carrier of an interstate shipment of freight for more than 48 hours after notice to the consignee of its arrival, is, within the meaning of the Carmack Amendment, a terminal service forming a part of the transportation, and is governed by such amendment when the bill of lading provides, in conformance with the carrier's published regulations, that every service to be performed under it, including that of connecting or terminal carrier, should be subject to the conditions specified, among which was one governing its responsibility as warehouseman for property not removed within 48 hours after notice of arrival. *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. ed. —, 36 Sup. Ct. Rep. 469, reversing 99 S. C. 422, 83 S. E. 781.

## 9. Termination of Liability.

### Delivery of Shipment at Destination.

The obligation imposed on an initial carrier by the Carmack Amendment ceases when the property, in good condition, reaches the destination to which it was originally consigned. *Barrett v. Northern P. R. Co.*, — Idaho —, 157 Pac. 1016.

### Further Loading of Car on Line of Connecting Carrier.

The fact that a bill of lading for a through interstate carload shipment permits the stopping of the car at points on the line of the connecting carrier to complete its load, does not terminate the liability of the initial carrier under the Car-

mack Amendment for subsequent injury to goods so loaded. *De Winters v. Texas C. R. Co.*, 150 App. Div. 612, 135 N. Y. Supp. 893.

### Rejection of Damaged Shipment by Consignee.

The liability of an initial carrier under the Carmack Amendment does not terminate with the delivery, in a damaged condition, by a terminal carrier of a car of freight on a siding or to another carrier for delivery to the consignee, who, on inspection, rejects the shipment, and thereafter it is the duty of the initial and the delivering carrier, as its agent, to protect the property so as to minimize the injury. *Burkenroad G. Co. v. Illinois C. R. Co.*, — La. —, 70 So. 44.

## 10. Defenses Available to Initial Carrier.

### Freedom of Initial Carrier from Negligence.

An initial carrier is not relieved from liability for a delay occurring on the lines of connecting carriers in the delivery of an interstate shipment by reason of the fact that the first carrier used all reasonable effort to induce the connecting carriers to forward the shipment which they refused to do because of an embargo they had declared. *Ft. Smith & W. R. Co. v. Awbrey*, 39 Okla. 270, 134 Pac. 1117.

### Defenses When Negligence that of Connecting Carrier by Water.

#### — Federal Laws Relating to Marine Losses.

When sued under the Carmack Amendment for the loss of an interstate shipment as the result of the sinking of a vessel of a connecting carrier by water, an initial carrier may avail itself of Federal legislation applicable to water carriers limiting and in some instances relieving them altogether from liability for the loss of freight. *Brinson v. Norfolk S. R. Co.*, 169 N. C. 425, 86 S. E. 371.

When an initial carrier by rail that is sued under the Carmack Amendment for the loss of interstate freight as the result of the sinking of a vessel of a connecting water carrier, seeks to avail itself of Federal legislation limiting the liability of vessel owners for loss of freight and in some cases relieving them entirely, it does not satisfy the burden resting on it to show that the vessel was seaworthy and properly manned and equipped, by evidence merely showing the sinking of the vessel and the loss of the cargo so as to require a return to the shipper of the unearned freight charges. *Brinson v. Norfolk S. R. Co.*, 169 N. C. 425, 86 S. E. 371.

**Defenses Available to Negligent Carrier.**

When sued under the Carmack Amendment for the loss of an interstate shipment of freight, the initial carrier may avail itself of any defense or limitation of liability open to the negligent connecting carrier. *Brinson v. Norfolk S. R. Co.*, 169 N. C. 425, 86 S. E. 371.

In an action under the Carmack Amendment an initial carrier may make any defense that is available to any connecting carrier on whose line the loss or damage occurred. *Hogan Milling Co. v. Union P. R. Co.*, 91 Kan. 783, 139 Pac. 397; *Riverside Mills v. Atlantic C. L. R. Co.*, 168 Fed. 987.

**Negligence of Shipper in Selecting Unfit Car.**

A shipper cannot recover under the Carmack Amendment for injuries to an interstate shipment of live stock as the result of the selection by him of an unsuitable car, where he refused to wait another day until the carrier could furnish a suitable car. *Otrich v. St. Louis, I. M. & S. R. Co.*, 154 Mo. App. 420, 134 S. W. 665.

**11. Settlement With Negligent Carrier.****Effect on Liability of Initial Carrier.**

Where, after an unreasonable delay, a consignee agreed to receive property shipped in interstate commerce, providing that it was thereafter delivered promptly, but without waiving any claim for damages for the delay, and when the property was delivered there was a shortage for which he was paid, he was not estopped by receipt of such payment from recovering damages for the delay from the initial carrier under the Carmack Amendment. *Ft. Smith & W. R. Co. v. Awbrey*, 39 Okla. 270, 134 Pac. 1117.

A shipper who settles with a connecting carrier for an injury to property is not thereby estopped from recovering all of his damages, less the amount received in such settlement, from the initial carrier under the Carmack Amendment. *Carlton Produce Co. v. Velasco, B. & N. R. Co.*, — Tex. Civ. App. —, 131 S. W. 1187.

**Unsuccessful Negotiations.**

The fact that a shipper attempts to collect from a person who ordered a terminal carrier to make a wrongful delivery of an interstate shipment is not a ratification of the former's act which will release the initial carrier from liability under the Carmack Amendment. *Kemper Mill Co. v. Missouri P. R. Co.*, — Mo. App. —, 186 S. W. 8.

**M. Liability of Connecting and Terminal Carriers.****1. In General.****Rights of Connecting Carrier Against Terminal Carrier.**

The fact that the Carmack Amendment imposes liability on the initial carrier for loss or damage occurring on the lines of connecting carriers, and provides for a recovery by the former from the carrier causing the injury, does not prevent the delivering carrier, when held liable to a shipper for fault of the initial or any preceding carrier from having the same redress it had before the adoption of such amendment. *Duvall v. Louisiana W. R. Co.*, 135 La. 189, 65 So. 104.

**2. For Own Negligence.****In General**

The fact that primary liability is imposed on an initial carrier by the Carmack Amendment for injuries to or the loss of an interstate shipment occurring on the lines of connecting carriers, does not deprive the owner of the property or the holder of the bill of lading of the right to maintain an action directly against the negligent carrier, since the remedy given against the initial carrier is not exclusive. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541, overruling on this point 15 Ga. App. 142, 82 S. E. 784; *Western & A. R. Co. v. White Produce Co.*, 142 Ga. 246, 82 S. E. 644; *Illinois C. R. Co. v. Mahon Live Stock Co.*, — Miss. —, 71 So. 802; *Mewborn v. Louisville & N. R. Co.*, — N. C. —, 87 S. E. 37; *Deaver-Jeter Co. v. Southern R. Co.*, 95 S. C. 485, 79 S. E. 709; *Eastover M. & H. Co. v. Atlantic C. L. R. Co.*, 99 S. C. 470, 83 S. E. 599; *Elliott v. Chicago, M. & St. P. R. Co.*, 35 S. D. 57, 150 N. W. 777; *St. Louis S. W. R. Co. v. Ray*, — Tex. Civ. App. —, 127 S. W. 281; *Treadwell v. Chicago & N. W. R. Co.*, 150 Wis. 259, 136 N. W. 794; *Bichlmeier v. Minneapolis, St. P. & S. S. M. R. Co.*, 159 Wis. 404, 150 N. W. 508; *Uber v. Chicago, M. & St. P. R. Co.*, 151 Wis. 431, 138 N. W. 57, writ of error dismissed without opinion 235 U. S. 715, 59 L. ed. 438, 35 Sup. Ct. Rep. 282; *Atlantic C. L. R. Co. v. Thomasville Live Stock Co.*, 13 Ga. App. 102, 78 S. E. 1019; *Thomasville Live Stock Co. v. Atlantic C. L. R. Co.*, 13 Ga. App. 276, 79 S. E. 162, overruled *Southern R. Co. v. Bennett*, 17 Ga. App. 162, 86 S. E. 418, but see *Central of Georgia R. Co. v. Waxelbaum Produce Co.*, — Ga. App. —, 89 S. E. 635, overruling *Southern R. Co. v. Bennett*, supra.

The fact that the Carmack Amendment

places primary liability on the initial carrier for the negligence of connecting carriers does not relieve the latter from liability to a shipper for losses occurring on its line, since the bill of lading issued by the initial carrier for an interstate shipment governs the entire transaction and fixes the obligations of all participating carriers to the extent that the terms of the bill are valid and applicable. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541, affirming 15 Ga. App. 142, 82 S. E. 784.

The common-law doctrine of a carrier's liability for a loss or injury to freight occurring on its own line was not changed by the Carmack Amendment. *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. ed. —, 36 Sup. Ct. Rep. 555.

Since the remedy given a shipper by the Carmack Amendment is cumulative and not exclusive, it does not compel him to sue the initial carrier alone, but he may sue the terminal or some other carrier as well for a loss occurring in transit. *Baltimore, C. & A. R. Co. v. Sperber*, 117 Md. 595, 84 Atl. 72.

The separate liability of a terminal or delivering carrier for the loss of an interstate shipment occurring on its own line, as fixed by a state law, was not abrogated nor in any way impaired by the Carmack Amendment. *Louisville & N. R. Co. v. Lynne*, — Ala. —, 71 So. 338.

Under the Carmack Amendment the liability of a succeeding or connecting carrier for injury to or the destruction of an interstate shipment is the same as that for which the initial carrier would have been liable if the action were against it. *Elliott v. Chicago, M. & St. P. R. Co.*, 35 S. D. 57, 150 N. W. 777.

A suit under a state law cannot be maintained against the last of several successive carriers for an injury to freight occurring in interstate transportation, since under the Carmack Amendment the initial carrier only is answerable and the remedy given by such act is exclusive. *Southern R. Co. v. Bennett*, 17 Ga. App. 162, 86 S. E. 418, overruling *Atlantic C. L. R. Co. v. Thomasville L. S. Co.*, 13 Ga. App. 102, 111, 78 S. E. 1019; *Southern R. Co. v. Bennett*, *supra*, overruled in *Central of Georgia R. Co. v. Maxelbaum Produce Co.*, — Ga. App. —, 89 S. E. 635.

A shipper cannot maintain an action of trover against a terminal carrier for the wrongful delivery of an interstate shipment made under an order bill of lading issued under the Carmack Amendment, on the theory that by converting the property the carrier abandoned the contract of shipment: since the parties could not waive the contract and hold the carrier to a different responsibility than

that fixed by the contract of carriage. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541, reversing on this point 15 Ga. App. 142, 82 S. E. 784.

### Showing Freedom From Negligence.

When the testimony in an action against a terminal carrier for injuries to live stock during interstate transportation, shows that the animals were in good condition when received from a connecting carrier, and that they were in a badly damaged condition on their arrival at destination, such carrier, in order to exonerate itself from liability, must show that the stock was carefully handled while in its possession. *Illinois C. R. Co. v. Mahon Live Stock Co.*, — Miss. —, 71 So. 802.

A terminal carrier, when sued for damages to live stock received by it in good condition for interstate transportation, must, in order to exonerate itself from liability, show not only the manner in which the car was handled while actually in transit, but also whether handled or not, and if so, in what manner, while it remained in its yards at stations. *Illinois C. R. Co. v. Mahon Live Stock Co.*, — Miss. —, 71 So. 802.

A terminal carrier, when sued for injury to live stock during interstate transportation and which was delivered to it by a connecting carrier in good condition, does not relieve itself from liability by showing the manner in which the car was handled while actually in transit upon its road without also showing how it was handled while in its yards at stations. *Illinois C. R. Co. v. Mahon Live Stock Co.*, — Miss. —, 71 So. 802.

### Effect of Failure of Initial Carrier to Issue Bill of Lading.

The failure of an initial carrier to issue a bill of lading, as required by the Carmack Amendment, for an interstate shipment, is not available to a connecting carrier when sued for its wrongful diversion of the goods from the route selected by the shipper, unless such carrier knew of and relied upon the bill of lading to be issued by a succeeding connecting carrier. *Saxon Mills v. New York, N. H. & H. R. Co.*, 214 Mass. 383, 101 N. E. 1075.

### 3. Liability on Own Contracts With Shipper.

#### (a) In General

(No decisions.)

#### (b) Varying Original Contract.

##### In General.

Since under the Carmack Amendment an initial carrier acts as principal in re-

ceiving the consideration for and in making a contract for a through shipment over the lines of several carriers, the contract of carriage so issued controls the subsequent carriers, and a connecting carrier cannot, during the transportation of the property, make a new contract with the shipper altering the terms of the original contract. *Atchison, T. & S. F. Co. v. Word*, — Tex. Civ. App. —, 159 S. W. 375.

An intermediate carrier cannot contract with a shipper that its liability in the interstate transportation of live stock shall not be that of a common carrier, but that only of a forwarder or private carrier for hire, and that in the event of loss or damage it shall not be liable except for negligence, which the shipper has the burden of showing; since a connecting carrier cannot by contract vary its liability from that of the initial carrier as created by the Carmack Amendment. *Missouri, O. & G. R. Co. v. French*, — Okla. —, 152 Pac. 591.

#### Contract Against Delay.

Although under the Carmack Amendment a connecting carrier would ordinarily be required to take an interstate shipment of live stock, if, before it reaches its line, a bridge was destroyed so that it was impossible to transport it in a reasonable time, it might refuse to accept it unless the shipper agreed to make shipment subject to delay. *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131.

#### (c) As Initial Carrier.

##### In General.

A connecting carrier will be deemed the initial carrier, within the meaning of the Carmack Amendment, and answerable as such for the failure of a terminal carrier to heat cars of vegetables shipped in interstate commerce in cold weather, where the connecting carrier made a special arrangement with the shipper for the heating of the cars to their destination. *Ross v. Maine C. R. Co.*, 112 Me. 63, 90 Atl. 711, S. C. 114 Me. 287, 96 Atl. 223.

#### On Diversion of Shipment.

A terminal carrier that, without notice to the preceding carriers, agrees with the consignee to and does divert an interstate shipment to a point on the line of another carrier, is answerable under the Carmack Amendment as the initial carrier, notwithstanding that a new bill of lading was not issued. *Barrett v. Northern P. R. Co.*, — Idaho —, 157 Pac. 1016.

#### Under New Bill of Lading.

The fact that an intermediate carrier issues a new bill of lading for an interstate shipment does not make it the initial carrier and answerable under the Car-

mack Amendment for loss or damage caused by a succeeding carrier. *Hudson v. Chicago, St. P. M. & O. R. Co.*, 226 Fed. 38.

When the bill of lading issued by the first carrier for interstate transportation of merchandise was surrendered to the first connecting carrier and a new bill of lading issued by the latter, it did not thereby become the initial carrier within the meaning of the Carmack Amendment, and answerable as such for the negligence of subsequent connecting carriers. *Looney v. Oregon S. L. R. Co.*, 271 Ill. 541, 111 N. E. 509, reversing 192 Ill. App. 273.

#### (d) As to Notice of Loss or Damage.

##### In General.

A contract made with an intermediate carrier while an interstate shipment was in course of transportation, declaring any claim for damages barred and not enforceable unless a written and verified claim was filed within 30 days after the injury or delay complained of, is void, since the contract made with the initial carrier under the Carmack Amendment fixed the liability of both the initial and the connecting carrier. *Missouri, K. & T. R. Co. v. Ward*, — Tex. Civ. App. —, 169 S. W. 1035.

#### 4. Right to Benefit of Conditions in Favor of Initial Carrier.

##### In General.

Any limitation of an initial carrier's liability contained in a contract for the interstate transportation of freight, which under the Carmack Amendment would be valid in its own behalf, will inure to the benefit of a connecting carrier. *Kansas City S. R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 227, reversing 91 Ark. 97, 121 S. W. 932, 134 Am. St. Rep. 56; *Atchison, T. & S. F. R. Co. v. Word*, — Tex. Civ. App. —, 159 S. W. 575; *Piper v. Boston & M. R. Co.*, — Vt. —, 97 Atl. 508.

A limitation in a bill of lading of a carrier's liability for an interstate shipment of freight, made in consideration of a reduced rate, extends to and may be relied on by a terminal carrier whose negligence resulted in the destruction of the property while holding it as warehouseman at destination. *Cleveland, C. C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 60 L. ed. —, 36 Sup. Ct. Rep. 177.

Since a stipulation in a bill of lading that an initial carrier should not be answerable unless a claim for damages to an interstate shipment was made within 10 days after delivery of the property is valid in the absence of any contention that the time limit is unreasonable, it inures to the

benefit of a connecting carrier. *Olivit v. Penn. R. Co.*, 88 N. J. L. 241, 96 Atl. 582; same v. same, 88 N. J. L. 376, 377, 96 Atl. 587; *Spada v. Penn. R. Co.*, 88 N. J. L. 388, 96 Atl. 587; *Albrecht v. Penn. R. Co.*, 88 N. J. L. 367, 96 Atl. 587.

Where a carrier issued a bill of lading for an interstate shipment of household goods only to a connecting point where they were delivered to another carrier, the shipment was controlled by a limitation in the bill of lading limiting liability to \$5 per cwt., and such limitation inured to the benefit of the connecting carrier. *Michelson v. Judson Freight Forwarding Co.*, 268 Ill. 546, 109 N. E. 281, affirming 189 Ill. App. 568.

## **N. Joint Liability of Initial and Succeeding Carriers.**

### **1. In General.**

#### **When Joint Action Lies.**

Under the Carmack Amendment a negligent connecting carrier is answerable with the initial carrier. *Gibson v. Little Rock, H. S. W. R. Co.*, 93 Ark. 439, 124 S. W. 1033.

A shipper may join an initial carrier and a negligent connecting carrier as defendants in an action under the Carmack Amendment, since they are jointly liable for an injury to an interstate shipment. *Otrich v. St. Louis, I. M. & S. R. Co.*, 154 Mo. App. 120, 134 S. W. 665; *Conley v. Chicago, B. & Q. R. Co.*, — Mo. App. —, 183 S. W. 1111; *Atchison, T. & S. F. R. Co. v. Word*, — Tex. Civ. App. —, 159 S. W. 575.

Under the Carmack Amendment a shipper may sue an initial carrier alone, or any one or more of the connecting carriers, or all of them jointly, for damage to an interstate shipment. *Atchison, T. & S. F. R. Co. v. Boyce*, — Tex. Civ. App. —, 171 S. W. 1094.

A shipper may maintain an action against both an initial and a connecting carrier for the failure of the latter to stop a partly loaded car at a point on its line to permit the further loading of the car according to the terms of the original bill of lading. *Conley v. Chicago, B. & Q. R. Co.*, — Mo. App. —, 183 S. W. 1111.

#### **Applicability of Carmack Amendment.**

The provisions of the Carmack Amendment do not apply to an action against both a connecting and a terminal carrier for damages to an interstate shipment. *New York & B. T. Line v. Baer*, 118 Md. 73, 84 Atl. 251.

#### **Effect on Liability of Initial Carrier.**

The fact that a connecting carrier is joined with an initial carrier in an action

based on the Carmack Amendment, will not prevent a recovery against the initial carrier for the whole damage to an interstate shipment. *Missouri, K. & T. R. Co. v. Demere*, — Tex. Civ. App. —, 145 S. W. 623.

By suing both an initial and a terminal carrier under the Carmack Amendment, a shipper does not waive his right to proceed under that act on the theory that it gives a remedy against the initial carrier only. *Baltimore, C. & A. R. Co. v. Sperber*, 117 Md. 595, 84 Atl. 72.

#### **Recovery Against Initial Carrier Only.**

When both an initial and a terminal carrier are joined as defendants in an action based on the Carmack Amendment for a loss alleged to have occurred by reason of the negligence of both defendants, in order to recover against the first carrier the plaintiff need prove only that it was the initial carrier, and that the loss was caused by its default or that of some connecting carrier. *Baltimore, C. & A. R. Co. v. Sperber*, 117 Md. 595, 84 Atl. 72.

#### **Dismissal of Action Against Negligent Carrier.**

In an action against an initial and a negligent connecting carrier, the former cannot complain of the dismissal of the suit as to the latter, on the theory that the Carmack Amendment imposed liability on the initial carrier only, and that by joining both in the same action the plaintiff elected to pursue them jointly and was bound to establish a joint liability. *Lepman v. Wabash R. Co.*, 185 Ill. App. 583.

### **2. Joint Liability.**

#### **In General.**

In an action under the Carmack Amendment against both an initial and a negligent connecting carrier, the latter is not answerable for damages caused by the initial carrier. *Otrich v. St. Louis, I. M. & S. R. Co.*, 154 Mo. App. 420, 134 S. W. 665.

In an action under the Carmack Amendment against an initial and a connecting carrier for injuries sustained by an interstate shipment, in order to establish a joint liability the plaintiff must show that the damages complained of occurred on the line of the connecting carrier. *Otrich v. St. Louis, I. M. & S. R. Co.*, 154 Mo. App. 665, 134 S. W. 665.

#### **Joint Judgment.**

A joint judgment should not be rendered against an initial and a negligent connecting carrier when joined in an action based on the Carmack Amendment, since such a judgment would conclusively estab-

lish between them that they were joint tortfeasors, and would bar the initial carrier's right to recover from the negligent carrier. *Walker v. St. Louis & S. F. R. Co.*, 162 Mo. App. 374, 142 S. W. 729.

#### **O. Liability Over of Negligent Carrier to Initial Carrier.**

##### **In General.**

A connecting carrier is not liable over to an initial carrier that is held liable to a shipper under the Carmack Amendment for an injury to an interstate shipment of live stock which were delivered in a damaged condition by the initial carrier to the connecting carrier. *Missouri, K. & T. R. Co. v. Jarmon*, — Tex. Civ. App. —, 141 S. W. 155.

##### **Effect of Dealings Between Shipper and Negligent Carrier.**

The right of an initial carrier, under the Carmack Amendment, to recover over from a negligent connecting carrier cannot be impaired or destroyed in any manner by an agreement between a shipper or holder of a bill of lading and the negligent carrier to indemnify the latter from liability, and the initial carrier may recover from the negligent carrier the amount recovered against it by the shipper for negligence of the succeeding carrier. *Carlton Produce Co. v. Velasco, B. & N. R. Co.*, — Tex. Civ. App. —, 131 S. W. 1187.

##### **Shipper's Receipt as Evidence of Extent of Liability.**

When an initial carrier in good faith pays a shipper for a loss occurring in the line of a connecting carrier, no evidence other than the shipper's receipt is necessary, in an action by the initial carrier under the Carmack Amendment against the negligent carrier, to establish the amount of the claim. *Kansas City & M. R. Co. v. New York C. & H. R. R. Co.*, 110 Ark. 612, 163 S. W. 171.

In the absence of actual fraud or gross negligence amounting to legal fraud on the part of an initial carrier in settling with a shipper for a loss occurring in the line of a connecting carrier, under the Carmack Amendment the receipt of the shipper is sufficient evidence to justify a recovery of the amount thereby shown in an action by the initial carrier against the negligent connecting carrier. *Kansas City & M. R. Co. v. New York C. & H. R. R. Co.*, 110 Ark. 612, 163 S. W. 171.

##### **Burden of Showing Fraud.**

The burden is on the defendant, in an action under the Carmack Amendment by an initial carrier against a negligent connecting carrier to recover the amount

paid the shipper by the initial carrier in settlement of a loss, to show fraud on the part of the initial carrier in obtaining the receipt of payment from the shipper. *Kansas City & M. R. Co. v. New York C. & H. R. R. Co.*, 110 Ark. 612, 163 S. W. 171.

##### **Defenses.**

Under the Carmack Amendment neither an initial carrier nor the consignor of goods shipped in the latter's name and subject to his order, have any privity with the person to whom delivery was to be made on the production of the bill of lading; and in an action by the initial carrier against the delivering carrier to recover the amount paid by the former to the shipper for a wrongful delivery of the goods by the terminal carrier, the defendant is not entitled to set off the amount that the initial carrier or the consignor might have received had they proven the claim against the bankrupt estate of the consignee. *Kansas City & M. R. Co. v. New York C. & H. R. R. Co.*, 110 Ark. 612, 163 S. W. 171.

## **XII. CUMMINS AMENDMENT.\***

##### **Retroactive Effect.**

The so-called Cummins Amendment to the Carmack Amendment (Act March 4, 1915, ch. 176, 38 St. L. 1197, Fed. St. Ann. Supp. 1916, p. 124), abrogating the rule of liability created by the latter act, and precluding limitation of the carrier's liability to a stipulated valuation, does not apply to a cause of action that arose prior to the passage of such amendment. *Southern R. Co. v. Bynum*, — Ala. —, 69 So. 820.

The Cummins Amendment to the Hepburn Act does not apply to a shipment in interstate commerce made before its enactment. *Northern P. R. Co. v. Wall*, 241 U. S. 87, 60 L. ed. —, 36 Sup. Ct. Rep. 493, reversing 30 Mont. 122, 145 Pac. 291.

The effect of the Cummins Amendment (Act March 4, 1915, 38 St. 1196, c. 176) is to invalidate all attempted agreements between shippers and carriers, limiting the latter's liability for the loss of or damage to interstate shipments of property. (Obiter.) *Norfolk & W. R. Co. v. Steele*, 117 Va. 788, 86 S. E. 124.

The provisions of the Cummins Amendment (Act March 4, 1915, 38 St. 1196, c. 176) which forbids carrier from compelling notice of claims for loss or damage to interstate shipments in less than 90 days, their filing within less than 4 months, or the institution of suit within 2 years, does not apply to an action arising before the adoption of such amend-

\*See appendix for text of act.



ment. *Nashville, C. & St. L. R. Co. v. Truitt Co.*, 17 Ga. App. 263, 86 S. E. 421, S. C. 14 Ga. App. 767, 82 S. E. 465.

### XIII. ACTIONS.

#### A. In General.

Actions against connecting and terminal carriers, see generally *supra* XI, M.

Actions against initial carriers, see in general *supra* XI, L.

Time for bringing action, see generally *supra* XI, K.

#### What Law Governs

See generally *supra* II.

An action against an initial carrier for the loss of an interstate shipment on the lines of connecting carriers when based on the Carmack Amendment, is governed by the same rules of pleading, practice and presumptions as would apply if the shipment had been between stations in different states on the road of the initial carrier. *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205, affirming — *Tex. Civ. App.* — 117 S. W. 169, 170.

#### Law of Case.

Where, in an action against a connecting carrier for the freezing of vegetables in interstate transit based on its special agreement for heating the cars to destination, it was held on appeal that as to the contract of affreightment, an electric railway company, from whom the cars were received by the defendant, was, within the meaning of the Carmack Amendment, the initial as well as an interstate carrier, such facts cannot be shown by the defendant on a second trial. *Ross v. Maine C. R. Co.*, 114 Me. 287, 96 Atl. 223, S. C. 112 Me. 63, 90 Atl. 711.

#### Form of Action.

##### — Trover.

The fact that the Carmack Amendment does not refer to actions in trover shows that Congress left to each state the free use of that remedy; and that law does not preclude an action of that nature against a terminal carrier for a conversion of an interstate shipment. *George F. & A. R. Co. v. Blish Milling Co.*, 15 Ga. App. 142, 82 S. E. 784, overruled on this point, 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541.

#### Removal of Causes.

A petition in an action against several carriers, which avers the delivery to one of them, of property of the value of \$1,500 for transportation to a foreign state, without the issue of any written bill of lading, and the nondelivery of and the failure to account for the goods, does not state a

cause of action under a law of the United States, although the Carmack Amendment would authorize a recovery against the initial carrier for the default of successive carriers, so as to permit the removal of the action from a state to a Federal court. *Adams v. Chicago G. W. R. Co.*, 210 Fed. 362.

A connecting carrier, when sued in a state court with an initial carrier, for the loss of an interstate shipment, may remove the action to a Federal court, where the former court did not have jurisdiction over the connecting carrier except by reason of the fact that it was sued with the initial carrier. *Alabama G. S. R. Co. v. American Cotton Oil Co.*, 143 C. C. A. 313, 229 Fed. 11.

Where, in an action in a state court against an initial and a connecting carrier, the latter's petition for removal to a Federal court was denied, and, although such defendant filed a transcript in the Federal court, the plaintiff obtained an order requiring such defendant to plead within a stated time, and the latter filed a bill in the Federal court to restrain the plaintiff from proceeding in the state court, the Federal court should grant a temporary injunction until the hearing of the bill. *Alabama G. S. R. Co. v. American Cotton Oil Co.*, 143 C. C. A. 313, 229 Fed. 11.

The fact that the law of a case arising under the Carmack Amendment has been determined in another case by the Supreme Court of the United States, does not preclude the removal by a connecting carrier, when sued with an initial carrier for the loss of an interstate shipment, of an action from a state to a Federal court where the former court would not have had jurisdiction over the connecting carrier except for such statute. *Alabama G. S. R. Co. v. American Cotton Oil Co.*, 143 C. C. A. 313, 129 Fed. 11.

As an action founded on the Carmack Amendment is one arising under the Interstate Commerce Act, of which a district court of the United States has original jurisdiction although the amount in dispute does not exceed \$3,000, such an action is, under the Judicial Code, removable from a state to a Federal court. *McGoon v. Northern P. R. Co.*, 204 Fed. 998.

#### B. Jurisdiction.

##### 1. In General.

(No decisions.)

##### 2. Federal Courts.

#### In General.

The Federal courts do not have exclusive jurisdiction of actions based on the Carmack Amendment. *Louisville & N. R. Co. v. Scott*, 133 Ky. 724, 118 S. W. 990, 19 Ann. Cas. 392, affirmed 219 U. S. 209, 55

L. ed. 183, 31 Sup. Ct. Rep. 171, Chicago, R. I. & P. R. Co. v. Clements, 53 Tex. Civ. App. 143, 115 S. W. 664.

The jurisdiction of the Federal courts over actions based on the Carmack Amendment is concurrent with that of the state courts. *Elliott v. Chicago, M. & St. P. R. Co.*, 35 S. Dak. 57, 150 N. W. 777.

State and Federal courts have concurrent jurisdiction of actions founded on the Carmack Amendment when the amount involved exceeds \$2,000, while the state courts have exclusive jurisdiction when a lesser amount is in controversy. *Smeltzer v. St. Louis & S. F. R. Co.*, 168 Fed. 420.

### 3. Interstate Commerce Commission.

#### In General.

Sections 8 and 9 of the Interstate Commerce Act relating to violations thereof, and providing for proceedings before the Interstate Commerce Commission or in the Federal courts, do not deprive a state court of jurisdiction of an action against an initial carrier under the Carmack Amendment, since that amendment, as well as section 22 of the original act, expressly preserves all rights under existing laws. *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205, affirming — *Tex. Civ. App.* —, 117 S. W. 169, 170, *Smeltzer v. St. Louis & S. F. R. Co.*, 168 Fed. 420, *St. Louis & S. F. R. Co. v. Heyser*, 95 Ark. 412, 130 S. W. 562, *Ann. Cas.* 1912 A. 610; *Olcovich v. Grand Trunk R. Co.*, 20 Cal. App. 349, 129 Pac. 290; *Southern P. R. Co. v. Crenshaw Bros.*, 5 Ga. App. 675, 63 S. E. 865; *Fry v. Southern P. Co.*, 247 Ill. 564, 93 N. E. 906; *Pittsburgh, C. C. & St. L. R. Co. v. Mitchell*, 175 Ind. 196, 211, 91 N. E. 735, 93 N. E. 996; *Louisville & N. R. Co. v. Scott*, 133 Ky. 724, 118 S. W. 990, 19 Ann. Cas. 392, affirmed 219 U. S. 209, 55 L. ed. 183, 31 Sup. Ct. Rep. 171; *Ft. Smith & W. R. Co. v. Awbrey*, 39 Okla. 270, 134 Pac. 1117; *Gibson v. Atlantic C. L. R. Co.*, 88 S. C. 360, 70 S. E. 1030; *Galveston, H. & S. A. R. Co. v. Piper*, 52 Tex. Civ. App. 568, 115 S. W. 107; *Chicago, R. I. & P. R. Co. v. Clements*, 53 Tex. Civ. App. 143, 115 S. W. 664; *Bichlmeier v. Minneapolis, St. P. & S. S. M. R. Co.*, 159 Wis. 404, 150 N. W. 508.

A state court is not without jurisdiction in the first instance, even in the absence of recourse to the Interstate Commerce Commission if necessary, to determine the validity of a stipulation of a uniform live stock contract for the interstate shipment of stock, limiting the amount of the carrier's liability for loss or damage, when based on alternative freight rates, where it does not appear that such contract was approved by such Commission or referred to in any manner in the carrier's tariffs.

*Norfolk & W. R. Co. v. Steele*, 117 Va. 788, 86 S. E. 124.

### 4. State Courts.

#### In General.

A state court has jurisdiction of an action against an initial carrier to enforce the primary liability imposed on it by the Carmack Amendment. *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205, affirming — *Tex. Civ. App.* —, 117 S. W. 169, 170; *Smeltzer v. St. Louis & S. F. R. Co.*, 168 Fed. 420; *Central of Ga. R. Co. v. Sims*, 169 Ala. 295, 53 So. 826; *St. Louis & S. F. R. Co. v. Heyser*, 95 Ark. 412, 130 S. W. 562, *Ann. Cas.* 1912 A. 610; *Southern P. Co. v. Crenshaw Bros.*, 5 Ga. App. 675, 63 S. E. 865; *Louisville & N. R. Co. v. Warfield*, 6 Ga. App. 550, 65 S. E. 308; *Fry v. Southern P. Co.*, 247 Ill. 564, 93 N. E. 906; *Louisville & N. R. Co. v. Scott*, 133 Ky. 724, 118 S. W. 990, 19 Ann. Cas. 392, affirmed 219 U. S. 209, 55 L. ed. 183, 31 Sup. Ct. Rep. 171; *Perkett v. Manistee & N. E. R. Co.*, 175 Mich. 253, 141 N. W. 607; *Shultz v. Skaneateles R. Co.*, 66 Misc. 9, 122 N. Y. Supp. 445, affirmed 145 App. Div. 906, 129 N. Y. Supp. 1146; *Ft. Smith & W. R. Co. v. Awbrey*, 39 Okla. 270, 134 Pac. 1117; *Elliott v. Chicago, M. & St. P. R. Co.*, 35 S. D. 57, 150 N. W. 777; *Houston & T. C. R. Co. v. Lewis*, 103 Tex. 452, 129 S. W. 594; *Galveston, H. & S. A. R. Co. v. Piper*, 52 Tex. Civ. App. 568, 115 S. W. 107; *Chicago, R. I. & P. R. Co. v. Clements*, 53 Tex. Civ. App. 143, 115 S. W. 664; *Galveston, H. & S. A. R. Co. v. Crow*, — *Tex. Civ. App.* —, 117 S. W. 170, affirmed 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205; *Pecos & N. T. R. Co. v. Meyer*, — *Tex. Civ. App.* —, 155 S. W. 309, 6 N. C. C. A. 146; *St. Louis, B. & M. R. Co. v. Gould*, — *Tex. Civ. App.* —, 165 S. W. 13.

The fact that an interstate shipment is controlled by the Carmack Amendment does not deprive a state court of jurisdiction of an action against the delivering carrier for a conversion. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 15 Ga. App. 142, 82 S. E. 784, affirmed on other grounds. 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541.

A petition that alleges that the plaintiff is the lawful holder of a bill of lading issued by a common carrier for the interstate transportation of property, which was in a damaged condition on arrival at its destination, is properly brought in a state court; and states a cause of action, although the bill of lading attached to the petition as an exhibit, contains conditions which, but for the Carmack Amendment, would exempt the carrier from liability. *Southern P. R. Co. v. Crenshaw Bros.*, 5 Ga. App. 675, 63 S. E. 865.

### **Actions Against Connecting or Terminal Carriers.**

A state court has jurisdiction of an action against a terminal carrier for injuries to an interstate shipment of freight caused by its negligence. *Bichlmeier v. Minneapolis, St. P. & S. S. M. R. Co.* 159 Wis. 404, 150 N. W. 508.

### **Power to Enforce Federal Laws Avoiding Liability of Water Crafts.**

The Federal legislation limiting and in some cases relieving a carrier by water from liability for the destruction of freight by the loss of a vessel, may be enforced in a state court in an action under the Carmack Amendment against an initial carrier for the loss of an interstate shipment by the sinking of a vessel of a connecting carrier by water. *Brinson v. Norfolk S. R. Co.*, 169 N. C. 425, 86 S. E. 371.

### **C. Process.**

#### **Service on Connecting Carrier.**

The Carmack Amendment does not make a connecting carrier the agent of an initial carrier when the latter is a foreign corporation, so as to permit it to be sued in the domicile of the connecting carrier for damages to an interstate shipment, on the theory that the initial carrier is there present and subject to service of process, although not carrying on business within the state in the sense previously held necessary to confer jurisdiction on its courts. *St. Louis S. W. R. Co. v. Alexander*, 227 U. S. 218, 57 L. ed. 486, 33 Sup. Ct. Rep. 245, Ann. Cas. 1915 B. 77.

### **D. Parties.**

#### **1. In General.**

(No decisions.)

#### **2. Plaintiffs.**

#### **Holder of Bill of Lading.**

An action under the Carmack Amendment must be brought by the holder of the bill of lading. *Burtless v. Oregon S. L. R. Co.*, 180 Ill. App. 249.

Any lawful holder of a bill of lading issued by an initial carrier pursuant to the Carmack Amendment upon receiving property for interstate transportation, may maintain an action for any loss or damage or injury to such property caused by any connecting carrier to whom it is delivered. *Carr v. Penn. R. Co.*, 88 N. J. L. 235, 96 Atl. 588; *Olivit v. Penn. R. Co.*, 88 N. J. L. 378, 96 Atl. 589.

The lawful holder of a bill of lading, within the meaning of the Carmack

Amendment, who may maintain an action against an initial carrier, is the owner of the property transported or the one beneficially entitled to recover for its loss or injury. *Pecos & N. T. R. Co. v. Meyer*, — Tex. Civ. App. —, 155 S. W. 309, 6 N. C. C. A. 146.

### **Shipper.**

A shipper may, under the Carmack Amendment, maintain an action against an initial carrier for the loss of an interstate shipment, since he is a lawful holder of the bill of lading. *International Watch Co. v. Delaware, L. & W. R. Co.*, 80 N. J. L. 553, 78 Atl. 49.

A shipper is the proper party to bring an action under the Carmack Amendment against an initial carrier for damages to goods caused by connecting carriers. *Shultz v. Skaneateles R. Co.*, 66 Misc. 9, 122 N. Y. Supp. 445, affirmed 145 App. Div. 906, 129 N. Y. Supp. 1146.

Where a shipper deposits in bank an order bill of lading with draft attached and the amount thereof is credited to him, and on the refusal of the drawee to pay the draft the amount is charged back to the shipper and the papers delivered to him, he is the owner of the bill of lading and may maintain an action in his own name under the Carmack Amendment against the initial carrier, for a wrongful diversion of the property at the drawee's direction by the terminal carrier, and a wrongful delay which enabled the drawee to attach the property in a suit against the shipper. *Perkett v. Manistee & N. E. R. Co.*, 175 Mich. 253, 141 N. W. 607.

### **Owner or Person Having Beneficial Interest in Shipment.**

A person need not be the holder of the bill of lading issued under the Carmack Amendment, in order to recover from an initial carrier for a loss or injury to an interstate shipment, since it is sufficient if he has any beneficial interest in the property. *Norfolk S. R. Co. v. Norfolk Truckers' Exchange*, — Va. —, 88 S. E. 318.

A joint owner of an interstate shipment may join with the holder of the bill of lading in an action against an initial carrier under the Carmack Amendment. *Kansas City, M. & O. R. Co. v. Corn*, — Tex. Civ. App. —, 186 S. W. 807.

Notwithstanding that the Carmack Amendment requires a carrier to issue a receipt or bill of lading for an interstate shipment and renders it liable to the holder for any loss or damage thereto, the failure of the plaintiff, in an action against carrier, to hold the bill of lading will not, upon proof of his right otherwise to recover, defeat that right. *Bowden v. Phila., B. & W. R. Co.*, — Del. —, 91 Atl. 209.

**3. Defendants.**

(No decisions.)

**E. Pleading.****1. In General.****Setting up Both Federal and State Law.**

In an action against a carrier for the loss of freight, the shipment cannot be treated, in separate counts of the declaration, as both interstate and intrastate. *Fornel v. Florida E. C. R. Co.*, 65 Fla. 102, 61 So. 194.

**2. What Must be Alleged.****(a) In General.****Invalidity of Conditions of Bill of Lading.**

If for any reason any of the stipulations of a contract for interstate transportation should not be enforced against a shipper, he must tender an issue thereto by appropriate pleadings. *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717.

**(b) Federal Law.****In General.**

The Carmack Amendment need not be expressly pleaded in an action against an initial carrier for the loss of an interstate shipment, since such law will be noticed judicially by a state court, and applied when the facts bring the action within the terms of such act. *Louisville & N. R. Co. v. Scott*, 133 Ky. 724, 118 S. W. 990, 19 Ann. Cas. 392, affirmed 219 U. S. 209, 55 L. ed. 183, 31 Sup. Ct. Rep. 171; *Wright v. Southern P. Co.*, 181 Mo. App. 137, 167 S. W. 1137; *Stubblefield v. St. Louis & S. F. R. Co.*, — Mo. App. —, 184 S. W. 149; *Norfolk Truckers' Exchange v. Norfolk S. R. Co.*, 116 Va. 466, 82 S. E. 92; *Karr v. Baltimore & O. R. Co.*, — W. Va. —, 86 S. E. 43.

**(c) Issue of Bill of Lading.****In General.**

The issuance of a bill of lading for an interstate shipment need not be alleged by the plaintiff in an action based on the Carmack Amendment. *Bowden v. Phila., B. & W. R. Co.*, — Del. —, 91 Atl. 209.

Since an oral contract for interstate transportation of freight is not void, although the Carmack Amendment requires the initial carrier to issue a written receipt or bill of lading, the plaintiff need not allege a written contract in an action for the loss of or injury to freight.

*Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131.

In an action based on the Carmack Amendment for the loss of an interstate shipment, the declaration is not subject to demurrer for failing to allege that a receipt or bill of lading was issued for the property. *Aultman v. Atlantic C. L. R. Co.*, — Fla. —, 71 So. 283.

**(d) Possession of Bill of Lading.****In General.**

Since a bill of lading issued a shipper as required by the Carmack Amendment, is not the contract of shipment but merely evidence thereof, it is not necessary for the plaintiff to aver, in an action against a carrier for failure to promptly and safely deliver an interstate shipment, that he is the lawful holder of such bill. *Bowden v. Phila., B. & W. R. Co.*, — Del. —, 91 Atl. 209.

In an action based on the Carmack Amendment the plaintiff need not allege that he is the holder of the receipt or bill of lading issued for an interstate shipment. *Aultman v. Atlantic C. L. R. Co.*, — Fla. —, 71 So. 283.

**(e) Ownership of Goods.****In General.**

In an action by a consignor against a carrier for the loss of perishable goods received for interstate transportation, alleged to be due to negligent handling and unreasonable delays, the declaration is not demurrable for failing to allege that the plaintiff was the owner of the property, since the consignor had the implied right to bring the action by reason of his delivery to and the receipt of the property for carriage by the defendant, especially where the declaration shows that the consignee was to receive and sell the goods for the plaintiff. *Aultman v. Atlantic C. L. R. Co.*, — Fla. —, 71 So. 283.

**(f) Name of Negligent Carrier.****In General.**

In an action under the Carmack Amendment against an initial carrier, the petition need not allege the names of the connecting carriers, since, as they are the agents for the initial carrier, it is presumed to know their names. *Pecos & N. T. R. Co. v. Meyer*, — Tex. Civ. App. —, 155 S. W. 309, 6 N. C. C. A. 146.

**(g) Notice of Claim.****In General.**

If a shipper gave notice of injury to live stock as required by the terms of a con-

tract for interstate carriage, he must plead that fact. *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717.

#### (h) Fraud or Deceit in Issuing Contract of Affreightment.

##### In General.

If deceit or fraud was practiced upon a shipper by a carrier in obtaining his assent to a contract for the interstate shipment of live stock, he must plead it. *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717.

#### (i) Negligence.

##### In General.

In an action against a carrier for injuries to perishable goods received for interstate transportation, where negligence is the basis of recovery, it is not necessary for the declaration to set out the facts constituting such negligence, but an allegation of sufficient acts causing injury to the plaintiff, coupled with an allegation that such acts were negligently done, is sufficient. *Aultman v. Atlantic, C. L. R. Co.*, — Fla. —, 71 So. 283.

The plaintiff need not allege negligence, in an action against an initial carrier under the Carmack Amendment, since the liability thereby imposed is that of the common law, and is not limited to negligence but includes liability for any loss or damage not the act of God or the public enemy; and the carrier has the burden of showing freedom from liability. *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 187 S. W. 149.

#### (j) Waiver.

##### In General.

A waiver by a carrier of a requirement of a contract of interstate shipment for written claim of damage thereto, must be pleaded by the shipper. *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717.

#### 3. Departure.

##### In General.

The fact that the original petition of the plaintiff in an action for injuries to an interstate shipment, declared on a written contract of carriage and claimed damages for a negligent delay, and the amended petition was silent as to the nature of the contract, and claimed damages for the violation of an implied contract to well and safely transport and deliver within a reasonable time, is immaterial, since a matter of procedure governed by the rules of practice of the forum, and if it was a de-

parture it was cured by the defendant answering over. *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131.

Where a contract of shipment was alleged in an action for injuries to an interstate shipment of live stock without stating whether the contract was in writing, and the defendant a connecting carrier, set upon a special written contract alleged to have been made by the shipper with it, there was no change made in the cause of action alleged by the plaintiff by reason of his setting up in his reply that the contract asserted by the defendant was ineffective because executed after delivery of the shipment to the connecting carrier and the payment of the freight charges. *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131.

#### 4. Plea or Answer.

##### What Must Be Alleged.

When, in action for injury to an interstate shipment, the plaintiff alleges merely a contract of shipment without stating whether the contract was in writing, the defendant must allege and set up a written contract of carriage if any of its defensive terms are to be relied on. *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131.

In an action against an initial carrier for damages to an interstate shipment, when the petition does not set out the bill of lading, the defendant cannot enforce its provisions as against the plaintiff, where, under the local rules of procedure, it constitutes an affirmative defense which must be pleaded. *Gilinsky v. Illinois C. R. Co.*, 98 Neb. 858, 154 N. W. 730.

Where the petition in an action against a carrier shows an interstate transaction, the defendant is not deprived of a defense under the Carmack Amendment by the fact of pleading a special defense based on a state law. *Wright v. Southern P. Co.*, 181 Mo. App. 137, 167 S. W. 1137.

#### F. Damages.

Limitations of value as measure of damages, see generally XI, I.

##### 1. In General.

(No decisions.)

##### 2. Delays.

##### In General.

The measure of damages, in an action under the Carmack Amendment against an initial carrier for delay in the delivery of goods that were sold at a stated price for arrived within a certain time, is, when the defendant was not informed of the agree-

ment, the depreciation in the market value of the goods between the time they should have been and the time they were delivered. *Southern P. Co. v. Lyon*, 107 Miss. 777, 66 So. 209.

### 3. Failure to Heat Cars.

#### In General.

The measure of damages in an action against a carrier under the Carmack Amendment, when based on the breach of a special agreement to heat cars of vegetables to their destination, is the difference between the contract price at destination and the market value, less the freight charges, at the place of shipment. *Ross v. Maine C. R. Co.*, 114 Me. 287, 96 Atl. 223, S. C. 112 Me. 63, 90 Atl. 711.

### 4. Freight Charges.

#### In General.

The plaintiff may recover as damages in an action founded on the Carmack Amendment, freight charges prepaid by him on an interstate shipment, when the bill of lading so provides. *Carr v. Penn. R. Co.*, 88 N. J. L. 235, 96 Atl. 588; *Olivit v. Penn. R. Co.*, 88 N. J. L. 378, 96 Atl. 589.

### 5. Injury to Live Stock.

#### Sale in Excess of Agreed Value.

The fact that a shipper sold injured live stock for more than the value agreed upon in a bill of lading will not relieve a carrier, in an action under the Carmack Amendment, from liability within the stipulated limit, for the full amount of culpable injuries sustained. *Southern R. Co. v. Bynum*, — Ala. —, 69 So. 820.

The fact that injured animals in their damaged condition were worth more than \$100 will not preclude a recovery under Carmack Amendment for their injury in interstate transportation, although the contract of shipment limits the carrier's liability to \$100 for each animal, since it is the contractual limitation and not the actual valuation that determines the measure of damages. *Washington Horse Exchange v. Louisville & N. R. Co.* — N. C. —, 87 S. E. 941.

The fact that in the market a shipper, realized more for injured cattle than the value stipulated in a bill of lading as the limit of the carrier's liability for loss or damage to an interstate shipment, does not relieve the carrier from liability for such damage less than the agreed valuation, as the shipper is entitled to recover for delay in transportation. *Norfolk & W. R. Co. v. Steele*, 117 Va. 788, 86 S. E. 124.

### 6. Mental Anguish.

#### In General.

An express company is not answerable for mental anguish resulting from delay in delivering a casket and grave clothing intended for the plaintiff's wife, when shipped in interstate commerce. *Southern Express Co. v. Byers*, 240 U. S. 612, 60 L. ed. —, 36 Sup. Ct. Rep. 410, reversing 165 N. C. 542, 81 S. E. 741.

### 7. Market Value.

#### In General.

A shipper may recover, in an action founded on the Carmack Amendment, for delay in the delivery of fruit at its destination, the market value thereof on the day on which it should have arrived had it been transported with reasonable dispatch. *Baltimore, C. & A. R. Co. v. Sperber*, 117 Md. 595, 84 Atl. 72.

Where a terminal carrier, which was guilty of delay in delivering a car of fruit at destination, sold the fruit and retained the proceeds, the true measure of damages in an action by the shipper against the initial carrier under the Carmack Amendment, is not the market value of the fruit had it been delivered promptly, less the amount received on the sale, since the shipper was not required to give credit for money he had never received. *Baltimore, C. & A. R. Co. v. Sperber*, 117 Md. 595, 84 Atl. 72.

### G. Evidence.

#### 1. In General.

##### Freedom From Negligence.

Evidence that the capacity of the ice bunkers of refrigerator cars owned by the plaintiff and in which meat was packed, sealed and iced by the shipper, were not of sufficient capacity to keep the meat at the proper temperature to prevent it from decaying, is admissible in an action against an initial carrier under the Carmack Amendment, for the delivery of the meat in a damaged condition. *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 187 S. W. 149.

#### 2. Judicial Notice.

(No decisions.)

#### 3. Admissions.

##### By Acceptance of Bill of Lading.

When a shipper signs a release relieving a carrier from liability in excess of \$5 per 100 pounds for the loss of or damage to an interstate shipment of household goods, as provided in the published tariffs,

such valuation is conclusive, and evidence tending to show an undervaluation is not admissible in an action against the carrier for the loss of the property. *Kansas City S. R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 227, reversing 91 Ark. 97, 121 S. W. 932, 134 Am. St. Rep. 556.

Recitals in a bill of lading for an interstate shipment, signed by both parties, that lawful alternative rates based on specific values were offered the shipper, constitute an admission by him and are sufficient prima facie evidence of his choice. *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. ed. —, 36 Sup. Ct. Rep. 555.

#### By Indorsements on Bill of Lading.

An indorsement by the initial carrier on a bill of lading for a car load of fresh meat shipped in a car owned, packed, sealed and iced by the shipper, that it was "in apparent good condition, contents and condition of packages unknown," is not an admission by the carrier as to the good condition of the meat and the proper icing of the car, that is binding on it in an action under the Carmack Amendment. *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 187 S. W. 149.

A certificate placed by a shipper on a bill of lading for an interstate shipment of meat, to the effect that it had been inspected according to the Act of Congress, and that it was "sound, healthful, wholesome and fit for human food" was not binding on the defendant in an action against the initial carrier under the Carmack Amendment for the delivery of the meat in a damaged condition. *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 187 S. W. 149.

#### 4. Presumptions.

##### Issuance of Bill of Lading.

It will be presumed that a bill of lading was issued for an interstate shipment as required by the Carmack Amendment. *Burtless v. Oregon S. L. R. Co.*, 180 Ill. App. 249.

##### Consideration for Special Stipulation.

A consideration for a stipulation requiring written notice of claim for damages to a shipment, will be presumed from the recitals of a bill of lading. *Hamilton v. Chicago & A. R. Co.*, 177 Mo. App. 145, 164 S. W. 248.

The recital in a contract for interstate shipment, of a reduced rate in consideration of a limitation of a carrier's liability, is prima facie evidence of such fact. *Stubblefield v. St. Louis & S. F. R. Co.*, — Mo. App. —, 184 S. W. 149.

##### Negligence.

Where the holder of a bill of lading proves that an interstate shipment of goods over the lines of different carriers has not been delivered to the consignee, the presumption arises that they were lost by reason of the negligence of the initial carrier or its agent. *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205, affirming — *Tex. Civ. App.* —, 117 S. W. 169, 170.

Proof of the delivery of an interstate shipment to the initial carrier and of a failure to deliver it to the consignee, raises a presumption of negligence so as to give rise to the primary liability imposed by the Carmack Amendment. *Nashville, C. & St. L. R. Co. v. Truitt Co.*, 17 Ga. App. 263, 86 S. E. 421, S. C. 14 Ga. App. 767, 82 S. E. 465.

When goods are delivered to a carrier for interstate transportation over the lines of several carriers, and the failure to deliver is admitted, under the Carmack Amendment a presumption of negligence arises in an action against the initial carrier. *Brinson v. Norfolk S. R. Co.*, 169 N. C. 425, 86 S. E. 571.

Proof of the delivery of property in good condition to a carrier and its receipt in bad condition establishes a prima facie liability of the initial carrier under the Carmack Amendment, which it has the burden of disproving by any lawful excuse. *Collins v. Denver & R. G. R. Co.*, 181 Mo. App. 213, 167 S. W. 1178.

In an action against an initial carrier under the Carmack Amendment, evidence that it received fresh meat in good condition in a refrigerator car owned by and properly loaded, sealed and iced by the shipper, and that in a reasonable time the car was delivered at destination with the meat spoiled, raises a presumption, notwithstanding the highly perishable nature of fresh meat, that something occurred to it in transit to cause the damage. *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 187 S. W. 149.

It will be presumed, in an action under the Carmack Amendment against an initial carrier for damage to an interstate shipment of freight, that goods received by it from another carrier, were in good condition, where it was shown that they were in that condition when delivered properly loaded to the first carrier. *Barrett v. Northern P. R. Co.*, — Idaho —, 157 Pac. 1016.

The primary liability clause of the Carmack Amendment did not abrogate the rule of evidence that property received in good order by an initial carrier is presumed to have been received in like condition by the succeeding carrier, and that the final delivery in bad order creates a

rebutable presumption that the damage occurred on the line of the last carrier. *Chicago, R. I. & P. R. Co. v. Harrington*, 44 Okla. 41, 143 Pac. 325.

The effect of the Carmack Amendment was to re-establish the common-law rule that the delivery of freight to a carrier in good condition and its arrival in a damaged state, or its nonarrival, creates a presumption of negligence on the part of the carrier, although each succeeding carrier may relieve itself from liability by showing that loss did not occur on its line and by locating the negligent carrier. *Pecos & N. T. R. Co. v. Meyer*, — Tex. Civ. App. —, 155 S. W. 309, 6 N. C. A. 146.

The presumption that an injury to a shipment occurred on the line of the final carrier is not applicable to an action under the Carmack Amendment against an initial carrier, since the latter is answerable irrespective of where the injury occurred. *Carlton Produce Co. v. Velasco, B. & N. R. Co.*, — Tex. Civ. App. —, 131 S. W. 1187.

The fact that the Carmack Amendment makes the initial carrier answerable for damages to or the loss of interstate shipments, does not, in an action against a connecting carrier, affect the presumption that goods delivered to the first carrier in good condition were in like condition when received by the second carrier. *Glassman v. Chicago R. I. & P. R. Co.*, 166 Iowa 254, 147 N. W. 757.

The fact that the Carmack Amendment imposes primary liability on the initial carrier for the faults of succeeding carriers, does not, in an action against the delivering carrier, preclude the application of the rule that the receipt of goods in good order by the initial carrier raises a presumption that they were received in like condition by the succeeding carriers, and that the injury occurred on the delivering carrier's line. *Duvall v. Louisiana W. R. Co.*, 135 La. 189, 65 So. 104.

#### Acceptance of Written in Lieu of Parole Contract.

The acceptance, in lieu of a parole contract, by a shipper of a bill of lading limiting a carrier's liability, will not be presumed from his use of such bill as a means of transportation on the same train with his property. *Panhandle & S. F. R. Co. v. Jones*, — Tex. Civ. App. —, 182 S. W. 1.

#### 5. Burden of Proof.

##### Possession of Bill of Lading.

Since the lawful holder of a bill of lading is the one on whom the Carmack Amendment confers a right of action, the burden is on the plaintiff, in an action against an initial carrier, to prove that he holds

such bill. *Idaho Sheep Co. v. Oregon S. L. R. Co.*, 188 Ill. App. 591.

#### Controverting Recitals of Contract of Affreightment.

In an action for injuries to an interstate shipment the burden is on the shipper to disprove the prima facie admissions of the bill of lading signed by him, that lawful alternative rates based upon valuation were offered him. *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60, L. ed. —, 36 Sup. Ct. Rep. 555.

#### Absence of Negligence.

When the holder of a bill of lading for the transportation of an interstate shipment over the lines of different carriers, proves that the property has not been delivered to the consignee, the burden is cast on the initial carrier, in an action against it, to show that the loss resulted from some cause for which it was not responsible in law or by contract. *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205, affirming — Tex. Civ. App. —, 117 S. W. 169, 170; *Nashville, C. & St. L. R. Co. v. Truitt Co.*, 17 Ga. App. 263, 86 S. E. 421, S. C. 14 Ga. App. 767, 82 S. E. 465.

The burden is on an initial carrier in an action against it under the Carmack Amendment, to show that, under the rules of the common law, the loss of or damage to an interstate shipment came within some one of the well-recognized exemptions from liability. *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 187 S. W. 149.

When there is an intervening human agency which contributes to the loss of an interstate shipment of fruit by freezing, the burden is on the initial carrier, when sued under the Carmack Amendment, to show that safe delivery was prevented by the act of God and not from delay or negligence in transportation. *Pittsburgh, C. C. & St. L. R. Co. v. Mitchell*, 175 Ind. 196, 211, 91 N. E. 735, 93 N. E. 996.

In an action against an initial carrier for the delivery of meat in a decayed condition, it has the burden of showing that such condition was due to the infirmity of the meat, where it was received by the carrier in good condition and transported within a reasonable time. *Cudahy v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 187 S. W. 149.

The receipt by a carrier of an extra charge in addition to the usual freight rate, for heating cars of vegetables in transit to destination over the lines of connecting interstate carriers, being prima facie evidence, in an action against the initial carrier under the Carmack Amend-



ment, that the vegetables were in good condition when received by it, it has the burden of showing, when they were frozen in transit, that the loss was due to causes for which it was not responsible. *Ross v. Maine C. R. Co.*, 114 Me. 287, 96 Atl. 223, S. C. 112 Me. 63, 90 Atl. 711.

The burden resting in the defendant, in an action against an initial carrier under the Carmack Amendment, to establish non-liability as an insurer, does not arise until after the plaintiff establishes the delivery to the carrier of property in good condition and properly prepared for shipment. *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 187 S. W. 149.

### **Limitation of Liability.**

#### **— In General.**

When a carrier relies on a special contract limiting its liability as showing non-liability for damages to an interstate shipment, it has the burden of showing a valid contract and of establishing the reasonableness of the provisions on which it relies. *Toledo, St. L. & W. R. Co. v. Milner*, — Ind. App. —, 110 N. E. 756.

#### **— Federal Laws Relating to Maritime Losses.**

An initial carrier by rail that is sued under the Carmack Amendment for the loss of interstate freight as the result of the sinking of a vessel of a connecting water carrier, when relying on Federal legislation limiting and under some circumstances relieving the water carriers from liability, has the burden of showing that the vessel was seaworthy and properly manned and equipped. *Brinson v. Norfolk S. R. Co.*, 169 N. C. 425, 86 S. E. 371.

### **Consideration for Limitation of Liability.**

In an action under the Carmack Amendment a carrier has the burden of showing a sufficient consideration for a stipulation of a bill of lading limiting its liability. *Panhandle & S. F. R. Co. v. Jones*, — Tex. Civ. App. —, 182 S. W. 1; *International & G. N. R. Co. v. Rathblath*, — Tex. Civ. App. —, 167 S. W. 751.

The burden is on a shipper to show the absence of consideration for a stipulation requiring written notice of claim for damages to be given carrier within 5 days from delivery of property at destination. *Hamilton v. Chicago & A. R. Co.*, 177 Mo. App. 145, 164 S. W. 248.

### **Reasonableness of Stipulations.**

In an action under the Carmack Amendment a carrier has the burden of showing the reasonableness of a provision of a bill of lading limiting its liability. *Panhandle & S. F. R. Co. v. Jones*, — Tex. Civ. App. —, 182 S. W. 1.

The burden of showing the reasonableness of a stipulation in contract for interstate shipment for written notice of claim for damages within one day after their delivery at destination, rests on the carrier. *Hovey v. Tankersley*, — Tex. Civ. App. —, 177 S. W. 153.

### **Delivery of Property to Carrier in Good Condition.**

The burden rests on the shipper, in an action under the Carmack Amendment against an initial carrier, to show that fresh meat was, when delivered to the carrier, in good condition and properly prepared for shipment. *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.* — Mo. App. —, 187 S. W. 149.

### **Negligence.**

In an action against an initial carrier under the Carmack Amendment for damage to fresh meat in transit, the plaintiff, by showing that his icing instructions were not carried out by the various carriers on the journey, did not thereby assume the burden of showing negligence on the part of the carriers, where such evidence was introduced merely to show conditions present in the car when it was delivered at destination, and such evidence did not establish an election by the shipper to base his cause of action on negligence. *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 187 S. W. 149.

### **Joint Liability of Carriers.**

In an action under the Carmack Amendment against both an initial and a connecting carrier for injury to an interstate shipment, in order to establish a joint liability the plaintiff has the burden of showing that the damage complained of occurred on the line of the connecting carrier. *Otrich v. St. Louis, I. M. & S. R. Co.*, 154 Mo. App. 420, 134, S. W. 665.

## **6. Circumstantial Evidence.**

### **In General.**

In an action against an initial carrier under the Carmack Amendment for the delivery in an unwholesome condition, of meat shipped in a car owned, packed, sealed and iced by the shipper, any competent evidence is admissible tending to show that the meat spoiled solely because of its tendency to decay, which may be shown by circumstantial evidence tending to eliminate every possible cause but that, including a failure on the part of the shipper to properly prepare the meat for shipment in a proper car that had sufficient ice facilities. *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 187 S. W. 149.

## 7. Documentary Evidence.

### Contract of Affreightment.

A bill of lading issued under the terms of the Carmack Amendment is evidence of the contract of shipment and not the contract itself. *Bowden v. Philadelphia, B. & W. R. Co.*, — Del. —, 91 Atl. 209.

A bill of lading issued pursuant to the terms of the Carmack Amendment is admissible in evidence in an action against a carrier for an injury to an interstate shipment, although not pleaded by the plaintiff. *Bowden v. Phila. B. & W. R. Co.*, — Del. —, 91 Atl. 209.

In an action against an initial carrier based on the Carmack Amendment for the wrongful delivery of a shipment by the terminal carrier without the production of an order bill of lading with draft attached, under a declaration, alleging that the defendant contracted to transport and deliver the property at its destination, the bill of lading is admissible in evidence although it shows on its face that a connecting carrier, and not the initial carrier was to make the delivery. *Perkett v. Manistee & N. E. R. Co.*, 175 Mich. 253, 141 N. W. 607.

### Letters.

A letter from the claim agent of a terminal carrier showing the receipt of a shipper's claim for damages to an interstate shipment, is admissible in an action against the initial carrier in an action based on the Carmack Amendment, where the bill of lading required claims for damages to be made in writing to the carrier at either the point of delivery or origin within 4 months, in order to hold the carrier responsible for damages. *Baltimore, C. & A. R. Co. v. Sperber*, 117 Md. 595, 84 Atl. 72.

In an action under the Carmack Amendment against an initial carrier for the wrongful diversion and delivery of property by the terminal carrier without the production of an order bill of lading with draft attached, a letter in which the shipper protested to the connecting carrier against the stoppage of the car as soon as the former learned of it, is admissible on the question whether the shipper acquiesced in such diversion. *Perkett v. Manistee & N. E. R. Co.*, 175 Mich. 253, 141 N. W. 607.

## 8. Tariffs, Classifications and Schedules.

### In General.

In an action for damages resulting from delay in delivering an interstate shipment, the schedules filed with the Interstate Commerce Commission by an express company are admissible in evidence in or-

der to determine the validity and effect of restrictions in the bill of lading on the liability of the carrier. *Southern Express Co. v. Byers*, 240 U. S. 612, 60 L. ed. —, 36 Sup. Ct. Rep. 410, reversing 165 N. C. 542, 81 S. E. 741.

An initial carrier, when sued for delay of a connecting carrier in delivering a car of fruit at destination too late for market, may prove that its published tariffs as filed with the Interstate Commerce Commission, provided for a higher rate when shipment was not made subject to the terms of the bill of lading. *New York, P. & N. R. Co. v. Peninsular Produce Co.*, 122 Md. 215, 89 Atl. 433, affirmed 240 U. S. 34, 60 L. ed. —, 36 Sup. Ct. Rep. 230.

### Shipper's Familiarity With.

Evidence is admissible, in an action against an electric railway company for the loss of an interstate express shipment on the lines of a connecting carrier, of a course of dealings between the plaintiff and the defendant relating to the rates for such shipments showing that the shipper was thoroughly familiar with a provision of the tariff of the connecting carrier, which was on file with the Interstate Commerce Commission, limiting its liability for loss to \$50 unless a greater value was declared and a higher rate paid, although the bill of lading issued by the initial carrier was silent on the subject. *Glenlyon Dye Works v. Interstate Express Co.*, 36 R. I. 588, 91 Atl. 5.

## 9. Negligence.

Burden of showing, see supra XIII, G. 5.  
Presumptions of negligence, see supra XIII, G. 4.

## 10. Damages.

Limitations on amount of recovery, see supra XI, I, 4.

### In General.

Evidence of injuries caused an interstate shipment by a connecting carrier is admissible in an action under the Carmack Amendment against an initial carrier to prove the extent of its liability. *Pecos & N. T. R. Co. v. Crews*, — Tex. Civ. App. —, 139, S. W. 1049.

It may be shown, in an action against a carrier for delay in transporting an interstate shipment of live stock, where it claims that the delay was unavoidable because due to the destruction of a bridge by fire not caused by negligence, that a similar shipment made from the same place and for the same destination, made a day later than the one in question arrived at destination a day earlier. *Norfolk & W. R. Co. v. Steele*, 117 Va. 788, 86 S. E. 124.

**11. Parole Evidence.**

(No decisions.)

**12. Meaning of Words and Terms.****In General.**

In an action against a carrier under the Carmack Amendment, based on the violation of a special agreement to heat cars of vegetables to their destination, the plaintiff may show the meaning of the terms "heater charges," the market price of the vegetables at the time and place of shipment, as well as the meaning of the term "lighterage free," and the exact point of delivery as known by its local designation. *Ross v. Maine C. R. Co.*, 114 Me. 287, 96 Atl. 223, S. C. 112 Me. 63, 90, Atl. 711.

**13. Scope of Issues and Variance.****In General.**

Evidence tending to show damage from delay in the delivery of property is admissible in an action against an initial carrier based on the Carmack Amendment, under a declaration averring in substance that the defendant as a common carrier, received goods of a stated value for interstate transportation, for safe carriage with due and proper care, for a certain reasonable reward, and that the defendant so negligently behaved and conducted itself that by reasons of its carelessness, negligence and default the property was lost. *Norfolk Truckers' Exchange v. Norfolk S. R. Co.*, 116 Va. 466, 82 S. E. 92.

**14. Weight and Sufficiency.****Condition of Property.**

The receipt by a carrier of an extra charge, in addition to the usual freight rate, for heating cars of vegetables to their destination, although passing over the lines of connecting interstate carriers, is prima facie evidence, in an action against the initial carrier under the Carmack Amendment for the breach of such agreement, that the vegetables were in good condition when received by it. *Ross v. Maine C. R. Co.*, 114 Me. 287, 96 Atl. 223, S. C. 112 Me. 63, 90 Atl. 711.

**To Show Negligence.**

Where a sound young mule was delivered to a carrier and loaded with others in a car, and a few hours later, after the car had been moved a short distance, it was found down and the other mules were removed from the car and the injured one left alone in heated condition in the car on a cold night, and it died shortly afterwards, the evidence was sufficient in an action against a carrier under the Carmack Amendment, to show negligence. *Nash-*

*ville, C. & St. L. R. Co. v. Truitt Co.*, 17 Ga. App. 263, 86 S. E. 421, S. C. 14 Ga. App. 767, 82 S. E. 465.

A prima facie case is established, in an action under the Carmack Amendment against an initial carrier, by showing the delivery to such carrier of fresh meat in good condition, in cars owned by and properly packed, sealed and iced by the shipper, and the subsequent delivery of the meat at destination, within a reasonable time, in a damaged condition. *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 187 S. W. 149.

**H. Instructions.****1. In General.****When No Evidence to Sustain.**

An instruction requested by the defendant, in an action under the Carmack Amendment for the breach of a special contract to heat cars of vegetables to their destination, was properly refused, when not supported by the pleadings or evidence, to the effect that if the plaintiff had knowledge that the defendant acted as the agent of a car company merely when it accepted such charges, the plaintiff could not recover. *Ross v. Maine C. R. Co.*, 114 Me. 287, 96 Atl. 223, S. C. 112 Me. 63, 90 Atl. 711.

**Heating Cars.**

In an action under the Carmack Amendment for the breach of a special agreement to heat cars of vegetables, the jury was properly instructed that by accepting a heater charge the defendant undertook to properly heat the cars while in transit to their destination. *Ross v. Maine C. R. Co.*, 114 Me. 287, 96 Atl. 223, S. C. 112 Me. 63, 90 Atl. 711.

**Condition of Merchandise.**

Since an indorsement by an initial carrier on a bill of lading for a car of meat which was packed, sealed and iced by the shipper, in a refrigerator car owned by the latter, that the property was "in apparent good order, contents and condition of packages unknown," was not an admission by the carrier of the good condition of the meat and the proper icing of the car; and as an indorsement on the bill by the shipper that the meat had been properly inspected under the Act of Congress and that it was "sound, healthful, wholesome and fit for human use" was not binding on the carrier, it was error to instruct the jury, in an action under the Carmack Amendment against the initial carrier for delivery of the meat in a damaged condition, that it was in good condition and properly packed and iced when delivered to the carrier. *Cudahy Packing Co. v.*

Atchison, T. & S. F. R. Co., — Mo. App. —, 187, S. W. 149.

## 2. Carrier's Liability.

Liability as insurer in general, see *supra* XI, L, 2.

### As Insurer.

It is reversible error to instruct the jury in an action for the loss of goods carried in interstate commerce, that the carrier was liable as an insurer. *Missouri, O. & G. R. Co. v. French*, — Okla. —, 152 Pac. 591.

## 3. Limitation of Liability.

Limitation of liability in general, see *supra* XI, I.

### In General.

Where a carrier asserted a contract limiting its liability for an interstate shipment, it was error to instruct the jury that it must appear that the shipper was granted a rate less than that exacted extended to all others for like service, since such rate must be open to all. *Stubblefield v. St. Louis & S. F. R. Co.*, — Mo. App. —, 184 S. W. 149.

### Exemption of Liability for Delays.

In an action for damages caused by a delay in the interstate transportation of live stock an instruction was properly refused when to the effect that a stipulation of the bill of lading exempting the carrier from liability for delays in reaching market was valid and binding on the shipper, although the option or opportunity to ship under a higher rate at the carrier's risk was not actually given him, since the instruction did not make the carrier answerable if the delay was caused by its negligence. *St. Louis & S. F. R. Co. v. Peery*, 40 Okla. 258, 138 Pac. 144.

### Binding Effect of Stipulations.

In an action against a carrier for damages to an interstate shipment, it was error to refuse to instruct the jury to the effect that a shipper was bound by the stipulations of the bill of lading although he was not aware thereof and did not assent thereto other than by his acceptance of the bill. *Spada v. Penn. R. Co.*, 86 N. J. L. 187, 92 Atl. 379; *Albrecht v. Penn. R. Co.*, 86 N. J. L. 355, 92 Atl. 381.

It was error to instruct the jury, in an action against a carrier for injury to an interstate shipment, to the effect that he was not bound by the stipulations of the bill of lading unless assented to by him, and that the presumption of assent arising from the acceptance of the bill without dissent was rebuttable by evidence that he

did not know thereof nor assent to the terms and limitations of the bill. *Spada v. Penn. R. Co.* 86 N. J. L. 187, 92 Atl. 379; *Albrecht v. Penn. R. Co.*, 86 N. J. L. 355, 92 Atl. 381.

In an action under the Carmack Amendment it is prejudicial error to refuse to instruct the jury that a stipulation in the bill of lading that \$30 was the maximum value of live stock per head, when made in consideration of the lower of two established rates, was the limit of the plaintiff's recovery. *Southern R. Co. v. Bynum*, — Ala. —, 69 So. 820.

## 4. Negligence.

(No decisions.)

## 5. Delays in Transit.

### In General.

In an interstate shipment of watermelons it was erroneous to refuse to charge "that the defendant was not bound to carry or transport the watermelons by any particular train, nor within any particular time, nor in time for any particular market, nor otherwise than with reasonable dispatch with reference to other business of the defendant as its general business permitted," when it appeared that such request embodied the exact language of the bill of lading. *Olivit v. Penn. R. Co.*, 88 N. J. L. 241, 96 Atl. 582; same v. same, 88 N. J. L. 376, 377, 96 Atl. 587; *Spada v. Penn. R. Co.*, 88 N. J. L. 388, 96 Atl. 587; *Albrecht v. Penn. R. Co.*, 88 N. J. L. 367, 96 Atl. 587.

In a suit under the Carmack Amendment, against a carrier for damages caused by a delay in an interstate shipment of watermelons, it is not erroneous to refuse to charge that under the circumstances it was the duty of the defendant to move the most perishable fruit first, and that the holding back of less perishable fruit, viz., watermelons, until peaches had been delivered, was not negligence, when there was no evidence that the peaches in question were more perishable than the watermelons at the time both were handled by the carrier. *Carr v. Penn. R. Co.*, 88 N. J. L. 325, 96 Atl. 588, *Olivit v. Penn. R. Co.*, N. J. L. 378, 96 Atl. 589.

Although an instruction that an initial carrier was liable if a connecting carrier failed to promptly transmit and deliver an interstate shipment, was erroneous, it was not prejudicial to the defendant, in an action under the Carmack Amendment, where other instructions correctly restricted the carrier's liability to a failure to transmit within a reasonable time. *Karr v. Baltimore & O. R. Co.*, — W. Va. —, 86 S. E. 43.

The refusal to submit to the jury at

the request of the defendant, in an action under the Carmack Amendment against an initial carrier, the question whether a car of fruit was transported with reasonable dispatch, was not erroneous where the evidence showed that transportation was not made with customary expedition, and the issue whether the fruit was delivered without delay was submitted to the jury by an instruction given for the plaintiff. *New York, P. & N. R. Co. v. Peninsular Produce Co.*, 122 Md. 215, 89 Atl. 433, affirmed 240 U. S. 34, 60 L. ed. —, 36 Sup. Ct. Rep. 230.

## 6. Notice of Damage Claims.

### In General.

The jury was erroneously instructed, in an action against a carrier for injuries sustained by an interstate shipment of live stock, to the effect that a special contract whereby the carrier sought to limit the shipper's right to a cause of action depending on written notice of injury being made within one day after the delivery of the stock at destination, was null and void under an express provision of a state constitution, since the contract was controlled by the Federal laws. *St. Louis & S. F. R. Co. v. Wynn*, — Okla. —, 156 Pac. 346.

## 7. Damages.

### As of Place of Shipment.

The jury was correctly instructed, in an action against a carrier under the Carmack Amendment for the breach of an agreement to heat cars of vegetables to destination, that the damages should be computed as of the place of shipment, where the instruction was substantially in the words of the bill of lading. *Ross v. Maine C. R. Co.*, 114 Me. 287, 96 Atl. 223, S. C. 112 Me. 63, 90 Atl. 711.

Under a bill of lading for an interstate shipment providing that the amount of any loss or damages for which the carrier is liable "shall be computed on the basis of the value of the property, being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid, at the place and time of shipment," it is proper to instruct the jury, in action under the Carmack Amendment, that if the carrier was liable for damage to the shipment, it included freight charges paid by the plaintiff. *Carr v. Penn. R. Co.*, 88 N. J. L. 235, 96 Atl. 588; *Olivit v. Penn. R. Co.*, 88 N. J. L. 378, 96 Atl. 589.

The failure to instruct the jury that the value of fruit at the time and place of shipment determined the liability of the initial carrier under the Carmack Amendment, for delay of a connecting carrier in delivering the fruit at destination, is not prejudicial to the defendant, where the

damages awarded the plaintiff were not greater than such value. *New York, P. & N. R. Co. v. Peninsular Produce Co.*, 122 Md. 215, 89 Atl. 433, affirmed 240 U. S. 34, 60 L. ed. —, 36 Sup. Ct. Rep. 230.

Since a stipulation in a bill of lading that in the event of the loss or injury to an interstate shipment, the value or cost of the property at the point of shipment should control, does not establish the measure of damages in an action against the initial carrier under the Carmack Amendment for a delay occurring on the lines of connecting carriers, it was not error to refuse to instruct the jury that the measure of damages was the difference in value of the goods at the time and place of shipment and the time of their receipt by the consignee. *Ft. Smith & W. R. Co. v. Awbrey*, 39 Okla. 270, 134 Pac. 1117.

### Market Prices at Destination.

In an action under the Carmack Amendment for delay in the delivery of fruit at destination, an instruction was properly given to the effect that the plaintiff was entitled to recover the value of the fruit on the market day on which it should have arrived if forwarded and transported with reasonable care, diligence and exertion, less transportation and refrigeration charges. *Baltimore, C. & A. R. Co. v. Sperber*, 117 Md. 595, 84 Atl. 72.

### Mental Anguish.

In an action for damages resulting from the delay of an express company in delivering a casket and grave clothing intended for the plaintiff's wife, when shipped in interstate commerce, the jury should be instructed that there can be no recovery for mental suffering. *Southern Express Co. v. Byers*, 240 U. S. 612, 60 L. ed. —, 36 Sup. Ct. Rep. 410, reversing 165 N. C. 542, 81 S. E. 741.

## I. Directing Verdict.

### In General.

A peremptory instruction for the defendant cannot be given in an action against an initial carrier under the Carmack Amendment, where the plaintiff's allegation that meat was delivered to such carrier in good condition in refrigerator cars owned and packed, sealed and iced by the plaintiff, was denied by the defendant, although the former's testimony tended to prove such allegations, unless the bill of lading admitted such fact, since otherwise the instruction was tantamount to telling the jury that the plaintiff's evidence as to the condition of the meat and the icing of the car must be believed. *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 187 S. W. 149.

### J. Questions of Law and Fact.

#### In General.

When, in the interstate transportation of live stock, inferior animals are substituted by the carrier for some of those originally shipped, it is a question for the jury, in an action based on the Carmack Amendment for a conversion of the stock, whether the explanation offered by the carrier is sufficient to negative the idea of a wrongful conversion and of negligence on its part amounting to gross or wanton neglect. *Nashville, C. & St. L. R. Co. v. Truitt Co.*, 14 Ga. App. 767, 82 S. E. 465, S. C. 17 Ga. App. 236, 86 S. E. 421.

#### Negligence.

When the last successive carrier seeks to relieve itself from liability, in an action based on the Carmack Amendment, for damages caused by delay in an interstate shipment of watermelons, because of a condition of the bill of lading that the carrier, except in case of negligence, should not be liable for damages to property resulting from delay in transportation when caused by a strike, and the evidence tended to show that the strike was over before the shipment was received by the carrier, and that the delay was caused by the use by the carrier of the watermelon track at the destination point during and following the strike, in the delivering of peaches usually delivered elsewhere, to the exclusion of the watermelons, which were placed on a storage track at an intermediate point, the question whether the delay was caused by the negligence of the carrier or by the strike, was for the jury. *Carr v. Penn. R. Co.*, 88 N. J. L. 235, 96 Atl. 588; *Olivit v. Penn. R. Co.*, 88 N. J. L. 378, 96 Atl. 589.

In an action under the Carmack Amendment against an initial carrier for the delivery of meat in damaged condition, which was shipped in cars owned, loaded, sealed and iced by the shipper, where there was evidence of the sound condition of the meat when delivered to the defendant, and that the latter and the connecting carriers followed the shipper's icing directions, and the defendant produced evidence either direct or circumstantial, or by a process of elimination, tending to show that the decay of the meat was due to its own infirmity, or created a reasonable inference to that effect, unaffected by any failure of the carrier's public duty, the question whether the meat spoiled from its own tendency to decay is for the jury. *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 187 S. W. 149.

In an action under the Carmack Amendment against an initial carrier for the delivery of meat in a spoiled condition, when there is either direct or circumstantial evi-

dence tending to show that it spoiled from its inherent tendency to decay, and such evidence tends to eliminate every other cause, the question of the defendant's liability is for the jury. *Cudahy Packing v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 187 S. W. 149.

#### Reasonableness of Stipulations.

The reasonableness of a stipulation of a contract for the interstate transportation of livestock, requiring the shipper to give the carrier written notice of claim for damage within 5 days after the removal of the animals from the car, is, when the facts are undisputed, a question of law. *Crawford v. Southern R. Co.*, — S. C. —, 86 S. E. 19.

The reasonableness of a stipulation in a contract for interstate shipment for notice of claim for damages, is a question of law for the court. *Atchison, T. & S. F. R. Co. v. Word*, — Tex. Civ. App. —, 159 S. W. 575.

Whether one day is a reasonable time in which to give notice of damages to livestock after their delivery at destination, is a question for the jury in an action against an initial carrier under the Carmack Amendment, where the nearest station from the place of destination where notice could be given was 35 miles distant. *St. Louis, I. M. & S. R. Co. v. Furlow*, 89 Ark. 404, 117 S. W. 517.

#### Waiver of Stipulations.

Whether negotiations between a shipper and a carrier for the adjustment of a claim for injury to an interstate shipment of livestock, amounts to an implied waiver by the carrier of a stipulation of the contract of carriage limiting to 6 months the time within which an action should be sustainable, is one of fact to be determined by the jury under proper instructions. *St. Louis, I. M. & S. R. Co. v. Patterson*, — Okla. —, 156 Pac. 216 (reported in advance sheets only).

### K. Costs, Interests and Attorney Fees.

#### Interest.

In an action under the Carmack Amendment against an initial carrier for the loss of, and injury to, an interstate shipment of freight, the plaintiff is not entitled to interest prior to judgment, since his claim is for unliquidated damages not susceptible of ascertainment by computation or market value. *Barrett v. Northern P. R. Co.*, — Idaho —, 157 Pac. 1016.

#### Attorney's Fees.

The provisions of section 8 of the act to regulate commerce, as to the allowance of a reasonable attorney's fee in actions against carriers for damages caused by a

violation of the act, does not apply to actions under the Carmack Amendment to recover from initial carriers for loss or damage to interstate movements of freight occurring on the lines of connecting carriers. *Atlantic C. L. R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 Sup. Ct. Rep. 164, 31 L. R. A. (N. S.) 7, affirming 168 Fed. 990; *Louisville & N. R. Co. v. Scott*, 219 U. S. 209, 55 L. ed. 183, 31 Sup. Ct. Rep. 171, affirming 133 Ky. 724, 118 S. W. 990, 19 Ann. Cas. 392.

A state statute allowing attorney fees in actions against carrier for shortage in shipments of grain, seed or hay, is not when applied to interstate shipments obnoxious to the Carmack Amendment. *Harold v. Atchison, T. & S. F. R. Co.*, 93 Kan. 456, 144 Pac. 823, reversed 241 U. S. 371, 60 L. ed. —, 36 Sup. Ct. Rep. 665.

### L. Judgment.

#### Joint Judgment Against Initial and Succeeding Carriers.

A joint judgment cannot be rendered against both defendants in an action under the Carmack Amendment against an initial and a negligent connecting carrier, in the absence of a showing of joint or concurrent negligence. *Walker v. St. Louis & S. F. R. Co.*, 162 Mo. App. 374, 142 S. W. 729.

In an action against both an initial and a connecting carrier for injuries caused by the latter to an interstate shipment, the former cannot complain of a judgment against it for a portion of the damages only, since under the Carmack Amendment it is answerable for the whole damage. *St. Louis & S. F. R. Co. v. Fenley*, — Tex. Civ. App. —, 118 S. W. 845.

### M. Appeal and Error.

#### 1. In General.

(No decisions.)

#### 2. Federal Question.

#### When Involved.

The denial by a state court of an express company's defense that its liability for the loss of an interstate shipment was governed by the Carmack Amendment rather than by the laws of the forum, involves a Federal question sufficient to give the Supreme Court of the United States jurisdiction to review such ruling. *Adams Express Co. v. Cronniger*, 226 U. S. 491, 57 L. ed. 314, 33 Sup. Ct. Rep. 148, 44 L. R. A. (N. S.) 257.

A Federal question involving the validity of an interstate shipping contract was

raised in a state court, notwithstanding that counsel for the carrier, for the purpose of the case, conceded that a provision of the receipt limiting the carrier's liability to \$50 was void both under the Carmack Amendment and the state law, when such concession was made merely for the sake of the argument as to a matter of law, since the shipping contract was not withdrawn from the case nor its validity from the consideration of the court. *Wells, Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267, reversing — Tex. Civ. App. —, 125 S. W. 614.

A Federal question is presented where the record shows that a state court of last resort, in an action under the Carmack Amendment against an initial carrier, held that a stipulation of a bill of lading for the interstate transportation of livestock, requiring, as a condition precedent to a right of action, the giving of written notice by the shipper of a claim for injury to the stock in transportation to some officer or agent of "said carrier" at point of destination before the animals were removed and mingled with others, was inoperative because no officer or agent of the initial carrier to whom such notice could be given, was accessible at the point of destination on the line of a connecting carrier. *Northern P. R. Co. v. Wall*, 241 U. S. 87, 60 L. ed. —, 36 Sup. Ct. Rep. 493, reversing 50 Mont. 122, 145 Pac. 291.

Where, on the arrival of an interstate shipment at its destination, the consignee paid the charges, receipted for the property and removed a portion thereof, and, with the consent of the carrier, left the remainder for subsequent removal at the former's convenience, whether the contract created by the bill of lading was discharged so that the carrier was liable as warehouseman, and whether, under a law of the forum the burden of disproving negligence rested on the carrier, are Federal questions. *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. ed. —, 36 Sup. Ct. Rep. 469, reversing 99 S. C. 422, 83 S. E. 781.

The denial by a state court to a carrier of the benefit of the Interstate Commerce Act in an action for the loss of freight moved in interstate commerce, when set up in the pleadings and supported by testimony, is reviewable by the Supreme Court of the United States. *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556, reversing 36 Okla. 435, 129 Pac. 20.

There was no denial of a Federal right, which was reviewable by the Supreme Court of the United States, in an action against a connecting carrier for the destruction by fire of an interstate shipment, by the overruling of the contention that

under the Carmack Amendment and the terms of the bill of lading, the carrier was not liable unless the plaintiff affirmatively showed that the property was destroyed in consequence of the defendant's negligence, where the court found and the evidence supported the conclusion that the fire was due to the negligence of the carrier in failing to remove from a railway yard when it was flooded, the cars containing the shipment, which were destroyed by fire communicated from adjoining cars which were ignited when the water reached their cargoes of lime. *New Orleans & N. E. R. Co. v. National Rice Mill Co.*, 234 U. S. 80, 58 L. ed. 1223, 34 Sup. Ct. Rep. 726, dismissing writ of error to 132 La. 615, 61 So. 708.

The refusal of a state court of last resort to pass on the question whether the Interstate Commerce Act controls a case, because raised for the first time in the appellant's supplemental brief, does not present a Federal question that is reviewable by the Supreme Court of the United States on writ of error. *Louisville & N. R. Co. v. Woodford*, 234 U. S. 46, 58 L. ed. 1202, 34 Sup. Ct. Rep. 739, dismissing writ of error to 152 Ky. 398, 153 S. W. 722, S. C. 153 Ky. 185, 154 S. W. 1083.

### 3. Admission or Rejection of Evidence.

See also evidence, *supra* XIII, G.

#### In General.

Where, in an action against a carrier under the Carmack Amendment for damage to fruit in shipment, records of inspections of the fruit at destination were admitted in evidence, the defendant was not prejudiced by endorsements thereon to the effect that its damaged condition was due to rough handling by the carrier, where no objection to the incompetency of such statements was made when the reports were offered in evidence. *Gamble-Robinson Commission Co. v. Union P. R. Co.*, 262 Ill. 400, 104 N. E. 666, Ann. Cas. 1915 B, 89, affirming 180 Ill. App. 256.

Where the agent of an initial carrier was not authorized to make a contract of interstate shipment with unlimited liability, such carrier, in an action for injury to such shipment when made under a contract of limited liability, was not harmed by the admission of evidence that the shipper was not informed that there were two rates, one of which was with unlimited liability, since, as the shipper was not given an opportunity to elect between such rates, the contract of shipment was void. *Cleveland, C. C. & St. L. R. Co. v. Hayes*, 181 Ind. 87, 102 N. E. 34, 103 N. E. 839, S. C. on rehearing — Ind. —, 104 N. E. 581.

In an action against an intrastate electric railway company for the loss of an interstate express shipment on the lines of a connecting carrier, where the trial court

held that the former was an initial carrier within the meaning of the Carmack Amendment, the plaintiff was not prejudiced by the admission of evidence of a course of dealing between him and the initial carrier tending to show that such carrier was the plaintiff's agent in delivering the shipment to the connecting carrier. *Glenlyon Dye Works v. Interstate Express Co.*, 36 R. I. 588, 91 Atl. 5.

A carrier is not prejudiced, in an action based on the Carmack Amendment, by the admission of evidence on the part of the plaintiff that he received the goods at one point and billed them to a point in another state, where such facts were also shown by the bill of lading. *Ross v. Maine C. R. Co.*, 114 Me. 287, 96 Atl. 223, S. C. 112 Me. 63, 90 Atl. 711.

### 4. Instructions.

See general Instructions, *supra* XIII, H.

#### Damages.

An erroneous instruction as to the measure of damages in an action against an initial carrier, under the Carmack Amendment, for a delay beyond its line in the delivery of a carload of fruit at the market, will not justify the reversal of a judgment for the plaintiff, where it did not exceed the maximum liability fixed by the bill of lading. *New York, P. & N. R. Co. v. Peninsular Produce Co.*, 240 U. S. 34, 60 L. ed. —, 36 Sup. Ct. Rep. 230, affirming 122 Md. 215, 89 Atl. 433.

### 5. Questions Not Raised Below.

#### Controlling Effect of Carmack Amendment.

That a shipment was controlled by the Carmack Amendment will not be considered when the question is raised for the first time in an appellate court. *Louisville & N. R. Co. v. Woodford*, 152 Ky. 398, 153 S. W. 723.

Whether the Carmack Amendment precludes an action against a terminal carrier for injury to an interstate shipment, will not be considered on appeal, where such question was not covered by the pleadings nor included in the motion for a directed verdict or the request for instructions. *Glassman v. Chicago, R. I. & P. R. Co.*, 166 Iowa 254, 147 N. W. 757.

### 6. Harmless Error.

(No decisions.)

## XIV. CRIMINAL LIABILITY.

(Will be covered in Quarterly for April, 1917.)



# EMPLOYERS' LIABILITY ACT

## FEDERAL

Act April 22, 1908, Ch. 149, 35 Stat. at Large, 65, U. S. Comp. St. Supp. 1911, p. 1322, Fed. Stat. Anno. 1909 Supp. p. 584, amended April 5, 1910, Ch. 143, 36 Stat. at Large 291, U. S. Comp. Stat. Supp. 1911, pp. 1324, 1325, U. S. Comp. Stat. 1913, §§ 8657-8665, Fed. Stat. Anno. Supp. 1912, p. 335.\*

- I. VALIDITY.
  - A. Act of 1906.
    1. In General.
    2. In District of Columbia and Territories.
  - B. Act of 1908.
    1. In General.
    2. Effect of Limitation to Carriers by Rail.
    3. Effect of Restriction on Freedom of Contract.
    4. Effect of Abrogation of Common-Law Defenses.
    5. Effect of Conferring Jurisdiction on State Courts.
    6. Effect of Prohibiting Removal from State Courts.
    7. Effect of Designating Beneficiaries.
- II. NATURE AND CONSTRUCTION.
  - A. In General.
  - B. Remedial Character.
  - C. Liberal or Strict Construction.
  - D. Construction of Words and Phrases.
  - E. Construction by State Courts.
- III. OPERATION.
  - A. In General.
  - B. Territorial Extent.
  - C. Exclusiveness of Remedy.
  - D. Effect on Particular Laws.
    1. In General.
    2. Common Law.
    3. State Laws.
      - (a) In General.
      - (b) Workmen's Compensation Acts.
    4. Territorial Laws.
  - E. Retroactive Effect.
- IV. CONTRACTS AGAINST AND RELEASES FROM LIABILITY.
  - A. In General.
  - B. Contracts Antedating Federal Act.
  - C. Contracts Between Express Companies and Employees.
  - D. Contracts Between Pullman Company and Employees.
  - E. Contracts With Student Employees.
  - F. Contracts With Independent Contractors.
  - G. Relief Department Contracts.
- H. Releases of Existing Causes of Action.
  - I. Stipulations for Notice of Injury.
- V. WHAT CARRIERS AND TRAFFIC WITHIN ACT.
  - A. In General.
  - B. Carriers of Passengers.
  - C. Terminal Companies.
  - D. Electric Railway Companies.
  - E. Carriers Operating Boats.
  - F. Logging Roads.
  - G. Lessors and Lessees.
- VI. WHAT EMPLOYEES WITHIN THE ACT.
  - A. In General.
    1. Necessity for Employment in Interstate Commerce.
    2. Test of Employment in Interstate Commerce.
    3. Employees of Interstate Carriers Engaged in Intrastate Commerce.
  - B. Scope of Employment.
    1. What Within.
    2. Injuries Received Without.
  - C. Employees Engaged in Original Construction Work.
    1. In General.
    2. Tracks, Bridges and Tunnels Not Open for Traffic.
    3. Buildings.
    4. Signal Systems.
  - D. Employees Demolishing Buildings.
  - E. Employees Engaged in Maintenance and Repair Work.
    1. In General.
    2. Inspectors.
    3. Bridges.
    4. Signal Systems.
    5. Telegraph Lines.
    6. Tracks Used for Interstate Traffic.
    7. Tracks Used for Interstate and Intrastate Traffic.
    8. Switches and Switchtracks.
    9. Relaying Rails.
    10. Pumping Plants.
    11. Work Train Employees.
    12. Ballasting Tracks.
    13. Cleaning Up Wrecks.
    14. Handling Old Rails.
    15. Removing Snow.
    16. Turntables.
    17. Repairmen Sleeping in Bunk Cars.
    18. Moving Buildings on Cars.
  - F. Employees Connected with Movement of Interstate Trains.
    1. In General.
    2. Particular Employees.
      - (a) Air Hose Couplers.
      - (b) Baggage Men.

\*See Appendix for text of act.

## EMPLOYERS' LIABILITY ACT—FEDERAL

- (c) Boat Employees.
- (d) Car Inspectors.
- (e) Caretaker on Dead Engine.
- (f) Cinder Pit Cleaner.
- (g) Coal Dock Hands.
- (h) Coal Miners.
- (i) Crossing Watchmen.
- (j) Deadheading Employees.
- (k) Electric Railway Employees.
- (l) Engine Dispatchers.
- (m) Express Messengers.
- (n) Freight Handlers.
- (o) Gardeners.
- (p) Logging Road Employees.
- (q) Pullman Porters.
- (r) Special Officers.
- (s) Station Agents.
- (t) Student Employees.
- (u) Yard and Seal Clerks.
- (v) Callers.
- 3. Preparations for Trip.
  - (a) In General.
  - (b) Making Up Trains.
  - (c) Preparing and Inspecting Engines.
  - (d) Setting Switches.
  - (e) Leaving Train for Private Purposes.
- 4. Movement of Trains.
  - (a) In General.
  - (b) Moving Interstate Train on Intrastate Portion of Journey.
  - (c) Injuries Caused by Intrastate Cars.
  - (d) Picking up and Setting Out Intrastate Cars.
  - (e) Returning with Engine and Caboose after Moving Interstate Train.
  - (f) Empty Cars.
  - (g) Cooling Hot Boxes.
- 5. Conduct at End of Run.
  - (a) In General.
  - (b) Switching.
  - (c) Leaving Carrier's Premises for Private Purposes.
- 6. Termination of Employment.
- G. Employees Connected with Movement of Intrastate Trains.
  - 1. In General.
  - 2. Car Inspectors.
  - 3. Trains Containing Interstate Traffic.
  - 4. Picking up and Setting Out Cars.
  - 5. Empty Cars.
- H. Moving Cars of Fuel and Water.
  - I. Employees Engaged in Switching.
    - 1. In General.
    - 2. Interstate Cars.
    - 3. Intrastate Cars.
    - 4. Empty Cars.
    - 5. Private Cars.
    - 6. Cars on Repair Track.
  - J. Roundhouse Employees.
  - K. Shop Employees.
    - 1. In General.
    - 2. Repairs in General.
    - 3. Cars Used in Interstate and Intrastate Commerce.
    - 4. Empty Cars.
    - 5. Wrecking Cars.
    - 6. Miscellaneous Employees.
  - L. Employees on Way to or from Work.
- VII. NEGLIGENCE FOR WHICH CARRIER ANSWERABLE.
  - A. In General.
  - B. Employer as Insurer.
  - C. Negligence as Foundation of Liability.
  - D. Necessity that Injury be Caused by Person or Instrumentality Employed in Interstate Commerce.
  - E. Accident Attributable to Injured Person's Negligence.
  - F. Negligence in General.
    - 1. In General.
    - 2. Insufficient Number of Employees.
    - 3. Instructing Employees.
    - 4. Warning of Danger.
    - 5. Failure to Discover Employee's Peril in Time to Avoid Accident.
    - 6. Failure to Exercise Care After Discovering Employee's Peril.
    - 7. Accidents Ordinary Care Could Not Prevent.
    - 8. Rules and Regulations.
      - (a) In General.
      - (b) Failure to Promulgate.
      - (c) Violation by Carrier or Co-employer.
      - (d) Violation by Injured Employee.
      - (e) Abrogation.
    - 9. Orders Negligently Given.
    - 10. Violation of Orders.
    - 11. Violation of Municipal Ordinances.
    - 12. Negligence of Fellow Servants.
      - (a) In General.
      - (b) Abolition of Common-Law Rule.
      - (c) Liability for Negligence of.
    - 13. Concurring Negligence of Coemployee and Injured Servant.
    - 14. Safe Place.
      - (a) In General.
      - (b) Tracks.

- (c) Inspection.
  - (d) Tracks Close Together.
  - (e) Structures Near Track.
  - (f) Cars Not in Clear.
  - (g) Failure to Provide Derail.
  - (h) Bridges.
  - (i) Overhead Obstructions.
  - (j) Narrow Freight and Roundhouse Doors.
  - (k) Defective Platforms.
  - (l) Obstructions on Floors.
  - (m) Pits.
  - (n) Ways and Paths.
  - 15. Defective Appliances and Tools.
    - (a) In General.
    - (b) Engines.
    - (c) Cars.
    - (d) Machinery.
    - (e) Tools.
  - 16. Violation of Safety Statutes.
    - (a) In General.
    - (b) Federal Laws.
    - (c) State Laws.
  - 17. Movement of Engines and Cars.
    - (a) In General.
    - (b) Orders.
    - (c) Improper Meeting Point.
    - (d) Lookout and Warning Signals.
    - (e) Excessive Speed.
    - (f) Failure to Observe Signals.
    - (g) Starting or Stopping with Unnecessary Violence.
    - (h) Kicking Cars.
    - (i) Running Switches.
    - (j) Stopping Train on Main Track at Meeting Point.
    - (k) Failure of Crew of First Train at Meeting Point to Set Switch.
  - 18. Miscellaneous Acts.
    - (a) In General.
    - (b) Gross Negligence.
    - (c) Use of Wooden Coal Cars.
    - (d) Jumping from Train in Fright.
    - (e) Sportive Acts of Employees.
    - (f) Electric Currents.
- VIII. PROXIMATE CAUSE.
- A. In General.
  - B. Negligence of Fellow Servants.
  - C. Defective Appliances.
    - 1. In General.
    - 2. Engine and Cars.
    - 3. Tools.
  - D. Safe Place.
    - 1. In General.
    - 2. Cars Not in Clear.
    - 3. Misplaced Switches.
    - 4. Unguarded Machinery.
    - 5. Structures and Obstructions Near Tracks.
  - E. Acts of Injured Employee.
  - F. Movement of Trains.
    - 1. In General.
    - 2. Excessive Speed.
    - 3. Failure to Give Warning Signals.
- IX. ASSUMED RISK.
- A. In General.
  - B. Effect of Federal Act on Common-Law Rule.
  - C. Violation of Safety Statutes.
    - 1. In General.
    - 2. Federal Statutes.
      - (a) In General.
      - (b) Safety Appliance Act.
      - (c) Hours of Labor Act.
    - 3. State Statutes.
  - D. What Risks Assumed.
    - 1. In General.
    - 2. Negligence of Employer.
    - 3. Negligence of Fellow Servants.
    - 4. Defective Appliance.
      - (a) In General.
      - (b) Engines and Cars.
      - (c) Tools.
    - 5. Safe Place.
      - (a) In General.
      - (b) Tracks Close Together.
      - (c) Absence of Block or Other Fixed Signals.
      - (d) Obstructions Near to or Above Tracks.
      - (e) Obstructed View of Switch Signals.
      - (f) Defective Premises.
    - 6. Movement of Trains and Cars.
      - (a) In General.
      - (b) Excessive Speed.
      - (c) Lookout and Warning Signals.
      - (d) Passing Trains.
      - (e) Failure to Observe Signals.
      - (f) Violent and Unusual Movements.
      - (g) Shunted or Kicked Cars.
      - (h) Violation of Rules and Orders.
      - (i) Stepping from Train Standing on Bridge.
      - (j) Boarding Moving Trains.
    - 7. Insufficient Number of Employees.

8. Unguarded Machinery.
  9. Charged Electric Wires.
  10. Improper Method of Doing Work.
  11. Objects Falling from Passing Trains.
  12. Acting in Emergency.
- X. CONTRIBUTORY NEGLIGENCE.
- A. In General.
  - B. Effect of Federal Act on Common-Law Rule.
    1. In General.
    2. As Complete Defense.
    3. Comparative Negligence.
  - C. Reduction of Damages for Contributory Negligence.
    1. In General.
    2. Method of Reduction.
  - D. Effect of Violation of Safety Statutes.
    1. In General.
    2. What Statutes Within Act.
      - (a) In General.
      - (b) Boiler Inspection Act.
      - (c) Hours of Labor Act.
      - (d) Safety Appliance Act.
  - E. What Amounts to Contributory Negligence.
    1. In General.
    2. Failure to Inspect.
    3. Violation of Rules.
    4. Knowledge of Danger or Defects.
    5. Improper Method of Doing Work.
    6. Failure to Observe Danger.
  - F. Necessity of Showing Freedom from Contributory Negligence.
- XI. FELLOW-SERVANT DOCTRINE.
- XII. LAST CLEAR CHANCE DOCTRINE.
- XIII. WHO ENTITLED TO BENEFIT OF ACT.
- A. In General.
  - B. Employees of Carriers Other than Defendant.
  - C. In Case of Death of Employee.
    1. In General.
    2. Recovery for Benefit of Estate.
    3. Recovery by Personal Representative.
    4. Necessity for Existence of Beneficiaries.
    5. Who Are Beneficiaries.
      - (a) In General.
      - (b) Widow.
      - (c) Children.
      - (d) Parents.
      - (e) Brothers and Sisters.
      - (f) Next of Kin.
      - (g) Aliens.
- XIV. SURVIVAL OF EMPLOYEE'S RIGHT OF ACTION.
- A. In General.
  - B. Prior to Amendment.
  - C. Subsequent to Amendment.
    1. Instantaneous Death.
2. Conscious Pain and Suffering.
  3. Election.
- XV. ADMINISTRATION OF DECEDENT'S ESTATE.
- A. In General.
  - B. Sole Asset Cause of Action Under Federal Law.
  - C. Cause of Action Arising in Foreign State.
  - D. Collateral Attack.
  - E. Compensation of Personal Representative.
- XVI. ACTIONS.
- A. In General.
  - B. Transitory Nature.
  - C. Limitations.
    1. In General.
    2. Accrual of Cause of Action.
    3. Time as Condition.
    4. Time for Bringing Action.
    5. Excusing Failure to Bring Action in Time.
    6. State Laws Saving Rights.
  - D. What Law Controls.
    1. Federal.
    2. State or Common Law.
      - (a) In General.
      - (b) Injury or Death of Employee in Interstate Commerce.
      - (c) Injury or Death While Engaged in Intrastate Commerce.
      - (d) Recovery by Parents.
      - (e) Nonprejudicial Submission Under State Law.
      - (f) Recovery Under Common Law on Denial Under Federal Act.
      - (g) Recovery Under State Workmen's Compensation Acts.
  3. State Laws Relating to Particular Questions.
    - (a) In General.
    - (b) Appeal and Error.
    - (c) Assumed Risk.
    - (d) Contributory Negligence.
    - (e) Damages.
    - (f) Evidence.
    - (g) Judgment.
    - (h) Jury.
    - (i) Limitations.
    - (j) Limitation on Amount of Recovery.
    - (k) Negligence.
    - (l) Next of Kin.
    - (m) Pleading.
    - (n) Survival.
    - (o) Verdict.
    - (p) Witnesses.
- E. Jurisdiction of Courts.
1. Federal Courts.
    - (a) In General.

- (b) Waiver of Defect in Jurisdiction.
- 2. State Courts.
  - (a) In General.
  - (b) Prior to Amendment of 1910.
  - (c) Effect of Amendment.
  - (d) Effect of State Laws Permitting Majority Verdict.
- 3. Territorial Courts.
- F. Removal of Causes.
  - 1. In General.
  - 2. Prior to Amendment of 1910.
  - 3. Since Amendment.
    - (a) In General.
    - (b) Grounds.
      - (1) In General.
      - (2) Action Arising Under Law of United States.
      - (3) Diverse Citizenship.
      - (4) Prejudice or Local Influence.
      - (5) Defendant Federal Corporation.
      - (6) State Law Permitting Majority Verdict.
  - 4. Petition for Removal.
  - 5. Power of State Court to Determine Sufficiency of Petition.
  - 6. Remand to State Court.
  - 7. Waiver of Wrongful Removal.
- G. Election of Remedies.
  - 1. In General.
  - 2. Between State and Federal Laws.
    - (a) In General.
    - (b) Voluntary Election.
    - (c) Compulsory Election.
    - (d) Action Under State Law as Election.
    - (e) Waiver and Estoppel.
- H. Parties.
  - 1. In General.
  - 2. Who May Maintain Action for Death.
    - (a) In General.
    - (b) Personal Representative.
    - (c) Surviving Beneficiaries.
    - (d) Substitution of Personal Representative for Surviving Beneficiary.
    - (e) Waiver of Misjoinder.
  - 3. Defendants.
    - (a) In General.
    - (b) Joint Tortfeasors.
- (c) Carrier and Negligent Coemployees.
- (d) Lessor and Lessee.
- I. Revivor.
- J. Pleading.
  - 1. Declaration or Complaint.
    - (a) In General.
    - (b) What Must Be Alleged.
      - (1) In General.
      - (2) Federal Law.
      - (3) Employment in Interstate Commerce.
      - (4) Existence of Beneficiaries.
      - (5) Pecuniary Loss.
      - (6) Due Care.
      - (7) Negating Assumed Risk.
  - (c) Sufficiency.
    - (1) In General.
    - (2) To Invoke Federal Act.
    - (3) To Show Employment in Interstate Commerce.
    - (4) To Show Negligence.
    - (5) To Show Dependency.
    - (6) To Show Acts Within Scope of Employment.
  - (d) Pleading Both Federal and State Law.
    - (1) In General.
    - (2) In Same Court.
    - (3) In Separate Courts.
    - (4) Requiring Separation of or More Specific Statement.
    - (5) Election.
- 2. Demurrer.
- 3. Plea or Answer.
  - (a) In General.
  - (b) What Defenses Must Be Pleaded.
    - (1) In General.
    - (2) Assumed Risk.
    - (3) Contributory Negligence.
    - (4) Employment in Interstate Commerce.
    - (5) Limitations.
  - (c) Plea in Abatement.
  - (d) What May be Shown Under General Denial.
  - (e) Demurrer to Plea or Answer.
- 4. Amendments.
  - (a) In General.
  - (b) Setting Up Federal Act.

- (1) In General.
- (2) After Two Years.
- (c) Alleging Representative Capacity.
- (d) Avering Existence of Beneficiaries.
- (e) Conforming to Proof.
- (f) On Appeal.
- (g) Plea or Answer.
- 5. Departure.
- 6. Pleading Over.
- 7. Striking Pleadings.
- 8. Plea or Answer as Express Aider of Defective Complaint.

## XVII. DAMAGES.

- A. In General.
- B. For Injuries.
  - 1. In General.
  - 2. Pain and Suffering.
  - 3. Aggravation of Injury.
  - 4. Expenses.
  - 5. Loss of Time and Earning Power.
- C. For Death.
  - 1. In General.
  - 2. Instantaneous Death.
  - 3. Loss to Estate.
  - 4. Loss Sustained by Widow and Children.
  - 5. Loss to Parents.
  - 6. Mental Anguish.
  - 7. Funeral Expenses.
  - 8. Effect of State Laws Limiting Amount of Recovery.
- D. Mitigation.
- E. Apportionment.
- F. Reasonableness.
  - 1. For Personal Injuries.
    - (a) In General.
    - (b) Loss of Members.
    - (c) Broken Bones.
    - (d) Loss of Eyes.
    - (e) Other Permanent Injuries.
  - 2. For Death.
    - (a) In General.
    - (b) For Death of Husband and Family.
    - (c) For Death of Son.
    - (d) For Conscious Pain and Suffering.
  - 3. Failure to Deduct for Contributory Negligence.
- G. Curing Excessive Verdict by Remittitur.
- H. Capacity in Which Fund Held by Personal Representative.
- I. Disposition of Amount Recovered.
  - 1. In General.
  - 2. What Law Governs.
  - 3. Conflicting Claims.

## XVIII. EVIDENCE.

- A. Judicial Notice.
- B. Presumptions.
  - 1. In General.

- 2. Exercise of Due Care.
- 3. Existence of Beneficiaries.
- 4. Injury in Discharge of Duties.
- 5. Negligence.
  - (a) In General.
  - (b) Res Ipsa Loquitur.
- 6. Notice of Defects.
- 7. Suppression of Evidence.
- 8. Use of Empty Cars in Interstate Commerce.
- C. Burden of Proof.
  - 1. In General.
  - 2. Appointment of Personal Representative.
  - 3. Employment in Interstate Commerce.
  - 4. Occurrence of Accident in Discharge of Duties.
  - 5. Negligence.
  - 6. Knowledge of Defects.
  - 7. Assumed Risk.
  - 8. Contributory Negligence.
  - 9. Custom.
- D. Admissibility of Evidence.
  - 1. In General.
  - 2. Admissions.
  - 3. Alighting from or Boarding Moving Train.
  - 4. Circumstantial Evidence.
  - 5. Conclusions, Opinions and Expert Testimony.
    - (a) In General.
    - (b) Conclusions.
    - (c) Opinions.
    - (d) Expert Testimony.
  - 6. Contributory Negligence.
  - 7. Customs.
  - 8. Damages.
    - (a) In General.
    - (b) Character and Habits.
    - (c) Dependency.
    - (d) Financial Condition.
    - (e) Incapacity.
    - (f) Loss of Sense of Taste and Smell.
    - (g) Mental Suffering.
    - (h) Physical Suffering.
    - (i) Promotions.
  - 9. Dying Declarations.
  - 10. Expectancy of Life.
    - (a) In General.
    - (b) Mortality Tables.
  - 11. Employment in Interstate Commerce.
  - 12. Fellow Servants.
    - (a) In General.
    - (b) Competency.
    - (c) Negligence.
  - 13. Inspections and Tests.
  - 14. Medical Testimony.
  - 15. Method of Performing Work.
  - 16. Parole Evidence.
  - 17. Photographs.
  - 18. Prior and Subsequent Conditions.

- 19. Engagement of or Remarriage of Widow.
  - 20. Res Gestæ.
  - 21. Rules.
  - 22. Use of Standard Instrumentalities.
  - 23. Testimony of Surviving Spouse.
  - E. Weight and Sufficiency.
    - 1. In General.
    - 2. Employment in Interstate Commerce.
    - 3. Cause of Accident.
    - 4. Negligence.
    - 5. To Sustain Particular Findings.
    - 6. To Sustain Verdict.
  - F. Demurrer to Evidence.
  - G. Scope of Issues.
  - H. Variance and Failure of Proof.
  - I. Credibility and Conduct of Witnesses.
  - J. Examination of Witnesses.
- XIX. TRIAL.
- A. In General.
    - 1. Consolidation of Actions.
    - 2. Physical Examination of Plaintiff.
    - 3. Exhibition of Injuries.
    - 4. Defenses.
      - (a) In General.
      - (b) Prior Action.
      - (c) Settlement with Illegally Appointed Administrator.
  - B. Questions for Court.
    - 1. In General.
    - 2. Interstate Commerce.
    - 3. Assumed Risk.
    - 4. Contributory Negligence.
    - 5. Construction of Rules and Orders.
  - C. Submitting Case or Questions to Jury.
    - 1. In General.
    - 2. Sufficiency of Evidence.
      - (a) In General.
      - (b) To Take Case to Jury.
      - (c) To Take Particular Questions to Jury.
    - 3. Questions for Jury.
      - (a) In General.
      - (b) What Law Governs.
      - (c) Assumed Risk.
      - (d) Capacity to Execute Release.
      - (e) Cause of Injury.
      - (f) Contributory Negligence.
      - (g) Custom.
      - (h) Damages.
      - (i) Defective Appliances and Tools.
      - (j) Defective Ways and Premises.
      - (k) Dependency.
  - (l) Due Care.
  - (m) Interstate Commerce.
  - (n) Knowledge of Injured Person's Danger.
  - (o) Manner of Loading Cars.
  - (p) Method of Performing Work.
  - (q) Negligence of Fellow Servants.
  - (r) Rules.
  - (s) Unavoidable Accidents.
  - (t) Proximate Cause.
  - (u) Scope of Employment.
  - (v) Violent and Unusual Movement of Cars.
  - (w) Warning of Danger.
  - (x) Weight of Testimony.
  - D. View by Jury.
  - E. Instructions.
    - 1. In General.
    - 2. Assumed Risk.
      - (a) In General.
      - (b) Risks of Employment.
      - (c) Extraordinary Risks.
      - (d) Negligence of Employer.
      - (e) Negligence of Fellow Servants.
      - (f) Knowledge of Danger or Defects.
      - (g) Violent and Unusual Movement of Cars.
      - (h) Violation of Safety Statutes.
    - 3. Assuming Facts.
    - 4. Contracts Against Liability.
    - 5. Contributory Negligence.
      - (a) In General.
      - (b) Acting in Emergency.
      - (c) Due Care.
      - (d) Going Between Moving Cars.
      - (e) Doing Work in Improper Manner.
      - (f) Going into Dangerous Place.
      - (g) Knowledge of Danger.
      - (h) Reduction of Damages For.
      - (i) Curing Omission to Instruct by Remittitur.
    - 6. Damages.
      - (a) In General.
      - (b) Personal Injuries.
      - (c) Contributory Negligence.
      - (d) Death.
      - (e) Apportionment.

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7. Defective Instrumentalities.
  8. Due Care.
  9. Evidence.
    - (a) In General.
    - (b) Presumptions and Burden of Proof.
    - (c) Negligence.
    - (d) Weight and Sufficiency.
  10. Warning of Danger.
  11. Interstate Commerce.
  12. Knowledge of Danger or Defects.
  13. Method of Performing Work.
  14. Movement of Cars with Unnecessary Violence.
  15. Negligence in General.
  16. Negligence Not Alleged.
  17. Negligence of Fellow Servants.
  18. Proximate Cause.
  19. Rules.
  20. Safe Place.
  21. Scope of Employment.
  22. Selection of Competent Servants.
  23. Unavoidable Accidents.
  24. Violation of Safety Statutes.
  25. Curing Error by Supplemental Instructions or Remittitur.
  26. Failure of Jury to Follow Instructions.
- F. Nonsuit.
1. In General.
  2. When Negligence Inferable.
  3. For Contributory Negligence.
  4. As to Portion of Defendants.
  5. Action on State Law and Employment in Interstate Commerce Shown.
  6. Waiver of Motion.
- G. Directing Verdict.
1. In General.
  2. Nonemployment in Interstate Commerce.
  3. When Negligence Shown or Inferable.
  4. When Negligence Not Shown.
  5. Failure to Show Survivorship or Dependency.
  6. For Assumed Risk.
  7. Contributory Negligence.
  8. Action on State Law and Employment in Interstate Commerce Shown.
  9. Action in Name of Beneficiary.
  10. Waiver of Motion.
- H. Argument to Jury.
- I. Verdict.
1. In General.
  2. Majority Verdict.
3. Special Issues and Questions.
  4. Apportionment of Damages.
    - (a) For Pain and Suffering.
    - (b) Among Beneficiaries.
  - J. Interest.
  - K. Costs.
  - L. Judgment.
  - M. New Trial.
    1. In General.
    2. Improper Admission of Testimony.
    3. Failure to Diminish Damages for Contributory Negligence.
    4. Remarriage of Widow.
    5. Excessiveness of Verdict.
- XX. APPEAL AND ERROR.
- A. To Federal Supreme Court.
1. In General.
  2. Writ of Error.
    - (a) In General.
    - (b) Return Day.
    - (c) To Federal Courts.
    - (d) To Courts of District of Columbia.
    - (e) To State Courts.
  3. Preserving Questions for Review.
  4. What Reviewable.
    - (a) In General.
    - (b) Employment in Interstate Commerce.
    - (c) Pleading and Practice.
    - (d) Admission of Testimony.
    - (e) Weight of Testimony.
    - (f) Amount of Verdict.
    - (g) Questions Not Raised Below.
  5. Affirmance or Reversal.
- B. To Federal Circuit Court of Appeals.
1. In General.
  2. Writ of Error.
    - (a) Parties.
    - (b) Amendment.
  3. Errors Noticed Without Exceptions or Assignments.
  4. Verdict Non Obstante.
  5. Finality of Judgment.
- C. Practice in General.
1. Preservation of Questions for Review.
    - (a) In General.
    - (b) Objections and Exceptions.
    - (c) Assignment of Error.
  2. Appeal From Portion of Judgment.
  3. Questions Not Raised Below.
  4. Estoppel to Raise Questions.



5. Law of Case.

D. Reversible Error.

1. In General.
2. Admission and Rejection of Evidence.
3. Submission Under State or Federal Law.
4. Instructions.
5. Verdict and Findings.
6. Amount of Verdict.
7. Harmless Error.

E. Remittitur.

F. Affirmance, Reversal and Remand.

1. In General.
2. Affirmance.
3. Reversal.
4. Remand for New Trial.

Recovery under Federal Employers' Liability Act for injuries due to defective safety appliances, see Safety Appliance Act, Federal.

I. VALIDITY.

A. Act of 1906.

1. In General.

**Validity.**

The Federal Employers' Liability Act of 1906 was beyond the powers of Congress, as it applied equally to employees engaged in both intrastate or interstate commerce. *Employers' Liability Cases* (Howard v. Illinois C. R. Co.), 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, affirming 148 Fed. 986, 997; *contra*, *Spain v. St. Louis & S. F. R. Co.*, 151 Fed. 522; *Snead v. Central of Ga. R. Co.*, 151 Fed. 608; *Plummer v. Northern P. R. Co.*, 152 Fed. 206; *Lancer v. Anchor Line*, 155 Fed. 433; *Kelley v. Great N. R. Co.*, 152 Fed. 211.

The Federal Employers' Liability Act of 1906 could not be sustained on the theory that a carrier by engaging in interstate commerce, submitted its business concerns to the regulating power of Congress. *Employers' Liability Cases* (Howard v. Illinois C. R. Co.), 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, affirming 148 Fed. 986, 997.

That portion of the Federal Employers' Liability Act of 1906 relating to the liability of interstate carriers for injuries to intrastate employees was so blended with the other portions of the act as to prevent its application to those employed in interstate commerce. *Employers' Liability Cases* (Howard v. Illinois C. R. Co.), 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, affirming 148 Fed. 986, 997.

**Effect.**

Since the Federal Employers' Liability Act of 1906 was unconstitutional it could confer neither rights nor immunities. *Chicago, I. & L. R. Co. v. Hackett*, 228 U. S.

559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581, affirming 170 Ill. App. 140.

**Contracts Against Liability.**

Section 5 of the Federal Employers' Liability Act of 1906 prohibiting contracts between employer and employee relieving the former from liability for injuries to an employee, was not an unconstitutional encroachment on the liberty of contract guaranteed by the Fifth Amendment to the Federal Constitution. *McNamara v. Washington Term. Co.*, 35 App. D. C. 230; *Goldenstein v. Baltimore & O. R. Co.* (Sup. Ct. D. C.), 37 Wash. L. R. 2; *Potter v. Baltimore & O. R. Co.* (Sup. Ct. D. C.), 37 Wash. L. R. 466.

2. In District of Columbia and Territories.

**District of Columbia.**

The provisions of the Federal Employers' Liability Act of 1906, so far as applicable to commerce within the District of Columbia, were within the powers of Congress. *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21, affirming 102 Tex. 378, 117 S. W. 426, which reversed — *Tex. Civ. App.* —, 111 S. W. 159; *McNamara v. Washington Term. Co.*, 35 App. D. C. 230; *Hyde v. Southern R. Co.*, 31 App. D. C. 466; *Goldenstein v. Baltimore & O. R. Co.* (Sup. Ct. D. C.), 37 Wash. L. R. 2.

That portion of the first Federal Employers' Liability Act pertaining to the District of Columbia was not affected by the invalidity of the remainder of the act as applied to carriers engaged in commerce among the several states. *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21, affirming 102 Tex. 378, 117 S. W. 426, which reversed — *Tex. Civ. App.* —, 111 S. W. 159.

The fact that the Federal Employers' Liability Act of 1906 applied to railways within the District of Columbia which extended beyond its limits, did not affect the validity of the act within the District. *Washington, A. & Mt. V. R. Co. v. Downey*, 40 App. D. C. 147, writ of error dismissed, 236 U. S. 190, 59 L. ed. 533, 35 Sup. Ct. Rep. 406.

**Territories.**

The Federal Employers' Liability Act of 1906 was valid as to carriers and their employees within the territories of the United States. *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21, affirming 102 Tex. 378, 117 S. W. 426, which reversed — *Tex. Civ. App.* —, 111 S. W. 159; *Friday v. Santa Fé C. R.*, 16 N. Mex. 434, 120 Pac. 316; *Missouri, K. & T. R. Co. v. Poole*, — *Tex. Civ. App.* —, 123 S. W. 1176; *Atchison, T. & S. F. R. Co. v. Pickens*, — *Tex. Civ. App.* —, 118 S. W. 1133.

## B. Act. of 1908.

## 1. In General.

**Constitutionality.**

The Federal Employers' Liability Act of 1908 is a valid regulation of commerce between the several states. *Second Employers' Liability Cases* (Mondou v. New York, N. H. & H. R. Co.), 223 U. S. 1, 56 L. ed. 327, 32 Sup. Ct. Rep. 169, 38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875, reversing 82 Conn. 373, 73 Atl. 762; *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 193, Ann. Cas. 1914 C 176, reversing 189 Fed. 495; *St. Louis, I. M. & S. R. Co. v. Conley*, 110 C. C. A. 97, 187 Fed. 949; *Cain v. Southern R. Co.*, 199 Fed. 211; *Zikos v. Oregon R. & N. Co.*, 179 Fed. 893; *Walsh v. New York, N. H. & H. R. Co.*, 173 Fed. 494, affirmed 223 U. S. 1, 56 L. ed. 327, 32 Sup. Ct. Rep. 169, 38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875; *Watson v. St. Louis, I. M. & S. R. Co.*, 169 Fed. 942, affirmed without opinion 223 U. S. 745, 56 L. ed. 639, 32 Sup. Ct. Rep. 533; *Atlantic C. L. R. Co. v. Whitney*, 62 Fla. 124, 56 So. 937, S. C. 65 Fla. 72, 61 So. 179, 3 N. C. C. A. 812; *Owens v. Chicago G. W. R. Co.*, 113 Minn. 49, 128 N. W. 1011, writ of error dismissed 225 U. S. 716, 56 L. ed. 1270, 32 Sup. Ct. Rep. 834; *Southern R. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99; *Contra. Hoxie v. New York, N. H. & H. R. Co.*, 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324, 21 Am. Neg. Rep. 42.

It is within the power of Congress to make interstate carriers by railroad liable for injuries to or the death of employees resulting from the negligence of the carrier or its employees. *Employers' Liability Cases* (Howard v. Illinois C. R. Co.), 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, affirming 148 Fed. 986, 997.

The duties of common carriers with respect to the safety of their employees while both are engaged in commerce among the states, as well as the liability of the former for injuries sustained by the latter while both are so engaged, have a real or substantial relation to such commerce, and are therefore subject to the control of Congress under its power to regulate commerce among the several states. *Second Employers' Liability Cases* (Mondou v. New York, N. H. & H. R. Co.), 223 U. S. 1, 56 L. ed. 327, 32 Sup. Ct. Rep. 169, 38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875, reversing 82 Conn. 373, 73 Atl. 762.

The fact that the second Federal Employers' Liability Act imposes responsibility on carriers for the injury to or death of employees engaged in interstate commerce when the causal negligence is that of an employee engaged in intrastate commerce, does not affect the validity of the act, since the negligence of such employee

when operating injuriously on employees engaged in interstate commerce has the same effect thereon as if the negligent employee were engaged in interstate commerce. *Second Employers' Liability Cases* (Mondou v. New York, N. H. & H. R. Co.), 223 U. S. 1, 56 L. ed. 327, 32 Sup. Ct. Rep. 169, 38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875, reversing 82 Conn. 373, 73 Atl. 762.

The second Federal Employers' Liability Act does not create any unconstitutional discrimination or conflict between state and Federal authority. *Zikos v. Oregon R. & N. Co.*, 179 Fed. 893.

The Federal Employers' Liability Act of 1908 does not unconstitutionally deprive a railway company of its property or its liberty of entering into contracts. *St. Louis, I. M. & S. R. Co. v. Conley*, 110 C. C. A. 97, 187 Fed. 949.

The fact that the Federal Employers' Liability Act of 1908 is not confined to injuries resulting from the negligence of fellow employees who are engaged in interstate commerce at the time of an accident, does not make the act, or that portion abolishing the fellow-servant rule, unconstitutional. *Watson v. St. Louis, I. M. & S. R. Co.*, 169 Fed. 942, affirmed without opinion 223 U. S. 745, 56 L. ed. 639, 32 Sup. Ct. Rep. 533.

Whether the second Federal Employers' Liability Act, by rendering the occupation of railway employees in interstate commerce less hazardous, tends to promote interstate commerce, is a legislative question. *Zikos v. Oregon R. & N. Co.*, 179 Fed. 893.

## 2. Effect of Limitation to Carriers by Rail.

**In General.**

The fact that the Federal Employers' Liability Act of 1908 applies only to carriers by rail does not constitute an arbitrary or unreasonable classification. *Watson v. St. Louis, I. M. & S. R. Co.*, 169 Fed. 942, affirmed without opinion, 223 U. S. 745, 56 L. ed. 639, 32 Sup. Ct. Rep. 533; *Zikos v. Oregon R. & N. Co.*, 179 Fed. 893.

The second Federal Employers' Liability Act does not, by imposing liability only on interstate carriers by railroad, although there are other carriers of interstate character, violate the "due process clause" of the Fifth Amendment to the Federal Constitution, if it can be assumed that such clause is equivalent to the "equal protection of the law" clause of the Fourteenth Amendment. *Second Employers' Liability Cases* (Mondou v. New York, N. H. & H. R. Co.), 223 U. S. 1, 56 L. ed. 327, 32 Sup. Ct. Rep. 169, 38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875, reversing 82 Conn. 373, 73 Atl. 762.

### 3. Effect of Restriction on Freedom of Contract.

#### Contracts Against Liability.

The provisions of section 5 of the Federal Employers' Liability Act that "any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created" by the act shall be void, was within the power of Congress. *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603, 56 L. ed. 911, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892, affirming 36 App. D. C. 565.

Section 5 of the second Federal Employers' Liability Act, which declares void any contract, rule, regulation or device the purpose or intent of which is to enable a carrier to exempt itself from the liability created by the act, is not repugnant to the Fifth Amendment to the Federal Constitution as an unwarranted interference with the liberty of contract. *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)*, 223 U. S. 1, 56 L. ed. 327, 32 Sup. Ct. Rep. 169, 38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875, reversing 82 Conn. 373, 73 Atl. 762.

The provisions of section 5 of the Federal Employers' Liability Act to the effect that any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from the liability created by the act, shall to that extent be void, if in violation of the Fifth Amendment to the Federal Constitution, are clearly separable from the remainder of the act. *Zikos v. Oregon R. & N. Co.*, 179 Fed. 893.

The validity of section 5 of the Federal Employers' Liability Act, which prohibits contracts between employees and carriers relieving the latter from the liability created by the act, is not affected by giving it a retrospective operation. *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603, 56 L. ed. 911, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892, affirming 36 App. D. C. 565.

### 4. Effect of Abrogation of Common-Law Defenses.

#### Assumed-Risk Rule.

The fact that the second Federal Employers' Liability Act modifies the assumed-risk rule and increases the employers' liability for injuries to or the death of employees, does not affect the validity of the act. *Second Employers' Liability Cases*, 223 U. S. 1, 56 L. ed. 327, 32 Sup. Ct. Rep. 169, 38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875, reversing 82 Conn. 373, 73 Atl. 762.

#### Fellow-Servant Doctrine.

The second Federal Employers' Liability Act is not vitiated by the fact that it

abrogates the fellow-servant doctrine. *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)*, 223 U. S. 1, 56 L. ed. 327, 32 Sup. Ct. Rep. 169, 38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875, reversing 82 Conn. 373, 73 Atl. 762; *Watson v. St. Louis, I. M. & S. R. Co.*, 169 Fed. 942, affirmed without opinion 223 U. S. 745, 56 L. ed. 639, 32 Sup. Ct. Rep. 533.

### 5. Effect of Conferring Jurisdiction on State Courts.

Jurisdiction of state courts in general, see *infra* XVI, E, 2.

#### In General.

The second Federal Employers' Liability Act does not unconstitutionally delegate judicial power to state courts by conferring on them jurisdiction over actions based on such act. *Zikos v. Oregon R. & N. Co.*, 179 Fed. 893.

The amendment to section 6 of the Federal Employers' Liability Act, permitting actions to be brought in the Federal Court of the district of the defendant's residence, or in which the cause of action arose, etc., and declaring that the jurisdiction of such courts shall be concurrent with that of the state courts, was within the constitutional powers of Congress. *Teel v. Chesapeake & O. R. Co.*, 123 C. C. A. 240, 204 Fed. 918, 47 L. R. A. (N. S.) 21.

The fact that in an action in a state court based on the Federal Employers' Liability Act, a verdict may, under a local law, be rendered by a less number of jurors than the whole panel, does not render the amendment of section 6, investing Federal and state courts with concurrent jurisdiction, obnoxious to the Seventh Amendment of the Federal Constitution preserving the right to trial by jury. *Chesapeake & O. R. Co. v. Kornhoff*, 167 Ky. 353, 180 S. W. 523.

### 6. Effect of Prohibiting Removal from State Courts.

Removal of causes in general, see *infra* XVI, F.

#### In General.

Section 6 of the Federal Employers' Liability Act of 1908, as amended, is not rendered unconstitutional by reason of forbidding the removal from state to Federal courts of actions founded thereon. *Teel v. Chesapeake & O. R. Co.*, 123 C. C. A. 240, 204 Fed. 918, 47 L. R. A. (N. S.) 21; *Lombardo v. Boston & M. R. Co.*, 223 Fed. 427; *Kansas City S. R. Co. v. Cook*, 100 Ark. 467, 140 S. W. 579.

The denial, under the amendment to section 6 of the Federal Employers' Liability Act, of the right to remove an action based on the act from a state to a Federal court on the ground of diverse

citizenship, does not deny to the defendant due process of law or the equal protection thereof. *Teel v. Chesapeake & O. R. Co.*, 123 C. C. A. 240, 204 Fed. 918, 47 L. R. A. (N. S.) 21.

The provisions of section 6 of the Federal Employers' Liability Act as amended, prohibiting the removal of actions based thereon from a state court of competent jurisdiction to a Federal court, is not unconstitutional. *Kelly v. Chesapeake & O. R. Co.*, 201 Fed. 602.

Sections 6 of the Federal Employers' Liability Act and 28 of the Judicial Code, prohibiting the removal from a state to a Federal court of actions founded on the former act, are constitutional, and do not discriminate against one class of litigants nor deny to them the equal protection of the law. *McChesney v. Illinois C. R. Co.*, 197 Fed. 85.

Section 28 of the Judicial Code, prohibiting the removal from state courts of competent jurisdiction to Federal courts, because of diversified citizenship, of actions predicated on the Federal Employers' Liability Act, is constitutional. *Gibson v. Bellingham & N. R. Co.*, 213 Fed. 428.

## 7. Effect of Designating Beneficiaries.

### Interference with State Rights.

The fact that the second Federal Employers' Liability Act designated those who may succeed to the right of a deceased employee, does not unlawfully interfere with the right of the states with respect to the administration of the estates of decedents. *Zikos v. Oregon R. & N. Co.*, 179 Fed. 893.

## II. NATURE AND CONSTRUCTION.

### A. In General.

(No decisions.)

### B. Remedial Character.

#### In General.

The Federal Employers' Liability Act is remedial in character. *Anderson v. Louisville & N. R. Co.*, 127 C. C. A. 277, 210 Fed. 689.

### C. Liberal or Strict Construction.

#### In General.

Since the Federal Employers' Liability Act of 1908 is remedial in character it should be liberally construed. *Behrens v. Illinois C. R. Co.*, 192 Fed. 581; *Armbruster v. Chicago, R. I. & P. R. Co.*, 166 Ia. 155, 147 N. W. 337.

Since the Federal Employers' Liability Act is remedial in character, it should be

so construed as to prevent the mischief it was intended to correct and to advance the remedy it provides. *St. Louis, I. M. & S. R. Co. v. Conley*, 110 C. C. A. 97, 167 Fed. 949.

Since the Federal Employers' Liability Act is in derogation of the common law it is to be strictly construed, but not so as to defeat the obvious intent of Congress. *Fulgham v. Midland V. R. Co.*, 167 Fed. 660, reversed on other grounds 104 C. C. A. 151, 181 Fed. 91.

The Federal Employers' Liability Act should be liberally construed as to the inclusion of its beneficiaries in order to effect the remedial purpose of the act, notwithstanding that it is in derogation of the common law. *Bolch v. Chicago, M. & St. P. R. Co.*, — Wash. —, 155 Pac. 422.

As the amendment to section 6 of the Federal Employers' Liability Act, prohibiting the removal of actions from state to Federal courts, is remedial in character it should be liberally construed. *Teel v. Chesapeake & O. R. Co.*, 123 C. C. A. 240, 204 Fed. 918, 47 L. R. A. (N. S.) 21.

The Federal Employers' Liability Act is remedial legislation, which should be liberally construed so as to advance the remedy given and to correct the evils against which it is directed. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

## D. Construction of Words and Phrases.

### Employee, Employment.

An employee of a railway company is, within the meaning of the Federal Employers' Liability Act, one who is hired by it or who works for a carrier at its request and under an agreement for compensation. *Missouri, K. & T. R. Co. v. West*, 38 Okla. 581, 134 Pac. 655, writ of error dismissed 232 U. S. 682, 58 L. ed. 795, 34 Sup. Ct. Rep. 471.

The words "employee" and "employed" in the Federal Employers' Liability Act were used in their natural sense to describe the conventional relation of employer and employee. *Robinson v. Baltimore & O. R. Co.*, 237 U. S. 84, 59 L. ed. 849, 35 Sup. Ct. Rep. 491, affirming 40 App. D. C. 169, L. R. A. 1915 D 510.

The failure to define in the Federal Employers' Liability Act the meaning of the words "employee" and "employment" shows a legislative intent to use them in the ordinary sense, and they should be interpreted according to their usage in the law of master and servant. *Louisville & N. R. Co. v. Walker*, 162 Ky. 209, 172 S. W. 517.

### Interstate Commerce.

The term "interstate commerce" in the Federal Employers' Liability Act was not used by Congress in a technical but in

a practical sense better suited to the purposes of the act. *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, —L. ed.—, 36 Sup. Ct. Rep. 188, L. R. A. 1916 C. 797, affirming 214 N. Y. 413, 108 N. E. 644.

### Through Train.

Where the evidence, in an action founded on the Federal Employers' Liability Act, showed that the western division of the main line of the Chicago & North-western Railway running from Omaha, Nebraska, to Black Hills, South Dakota, was known as the "Black Hills Division," the term "through train" as applied by railroad men to trains on such division, will be construed to mean trains which run through the division from one terminal point to the other. *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419, 148 N. W. 145, affirmed on other grounds, 241 U. S. 470, 60 L. ed.—, 36 Sup. Ct. Rep. 624.

### "Suffering Injury."

The words "suffering injury" as used in section 1 of the Federal Employers' Liability Act, are not to be given a restricted meaning so as to confine them to injuries attended with force or violence. *Baltimore & O. R. Co. v. Branson*, —Md.—, 98 Atl. 225.

### E. Construction by State Courts.

#### Following Federal Decisions.

The construction placed on the Federal Employers' Liability Act by the Supreme Court of the United States is binding on a state court. *Chesapeake & O. R. Co. v. Kornhoff*, 167 Ky. 353, 180 S. W. 523; *Rich v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379, 148 S. W. 1011; *Dooley v. Seaboard A. L. R. Co.*, 163 N. C. 454, 79 S. E. 970; *Lauer v. Northern P. R. Co.*, 83 Wash. 465, 145 Pac. 606.

The construction placed by the Federal courts on the Federal Employers' Liability Act is binding on state courts. *Southern P. R. Co. v. Pillsbury*, 170 Cal. 782, 151 Pac. 277; *Kendrick v. Chicago & E. I. R. Co.*, 188 Ill. App. 172; *Jorgenson v. Grand Rapids & I. R. Co.*, —Mich.—, 155 N. W. 535; *Newkirk v. Pryor*, —Mo. App.—, 183 S. W. 682; *Hawkins v. St. Louis & S. F. R. Co.*, 189 Mo. App. 201, 174 S. W. 129; *Hadley v. Union P. R. Co.*, 99 Neb. 349, 156 N. W. 765; *Bolch v. Chicago, M. & St. P. R. Co.*, —Wash.—, 155 Pac. 422; *Horton v. Oregon-W. R. & N. Co.*, 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8.

A state court is bound by the decisions of the Federal courts in determining the power of Congress and the extent of its exercise under the Federal Employers' Liability Act. *Horton v. Oregon-W. R. & N. Co.*, 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8.

The decisions of the Federal courts as to what constitutes interstate commerce are binding on a state court in an action based on the Federal Employers' Liability Act. *Holmberg v. Lake Shore & M. S. R. Co.*, —Mich.—, 155 N. W. 504.

The liberal construction given the Federal Employers' Liability Act by the Federal courts is binding on a state court. *Armbruster v. Chicago, R. I. & P. R. Co.*, 166 Ia. 155, 147 N. W. 337.

## III. OPERATION.

### A. In General.

#### Binding Effect on State Courts.

The provisions of the Federal Employers' Liability Act are as binding on a state court as if enacted by its own legislature. *Hogarty v. Phila. & R. R. Co.*, 245 Pa. 443, 91 Atl. 854.

### B. Territorial Extent.

#### Porto Rico.

The Federal Employers' Liability Act applies to Porto Rico. *American R. Co. v. Didricksen*, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224, reversing 5 Porto Rico Fed. Rep. 401, S. C. 5 id. 427; *American R. Co. v. Birch*, 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603, reversing 5 Porto Rico Fed. Rep. 273.

### C. Exclusiveness of Remedy.

#### In General.

The Federal Employers' Liability Act is the supreme and paramount law of the land with respect to the liability of interstate carriers by rail for injuries to or the death of employees while engaged in interstate commerce. *Flanders v. Georgia S. & F. R. Co.*, 68 Fla. 479, 67 So. 68; *McChesney v. Illinois C. R. Co.*, 197 Fed. 85; *Lemon v. Louisville & N. R. Co.*, 137 Ky. 276, 125 S. W. 701; *Jorgenson v. Grand Rapids & I. R. Co.*, —Mich.—, 155 N. W. 535; *Jones v. Charleston & W. C. R. Co.*, 98 S. C. 197, 82 S. E. 415; *Southern R. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99, affirmed on other grounds 241 U. S. 229, 60 L. ed.—, 36 Sup. Ct. Rep. 588.

The exclusive remedy for injuries received by or for the death of railway employees while engaged in interstate commerce is under the Federal Employers' Liability Act. *Chicago, R. I. & P. R. Co. v. Devine*, 239 U. S. 52, —L. ed.—, 36 Sup. Ct. Rep. 27, affirming 266 Ill. 248, 107 N. E. 595; *Chicago, R. I. & P. R. Co. v. Wright*, 239 U. S. 548, —L. ed.—, 36 Sup. Ct. Rep. 185, affirming 96 Neb. 87, 146 N. W. 1024, S. C. 94 Neb. 317, 143 N. W. 220; *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. ed.

1226, 34 Sup. Ct. Rep. 729; *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703, reversing 98 Ark. 240, 135 S. W. 874; *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 193, Ann. Cas. 1914 C. 176, reversing 189 Fed. 495; *Hogan v. New York C. & H. R. R. Co.*, 139 C. C. A. 328, 223 Fed. 890; *Garrett v. Louisville & N. R. Co.*, 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769, affirmed 236 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32; *De Atley v. Chesapeake & O. R. Co.*, 201 Fed. 591; *Bankson v. Illinois C. R. Co.*, 196 Fed. 171; *Oliver v. Northern P. R. Co.*, 196 Fed. 432; *Clark v. Southern P. Co.*, 175 Fed. 122; *Dewberry v. Southern R. Co.*, 175 Fed. 307; *St. Louis, I. M. & S. R. Co. v. Hesterly*, 98 Ark. 240, 135 S. W. 874; *Smith v. Industrial Accident Comm.*, 26 Cal. App. 560, 147 Pac. 600; *Vickery v. New London N. R. Co.*, 87 Conn. 634, 89 Atl. 277; *Flanders v. Georgia S. & F. R. Co.*, 68 Fla. 479, 69 So. 68; *Staley v. Illinois C. R. Co.*, 268 Ill. 356, 109 N. E. 342, reversing 186 Ill. App. 593; *Armbruster v. Chicago, R. I. & P. R. Co.*, 166 Ia. 155, 147 N. W. 337; *Cole v. Atchison, T. & S. F. R. Co.*, 92 Kan. 132, 139 Pac. 1177; *McGarvey v. McGarvey*, 163 Ky. 242, 173 S. W. 765; *Louisville & N. R. Co. v. Strange*, 156 Ky. 439, 161 S. W. 239; *South Covington & C. St. R. Co. v. Finan*, 153 Ky. 340, 155 S. W. 742; *Jorgenson v. Grand Rapids & I. R. Co.*, — Mich. —, 155 N. W. 535; *Sells v. Atchison, T. & S. F. R. Co.*, — Mo. —, 181 S. W. 106; *Moliter v. Wabash R. Co.*, 180 Mo. App. 84, 168 S. W. 250; *Miller v. Kansas City W. R. Co.*, 180 Mo. App. 371, 168 S. W. 336; *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144; *Melzner v. Northern P. R. Co.*, 46 Mont. 277, 127 Pac. 1002; *Shannon v. Boston & M. R. Co.*, 77 N. H. 349, 92 Atl. 167; *Parker v. Atlantic C. R. Co.*, 87 N. J. L. 148, 93 Atl. 574; *Winfield v. New York C. & H. R. R. Co.*, 216 N. Y. 284, 110 N. E. 614, affirming 168 App. Div. 351, 153 N. Y. Supp. 499; *Rogers v. New York C. & H. R. R. Co.*, — App. Div. —, 157 N. Y. Supp. 83; *Renn v. Seaboard A. L. R.*, 170 N. C. 128, 86 S. E. 964; *Erie R. Co. v. Welsh*, 89 Ohio St. 81, 105 N. E. 189; *Missouri, K. & T. R. Co. v. Lenahan*, 39 Okla. 283, 135 Pac. 383; *Kamboris v. Oregon, W. R. & N. Co.*, 75 Oreg. 358, 146 Pac. 1097; *Oberlin v. Oregon, W. R. & N. Co.*, 71 Oreg. 177, 142 Pac. 554; *Hogarty v. Phila. & R. R. Co.*, 245 Pa. 443, 91 Atl. 854; *Jones v. Charleston & W. C. R. Co.*, 98 S. C. 197, 82 S. E. 415; *Eastern R. Co. v. Ellis*, — Tex. Civ. App. —, 153 S. W. 701; *Rivera v. Atchison, T. & S. F. R. Co.*, — Tex. Civ. App. —, 149 S. W. 223, 3 N. C. C. A. 788; *St. Louis, S. F. & T. R. Co. v. Geer*, — Tex. Civ. App. —, 149 S. W. 1178; *Niles v. Central Vt. R. Co.*, 87 Vt. 356, 89 Atl. 629; *Bouchard v. Central Vt. R. Co.*, 87 Vt. 399, 89 Atl. 475, L. R. A. 1915 C. 33.

Where an employee of an interstate carrier was killed while engaged in interstate commerce as the proximate result of the latter's negligence, the Federal Employers' Liability Act controls, even though the decedent and the carrier were also engaged in intrastate commerce. *Flanders v. Georgia S. & F. R. Co.*, 68 Fla. 479, 69 So. 68.

When the facts of a case, whether developed by the pleadings or the evidence, bring the Federal Employers' Liability Act into operation, such law is paramount and excludes all conflicting state regulations, even though the facts were commingled with others which show an intrastate operation at the same time by the same parties and by the same means. *Flanders v. Georgia S. & F. R. Co.*, 68 Fla. 479, 69 So. 68.

The Federal Employers' Liability Act, in so far as it deals with the subject to which it relates, is paramount and exclusive. *Seaboard A. L. R. Co. v. Kenney*, 240 U. S. 489, 60 L. ed. —, 36 Sup. Ct. Rep. 458, affirming 167 N. C. 14, 82 S. E. 968.

## D. Effect on Particular Laws.

### 1. In General.

#### Territorial Laws.

##### —In General.

The Federal Employers' Liability Act of 1906 superseded the laws of the territory of New Mexico with respect to the liability of carriers for injury to their employees. *Atchison, T. & S. F. R. Co. v. Tack*, — Tex. Civ. App. —, 130 S. W. 596.

##### —On Admission to Union.

The Federal Employers' Liability Act of 1906 was not in effect in Oklahoma after its admission to statehood. *Chicago, R. I. & P. R. Co. v. Holliday*, — Okla. —, 145 Pac. 786.

#### Limitation of Liability of Vessel Owners.

The Act of Congress permitting the limitation of the liability of vessel owners was not impliedly repealed by the Federal Employers' Liability Act, and it is applicable to an action under the latter act in a Federal court against an interstate railway company for injuries received by an employee on a ferryboat used in interstate commerce. *The Passaic*, 122 C. C. A. 466, 204 Fed. 266, affirming 190 Fed. 644.

### 2. Common Law.

See also *infra* III, D, 2.

#### In General.

Since the Federal Employers' Liability Act is exclusive to the extent to which it applies, there can be no recovery at com-

mon law where a case under the act is made out. *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. ed. 1228, 34 Sup. Ct. Rep. 729; *South Covington & C. St. R. Co. v. Finan*, 153 Ky. 340, 155 S. W. 742; *Boucharde v. Central Vt. R. Co.*, 87 Vt. 399, 89 Atl. 475, L. R. A. 1915 C. 33.

### When Federal Law Does Not Apply.

An injured employee may pursue his common-law remedy where his action does not fall within the terms of the Federal Employers' Liability Act. *Grow v. Oregon S. L. R. Co.*, — Utah —, 150 Pac. 970, S. C. 44 Utah 160, 138 Pac. 398.

### 3. State Laws.

Recovery under or partial reliance on state laws, see Actions XVI, D, 2 and 3.

#### (a) In General.

#### Superseding Effect of Federal Act.

All state laws regulating the liability of carriers for injuries to or the death of employees while engaged in interstate commerce were superseded by the Federal Employers' Liability Act. Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*), 223 U. S. 1, 56 L. ed. 327, 32 Sup. Ct. Rep. 169, 38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875, reversing 82 Conn. 373, 73 Atl. 762; *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703, reversing 98 Ark. 240, 135 S. W. 874; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 505, Ann. Cas. 1914 C. 159, 9 N. C. C. A. 109, reversing 156 N. C. 496, 72 S. E. 858; *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, L. R. A. 1915 C. 1, Ann. Cas. 1915 B. 475, 8 N. C. C. A. 834, reversing 162 N. C. 424, 78 S. E. 494; *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. ed. 1160, 35 Sup. Ct. Rep. 704, 9 N. C. C. A. 754, affirming 115 Ark. 483, 171 S. W. 1185; *Chicago, R. I. & P. R. Co. v. Wright*, 239 U. S. 548, — L. ed. —, 36 Sup. Ct. Rep. 185, affirming 96 Neb. 87, 146 N. W. 1024, S. C. 94 Neb. 317, 143 N. W. 220; *Southern P. Co. v. McGinnis*, 98 C. C. A. 403, 174 Fed. 649; *Hogan v. New York C. & H. R. R. Co.*, 139 C. C. A. 328, 223 Fed. 890; *Oliver v. Northern P. R. Co.*, 196 Fed. 432; *Bottoms v. St. Louis & S. F. R. Co.*, 179 Fed. 318; *Fulgham v. Midland V. R. Co.*, 167 Fed. 660, reversed on other grounds 104 C. C. A. 151, 181 Fed. 91; *Taylor v. Southern R. Co.*, 178 Fed. 380; *Dewberry v. Southern R. Co.*, 175 Fed. 307; *Ex parte Atlantic C. L. R. Co.*, 190 Ala. 132, 67 So. 256; *Flanders v. Georgia S. & F. R. Co.*, 68 Fla. 479, 67 So. 68; *Louisville & N. R. Co. v. Kemp*, 140 Ga. 657, 79 S. E. 558; *Kendrick v. Chicago & E. I. R. Co.*, 188 Ill.

App. 172; *Southern R. Co. v. Howerton*, 182 Ind. 208, 232, 106 N. E. 369, 105 N. E. 1025, reversing — Ind. App. —, 101 N. E. 121, 103 N. E. 121; *Vandalia R. Co. v. Stringer*, 182 Ind. 676, 106 N. E. 865, rehearing denied 182 Ind. 684, 107 N. E. 673; *Cole v. Atchison, T. & S. F. R. Co.*, 92 Kan. 132, 139 Pac. 1177; *Louisville & N. R. Co. v. Strange*, 156 Ky. 439, 161 S. W. 239; *South Covington & C. St. Ry. Co. v. Finan*, 153 Ky. 340, 155 S. W. 742; *Illinois C. R. Co. v. Doherty*, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31, *La Casse v. New Orleans, T. & M. R. Co.*, 135 La. 129, 64 So. 1012; *Penny v. New Orleans G. N. R. Co.*, 135 La. 692, 66 So. 313; *Sells v. Atchison, T. & S. F. R. Co.*, — Mo. —, 181 S. W. 106; *Miller v. Kansas City W. R. Co.*, 180 Mo. App. 371, 168 S. W. 336; *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144; *Rich v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379, 148 S. W. 1011; *Melzner v. Northern P. R. Co.* 46 Mont. 277, 127 Pac. 1002; *Shannon v. Boston & M. R. Co.*, 77 N. H. 349, 92 Atl. 167; *Winfield v. New York C. & H. R. R. Co.*, 216 N. Y. 284, 110 N. E. 614, affirming 168 App. Div. 351, 153 N. Y. Supp. 499; *Rogers v. New York C. & H. R. R. Co.*, — App. Div. —, 157 N. Y. Supp. 83; *Renn v. Seaboard A. L. R. Co.* 170 N. C. 128, 86 S. E. 964; *Warren v. Hannon*, 15 Ohio C. C. R. (N. S.) 289; *St. Louis & S. F. R. Co. v. Snowden*, — Okla. —, 149 Pac. 1083; *Missouri, K. & T. R. Co. v. Lenahan*, 39 Okla. 283, 135 Pac. 383; *Kamboris v. Oregon, W. R. & N. Co.*, 75 Ore. 358, 146 Pac. 1097; *Hogarty v. Phila. & R. R. Co.*, 245 Pa. 443, 91 Atl. 854; *Jones v. Charleston & W. C. R. Co.*, 98 S. C. 197, 82 S. E. 415; *Rivera v. Atchison, T. & S. F. R. Co.*, — Tex. Civ. App. —, 149 S. W. 223, 3 N. C. C. A. 788; *Gulf, C. & S. F. R. Co. v. Lester*, — Tex. Civ. App. —, 149 S. W. 841; *Southern R. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99; *Findley v. Coal & C. R. Co.*, — W. Va. —, 87 S. E. 198; *Rowlands v. Chicago & N. W. R. Co.*, 149 Wis. 51, 135 N. W. 156, writ of error dismissed 229 U. S. 627, 57 L. ed. 1357, 33 Sup. Ct. Rep. 771.

State statutes must yield to the Federal Employers' Liability Act. *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. ed. —, 36 Sup. Ct. Rep. 683, affirming 133 C. C. A. 370, 217 Fed. 518.

A state law permitting railway companies to cut down any standing trees that may be in danger of falling on its road was not superseded by the Federal Employers' Liability Act. *O'Connor v. Chicago, M. & St. P. R. Co.*, — Wis. —, 158 N. W. 343.

In an action by an employee against an interstate carrier for personal injuries received while engaged in interstate commerce, constitutional and statutory provisions of a state which are in conflict with the Federal Employers' Liability Act, are

suspended and annulled. *St. Louis & S. F. R. Co. v. Snowden*, — Okla. —, 149 Pac. 1083.

#### Act of 1906.

Since the Federal Employers' Liability Act of 1906 was inoperative, it could not supersede any existing valid state law. *Chicago, I. & L. R. Co. v. Hackett*, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581, affirming 170 Ill. App. 140.

#### Statutes Permitting Recovery by Parents.

See generally *infra* XVI, D, 2 (d).

The right of a parent to recover as permitted by a state law, for the mental pain and suffering as well as for the loss of services of a minor son who was killed while in the employ of an interstate carrier and engaged in interstate commerce, was superseded by the Federal Employers' Liability Act. *Flanders v. Georgia S. & F. R. Co.*, 68 Fla. 479, 67 So. 68.

#### Injuries Sustained in Intrastate Commerce.

The Federal Employers' Liability Act does not supersede a state statute relating to the liability of a carrier for injury to or the death of an employee while engaged in intrastate commerce. *Thompson v. Wabash R. Co.*, 184 Fed. 554.

A state statute pertaining to the liability of carriers for injury to employees was not superseded by the Federal Employers' Liability Act, as to liability for injuries sustained by employees engaged in intrastate commerce. *Fernette v. Pere Marquette R. Co.*, 175 Mich. 653, 672, 141 N. W. 1084, 144 N. W. 834.

#### (b) Workmen's Compensation Acts.

Recovery in general under Workmen's Compensation Acts, XVI, D, 2 (g).

#### In General.

A state Workmen's Compensation Act was not superseded by the Federal Employers' Liability Act, since the former act relates to compensation arising out of contract and the Federal act to torts. *Hamill v. Penn. R. Co.*, 87 N. J. L. 388, 94 Atl. 313, affirmed — N. J. —, 96 Atl. 292; *Rounsaville v. Cent. R. Co.*, 87 N. J. L. 371, 94 Atl. 392.

#### 4. Territorial Laws.

##### Superseding Effect of Federal Act.

The Federal Employers' Liability Act superseded the common law in the territories of the United States, with reference to the liability of railway companies for injuries to their employees. *Cound v. Atchison, T. & S. F. R. Co.*, 173 Fed. 527.

A law of the territory of New Mexico governing actions for injuries to railway employees was superseded by the first Federal Employers' Liability Act, since that act was a valid regulation of commerce in the territories of the United States. *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21, affirming 102 Tex. 378, 117 S. W. 426, which reversed — Tex. Civ. App. —, 111 S. W. 159.

The Federal Employers' Liability Act of 1906 superseded the laws of the territory of New Mexico with respect to the liability of a carrier for injuries to its employees. *Atchison, T. & S. F. R. Co. v. Tack*, — Tex. Civ. App. —, 130 S. W. 596.

A provision of a law of the territory of New Mexico that no action for injuries or death should be maintained unless within a specified time after the accident an affidavit of particulars was served on the negligent person or corporation, was superseded by the Federal Employers' Liability Act of 1906 in cases where an employee was injured or killed while engaged in interstate commerce. *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21, affirming 102 Tex. 378, 117 S. W. 426.

#### E. Retroactive Effect.

##### In General.

The Federal Employers' Liability Act cannot be given a retrospective construction since it introduces a new policy and radically changes existing laws. *Winfree v. Northern P. R. Co.*, 227 U. S. 296, 57 L. ed. 518, 33 Sup. Ct. Rep. 273, affirming 97 C. C. A. 392, 173 Fed. 65, 44 L. R. A. (N. S.) 841, S. C. 164 Fed. 698.

The Federal Employers' Liability Act is not applicable to an action for the death of an employee who was killed previously to the passage of such act. *Winfree v. Northern P. R. Co.*, 227 U. S. 296, 57 L. ed. 518, 33 Sup. Ct. Rep. 273, affirming 97 C. C. A. 392, 173 Fed. 65, 44 L. R. A. (N. S.) 841, 164 Fed. 698.

The Federal Employers' Liability Act of 1906 could not be retrospectively applied to causes of action arising previously to its passage. *Plummer v. Northern P. R. Co.*, 152 Fed. 206; *Hall v. Chicago, R. I. & P. R. Co.*, 149 Fed. 564.

The provisions of the Federal Employers' Liability Act, which abolished the fellow-servant doctrine, are not applicable to injuries which occurred previously to the passage of such act. *Gibson v. Chesapeake & O. R. Co.*, 131 C. C. A. 332, 215 Fed. 24.

##### Provision as to Time for Bringing Action.

The provision of the Federal Employers' Liability Act of 1906 as to the time within



which actions should be brought is not retrospective in its operation. *Morrison v. Baltimore & O. R. Co.*, 40 App. D. C. 391, Ann. Cas. 1914 C 1026.

#### **Amendment of 1910.**

##### **— Survival.**

The amendment of 1910, providing for the survival of an injured employee's right of action under the Federal Employers' Liability Act, for loss and suffering previous to his death, is not retrospective in its operation, and cannot be applied where an employee died prior to its adoption. *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703, reversing 98 Ark. 240, 135 S. W. 874; *Cain v. Southern R. Co.*, 199 Fed. 211.

### **IV. CONTRACTS AGAINST AND RELEASES FROM LIABILITY.**

Instructions as to contracts against liability, see *infra* XIX, E, 4.

#### **A. In General.**

##### **Workmen's Compensation Acts.**

Since the Illinois Workmen's Compensation Act is a part of an employee's contract of employment, it is not within the prohibition of section 5 of the Federal Employers' Liability Act as a contract exempting the employer from liability. *Staley v. Illinois C. R. Co.*, 268 Ill. 356, 109 N. E. 342, L. R. A. 1916 A, 450, reversing 186 Ill. App. 593.

#### **B. Contracts Antedating Federal Act.**

##### **In General.**

Section 5 of the Federal Employers' Liability Act, prohibiting contracts between carriers and employees relieving the former from the liability created by the act, applies to contracts entered into previous to the passage of the act. *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603, 56 L. ed. 911, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892, affirming 36 App. D. C. 565.

#### **C. Contracts Between Express Companies and Employees.**

##### **When Employee Also Servant of Railway.**

A contract between an express company and an express messenger who was also an employee of a railway company, releasing the express company, as well as any railroad upon the lines of which he was employed to travel, from liability for any injuries he might receive, is void under section 5 of the Federal Employers' Liability Act. *Taylor v. Wells Fargo Co.*, 136 C. C. A. 402, 220 Fed. 796.

#### **D. Contracts Between Pullman Company and Employees.**

##### **In General.**

A contract between a sleeping car porter and the Pullman Company releasing all railroad corporations over whose lines the cars of such company might be operated while he was traveling in its service, from liability of any nature or character whatsoever on account of personal injuries or death, does not, where the porter cannot be regarded as an employee of the railroad company, violate section 5 of the Federal Employers' Liability Act prohibiting contracts between common carriers and their employees exempting the former from liability under that act. *Robinson v. Baltimore & O. R. Co.*, 237 U. S. 84, 59 L. ed. 849, 35 Sup. Ct. Rep. 491, affirming 40 App. D. C. 169, L. R. A. 1915 D. 51.

#### **E. Contracts with Student Employees.**

##### **In General.**

Where the uncontradicted evidence in an action based on the Federal Employers' Liability Act, showed that a student brakeman was in fact an employee of the defendant and not a mere licensee, although his contract with the defendant did not indicate that he was to perform any services for it or to receive compensation, a portion of such contract which absolved the defendant from liability for injuries to the student was properly excluded in an action by him for personal injuries, since it was void under section 5 of the Federal act. *Rief v. Great N. R. Co.*, 126 Minn. 430, 148 N. W. 309.

#### **F. Contracts with Independent Contractors.**

##### **For Coaling Engines.**

A contract with an independent contractor for the coaling of engines of an interstate carrier, by which the former assumed all liability for injuries to himself or his employees from the carrier's negligence, is not within the prohibition of section 5 of the Federal Employers' Liability Act. *Chicago, R. I. & P. R. Co. v. Bond*, 240 U. S. 449, — L. ed. —, 36 Sup. Ct. Rep. 403, reversing — Okla. —, 148 Pac. 103.

#### **G. Relief Department Contracts.**

##### **Stipulation for Release of Liability by Acceptance of Benefits.**

##### **— In General.**

A regulation of a railway relief department to the effect that the acceptance of benefits therefrom should release a carrier from liability for injuries to or the

death of an employee, falls within the condemnation of section 5 of the Federal Employers' Liability Act, prohibiting contracts relieving carriers from the liability under that act. *Phila., B. & W. R. Co. v. Schubert*, 224 U. S. 603, 56 L. ed. 911, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892, affirming 36 App. D. C. 565.

A rule of a railway relief department that the acceptance of benefits by an injured employee should relieve a carrier from liability, is within section 5 of the Federal Employers' Liability Act of 1906, and is void. *Phila., B. & W. R. Co. v. Schubert*, 36 App. D. C. 565, affirmed 224 U. S. 603, 56 L. ed. 911, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892.

A relief department contract providing that the acceptance of benefits thereunder should release the employer from liability for injuries to an employee or that the bringing of suit should amount to a forfeiture of all rights under such contract, is void under section 5 of the Federal Employers' Liability Act. *Hartman v. Chicago, B. & Q. R. Co.*, — Mo. —, 182 S. W. 148.

A provision in a contract of employment that the acceptance of benefits by an employee from a railway relief department should release a carrier from liability for injuries received by the former, was within section 5 of the Federal Employers' Liability Act of 1906. *McNamara v. Washington Term. Co.*, 35 App. D. C. 230; *Potter v. Baltimore & O. R. Co.* (Sup. Ct. D. C.), 37 Wash. L. R. 466.

#### —Release Executed After Receiving Benefits.

Under section 5 of the Federal Employers' Liability Act the acceptance of benefits by an injured employee from a railway relief department does not relieve the carrier from liability, although the injured employee executes a release therefor. *Wagner v. Chicago & A. R. Co.*, 180 Ill. App. 196, affirmed 265 Ill. 245, 106 N. E. 809, Ann. Cas. 1916 A, 778, 239 U. S. 452, — L. ed. —, 36 Sup. Ct. Rep. 135.

Where an employee became a member of a railway relief department under a contract by which he agreed to execute to the railway company a release of all claims for injuries before he should receive relief benefits, and after an injury he did execute such a release and was paid benefits, such contract was within section 5 of the Federal Employers' Liability Act, and was not a bar to a subsequent action under such statute. *Baltimore & O. R. Co. v. Gawinski*, 116 C. C. A. 579, 197 Fed. 31.

#### —When Available to Joint Tortfeasor.

An employee's agreement that the acceptance by him of benefits from a rail-

way relief department should release his employer from liability for injuries, since invalid under section 5 of the Federal Employers' Liability Act as to injuries sustained while employed in interstate commerce, affords no defense to another company when sued by an injured employee as a joint tortfeasor of the contracting company. *Chicago & A. R. Co. v. Wagner*, 239 U. S. 452, — L. ed. —, 36 Sup. Ct. Rep. 135, affirming 265 Ill. 245, 106 N. E. 809, Ann. Cas. 1916 A, 778.

#### Effect of Such Stipulation on Contract of Membership.

##### —In General.

A rule of a railway relief department forfeiting the right of a member to benefits if he brings action against the carrier for personal injuries unless he shall first discontinue the action, being void under section 5 of the Federal Employers' Liability Act, vitiates the contract of a member for benefits, since it was indivisible, and he cannot recover on such contract where he previously recovered judgment under the Federal act. *Baltimore & O. R. Co. v. Miller*, 183 Ind. 323, 107 N. E. 545.

##### —Recovery on.

There may be a recovery on a railway relief association certificate of membership for the death of an employee while engaged in interstate commerce, irrespective of a condition thereof that no money should be paid thereon until all claims against the railway company arising from the injury or death of the employee should be released, since such condition was in violation of section 5 of the Federal Employers' Liability Act. *Rodell v. Relief Dept. C. B. & Q. R. Co.*, 118 Minn. 449, 137 N. W. 174.

Under section 5 of the Federal Employers' Liability Act, declaring void any contract, rule or regulation of a common carrier exempting it from the liability imposed by that act, and providing that, in an action for his injuries, it may set off its contributions to any insurance or relief benefits paid an injured employee, a regulation of a carrier's relief department that if an employee brought suit for his injuries the benefits accruing under his membership should be forfeited, is invalid, and an injured employee may recover on his membership certificate although he has an action pending against the company for his injuries. *Wise v. Chicago, B. & Q. R. Co.*, — Minn. —, 158 N. W. 711.

#### Acceptance of Benefits as Defense to Action Under Federal Law.

Where by the rules of a railway company all persons entering its employ were required to become members of its relief department, the receipt by an injured em-

ployee of benefits therefrom is not, under section 5 of the Federal Employers' Liability Act, a defense to an action against the carrier for such injuries. *Herring v. Atlantic C. L. R. Co.*, 168 N. C. 555, 84 S. E. 863.

A carrier is not relieved from liability under the Federal Employers' Liability Act by reason of the receipt by an injured employee of benefits from a relief department, a rule of which provided that such payment should release the carrier from all liability. *Phila., B. & W. R. Co. v. Schubert*, 36 App. D. C. 565, affirmed 224 U. S. 603, 56 L. ed. 911, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892.

The acceptance by an injured employee of payments from a railway relief department does not bar an action under the Federal Employers' Liability Act for damages resulting from injuries negligently inflicted. *Burnett v. Atlantic C. L. R. Co.*, 163 N. C. 186, 79 S. E. 414, reversed on other grounds 239 U. S. 199, 60 L. ed. —, 36 Sup. Ct. Rep. 75.

The acceptance of benefits by an injured employee from a railway relief department is not a defense to an action under the Federal Employers' Liability Act. *Hogarty v. Phila. & R. R. Co.*, 245 Pa. 443, 91 Atl. 854.

The fact that an injured employee received benefits from a railway relief department under a contract providing that it should be a waiver of his right of action for his injuries, is no defense to an action under the Federal Employers' Liability Act. *Pitts., C. & St. L. R. Co. v. Sheets*, 15 Ohio C. C. R. (N. S.) 305, affirmed 87 Ohio St. 476, 102 N. E. 1129.

Where a case is shown falling within the terms of the Federal Employers' Liability Act, although that act was not pleaded, the proof of acceptance of benefits by the plaintiff from the relief department of the defendant railway does not entitle the latter to a directed verdict. *Hogarty v. Phila. & R. R. Co.*, 245 Pa. 443, 91 Atl. 854.

#### Setting Off Payments.

An employer may, in an action founded on the Federal Employers' Liability Act, set off against the plaintiff such sum as it may have contributed to relief benefits received by the plaintiff on account of his injuries. *Wagner v. Chicago & A. R. Co.*, 180 Ill. App. 196, affirmed 265 Ill. 245, 106 N. E. 809, 239 U. S. 452, — L. ed. —, 36 Sup. Ct. Rep. 135; *Herring v. Atlantic C. L. R. Co.*, 168 N. C. 555, 84 S. E. 863.

Where an employee of a railway company was injured by the negligence of another company over the tracks of which he was moving cars in interstate commerce, and he accepted benefits from a relief department maintained by his employer, in an action against the negligent carrier it may set off the portion of such

benefits contributed to such department by the plaintiff's employer. *Wagner v. Chicago & A. R. Co.*, 180 Ill. App. 196, affirmed 265 Ill. 245, 106 N. E. 809, Ann. Cas. 1916 A, 778; 239 U. S. 452, — L. ed. —, 36 Sup. Ct. Rep. 135.

When sued by an employee for the recovery of relief department benefits for injuries sustained while engaged in interstate commerce, the defendant cannot rely on a provision of the contract forfeiting the employee's right to all benefits by the bringing of action for his injuries; and where the employer has paid nothing to the employee under such contract, it is not entitled to the benefit of section 5 of the Federal Employers' Liability Act, permitting the setting off amounts paid by the carrier to the relief of the plaintiff. *Keels v. Atlantic C. L. R. Co.*, — S. C. —, 89 S. E. 388.

#### H. Release of Existing Causes of Action.

##### Validity in General.

A settlement made by a widow in good faith with a carrier for the death of her husband is a bar to an action for her benefit under the Federal Employers' Liability Act. *Goen v. Baltimore & O. S. W. R. Co.*, 179 Ill. App. 566.

A release by an employee who was injured while engaged in interstate commerce, of a carrier from liability therefor is not within section 5 of the Federal Employers' Liability Act. *Anderson v. Oregon S. L. R. Co.*, — Utah —, 155 Pac. 446.

An injured employee's release of an interstate carrier from liability for an existing cause of action is binding under the Federal Employers' Liability Act, when made without fraud or concealment. *Anderson v. Oregon S. L. R. Co.*, — Utah —, 155 Pac. 446.

A release of the liability of a carrier for personal injuries, executed by an employee of sufficient mental capacity to understand the nature of his act, when based on a sufficient consideration, is a defense to an action founded on the Federal Employers' Liability Act. *Clark v. Chicago G. W. R. Co.*, 170 Ia. 457, 152 N. W. 635.

A release of liability is not a defense to an action under the Federal Employers' Liability Act, when procured from an injured employee who was not mentally capable of understanding its nature, and which the employer represented as a payment merely for lost wages. *Louisville & N. R. Co. v. Winkler*, 162 Ky. 843, 173 S. W. 151, 9 N. C. C. A. 146.

A release of an employee's claim for damages for an injury previously sustained while engaged in interstate commerce, is valid, and constitutes a bar to a subsequent action founded on the Federal Employers' Liability Act, since not within the prohibi-

tion of section 5 against contracts, rules, regulations or devices intended to enable a carrier to evade the liability created by the act. *Patton v. Atchison, T. & S. F. R. Co.*, — Okl. —, 158 Pac. 576.

#### **Settlement by Parent as Bar to Action by Administrator.**

A settlement by a mother of her claim against a railway company for the death of her son, is no bar to a recovery for her benefit by a personal representative under the Federal Employers' Liability Act. *Pittsburgh, C. C. & St. L. R. Co. v. Col-lard*, — Ky. —, 185 S. W. 1108.

#### **Release of Joint Tortfeasors.**

The acceptance by a railroad switchman of compensation from a street railway company and its release by him from further liability for injuries sustained when he was knocked from the top of a freight car by a trolley wire negligently maintained over a street crossing, is a release of one joint tortfeasor which will bar an action under the Federal Employers' Liability Act against his employer for negligently permitting such wire to be suspended in too close proximity to the railroad track, notwithstanding that the release expressly reserved the employee's right of action against his employer. *Louisville & N. R. Co. v. Allen*, 67 Fla. 257, 65 So. 8, L. R. A. 1915 C 20.

#### **I. Stipulations for Notice of Injury.**

##### **Validity.**

A stipulation of a contract of employment with a carrier, that the giving of written notice to it within a specified time after the injury or death of an employee, should be a condition precedent to an action therefor, is void and unenforceable in an action under the Federal Employers' Liability Act, where the employee met death while engaged in interstate commerce. *Chicago, R. I. & P. R. Co. v. Pearce*, 118 Ark. 6, 175 S. W. 1160, L. R. A. 1915 F 551.

### **V. WHAT CARRIERS AND TRAF-FIC WITHIN ACT.**

#### **A. In General.**

##### **Common Carriers Only Within Act.**

The Federal Employers' Liability Act applies only to common carriers by rail. *The Pawnee*, 205 Fed. 333; *Hammill v. Penn. R. Co.*, 87 N. J. L. 388, 94 Atl. 313.

An action cannot be maintained under the Federal Employers' Liability Act against a defendant who is not shown to be a common carrier. *Shade v. Northern P. R. Co.*, 206 Fed. 353.

In order to recover under the Federal Employers' Liability Act for personal injuries it must appear that the defendant owned and operated a common carrier railroad. *Bay v. Merrill & Ring L. Co.*, 211 Fed. 717, affirmed 136 C. C. A. 277, 220 Fed. 295.

Where an employee of an intrastate carrier was injured by the negligence of a coemployee while they were repairing a bridge, an action may be maintained under the Federal Employers' Liability Act, although it was not alleged that the defendant was engaged in interstate commerce, since it is common knowledge that every railway of the state engages in interstate commerce by transporting passengers and freight to and from points in other states. *McIntosh v. St. Louis & S. F. R. Co.*, 182 Mo. App. 188, 168 S. W. 821.

To warrant a recovery under the Federal Employers' Liability Act, the employer must be a railway company engaged in interstate commerce. *McKee v. Ohio V. E. R. Co.*, — W. Va. —, 88 S. E. 616; *Hurley v. Illinois C. R. Co.*, — Minn. —, 157 N. W. 1005; *Lucchetti v. Philadelphia & R. Co.*, 233 Fed. 137; *Alexander v. Great N. R. Co.*, — Mont. —, 154 Pac. 914; *Grow v. Oregon S. L. R. Co.*, 44 Utah, 160, 138 Pac. 398, Ann. Cas. 1915, B, 481.

In order to recover under the Federal Employers' Liability Act, it must be established that the defendant owned and operated a common carrier railroad, and was engaged in interstate or foreign commerce at the time the plaintiff was injured. *Bay v. Merrill & Ring L. Co.*, 211 Fed. 717, affirmed 136 C. C. A. 277, 220 Fed. 295.

#### **What Constitutes Interstate Commerce.**

##### **—In General.**

A train transporting any goods from without a state to points therein or from points within the state to points in another state, is engaged in interstate commerce within the Federal Employers' Liability Act. *Lynch v. Central Vt. R. Co.*, — Vt. —, 95 Atl. 683.

It cannot be said that cars of fruit were moved in interstate commerce within the meaning of the Federal Employers' Liability Act when left by a train at a station near the state line, where it does not appear that such cars had crossed such line. *Osborne v. Gray*, 241 U. S. 16, — L. ed. —,

##### **—Intrastate Trains Containing Interstate Traffic.**

An intrastate railway is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act when hauling to points within the state a train composed largely of cars containing interstate traffic which originated without the state on the lines of connecting interstate

carriers. *Findley v. Coal & C. R. Co.*, — W. Va. —, 87 S. E. 198.

— **Cars Withdrawn from Interstate Traffic for Repairs.**

A loaded freight car in process of transportation from one state to another is in transit and in use in interstate commerce, within the meaning of the Federal Employers' Liability Act, although it is to be removed to a repair track to replace a defective coupler. *Otos v. Great N. R. Co.*, 128 Minn. 283, 150 N. W. 922, affirmed 239 U. S. 349, — L. ed. —, 36 Sup. Ct. Rep. 124.

— **Movement of Fuel and Water for Carrier's Use.**

See also *infra* VI, H.

An interstate railway engaged in moving cars of water or coal over its lines from one state to another for use in its engines is engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act. *Barker v. Kansas City, M. & O. R. Co.*, 88 Kan. 767, 129 Pac. 1151, 43 L. R. A. (N. S.) 1121.

An interstate railway when hauling cars of coal over its lines within the state, where their bulk is to be broken and some portion thereof afterwards used for fuel on engines running into other states, is not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *Barker v. Kansas City, M. & O. R. Co.*, 94 Kan. 176, 146 Pac. 358.

— **Movement of Dead Engine.**

A dead engine while being hauled in an interstate train from one state to another was an instrumentality of interstate commerce within the meaning of the Federal Employers' Liability Act. *Atlantic C. L. R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 693, reversed on other grounds — Ala. —, 67 So. 256.

— **Turning Engine.**

An engine which had just been detached from an interstate train was still engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, where an employee, while repairing a turntable, was injured by the negligent movement of the locomotive while it was being turned preparatory to entering a roundhouse. *Chesapeake & O. R. Co. v. Kornhoff*, 167 Ky. 353, 180 S. W. 523.

**B. Carriers of Passengers.**

**In General.**

A carrier of passengers only is a common carrier within the meaning of the Federal Employers' Liability Act of 1906. *Washington, A. & Mt. V. R. Co. v. Downey*, 40 App. D. C. 147, writ of error dismissed 236 U. S. 190, 59 L. ed. 533, 35 Sup. Ct. Rep. 406.

**C. Terminal Companies.**

**When Within Act.**

A terminal company owning many miles of track within the District of Columbia over which all railway traffic entering the District must pass, is a common carrier within the meaning of the Federal Employers' Liability Act of 1906. *McNamara v. Washington Term. Co.*, 37 App. D. C. 384, S. C. 35 App. D. C. 230.

**D. Electric Railway Companies.**

**When Within Federal Act.**

An electric interurban railway lying wholly within a state is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, where it received eighty per cent of its traffic from connecting lines originating without the state. *Ross v. Sheldon*, — Ia. —, 154 N. W. 499.

An interurban trolley or electric system of railway running through more than one state and carrying passengers or freight or both, is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *McAdow v. Kansas City W. R. Co.*, — Mo. App. —, 164 S. W. 188, affirmed 240 U. S. 51, — L. ed. —, 36 Sup. Ct. Rep. 252.

An electric interurban railway company which transfers its cars with their passengers therein, from its tracks to the track of a street railway company, from which point the cars are transported over the tracks of the latter company from one state to another, the fares collected for that part of the trip covering the street railway tracks being divided, is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *McAdow v. Kansas City W. R. Co.*, — Mo. App. —, 164 S. W. 188, affirmed 240 U. S. 51, — L. ed. —, 36 Sup. Ct. Rep. 252.

**E. Carriers Operating Boats.**

Limiting liability in admiralty, see *supra* III, D. 1.

**In General.**

It cannot be said as a matter of law, that an interstate carrier was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, while using a tug boat to continue or complete the movement of interstate traffic. *Erie R. Co. v. Jacobus*, 137 C. C. A. 151, 221 Fed. 335.

A ferry boat used by a carrier in interstate commerce is within the Federal Employers' Liability Act. *The Passiac*, 190 Fed. 644, affirmed 122 C. C. A. 466, 204 Fed. 266.

A vessel engaged in commerce by water with a foreign nation was within the Fed-

eral Employers' Liability Act of 1906. *Lancer v. Anchor Line*, 155 Fed. 433.

A steamship plying between different states is not within the Federal Employers' Liability Act, although owned by an interstate railway company, when not operated in connection therewith. *Jensen v. Southern P. Co.*, 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916, A, 403, Ann. Cas. 1916, B, 776, 9 N. C. C. A. 286, affirming 167 App. Div. 945, 152 N. Y. Supp. 1120; *Burns v. Southern P. Co.*, 215 N. Y. 738, 109 N. E. 606, 1068, affirming 167 App. Div. 945, 152 N. Y. Supp. 1101.

A boat that is not engaged in carrying goods for the general public, and which is not a part of a railway system, is not within the Federal Employers' Liability Act, since the act applies only to carriers by rail. *The Pawnee*, 205 Fed. 333.

The Federal Employers' Liability Act applies only to carriers by rail and not to a canal leased by such a carrier. *Ham-mill v. Penn. R. Co.*, 87 N. J. L. 388, 94 Atl. 313.

#### F. Logging Roads.

##### When Within Federal Act.

A corporation owning and operating a logging railroad for transporting logs cut from land owned by it, to a point on tide water in the same state, where they were sold to nearby mills and most of the finished lumber then shipped to other states, was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, notwithstanding that it carried some poles over the road and sold them to a person at tide water, who resold them for shipment to a foreign state. *Bay v. Merrill & Ring L. Co.*, 136 C. C. A. 277, 220 Fed. 295, affirming 211 Fed. 717.

A logging railroad lying entirely within one state is not within the Federal Employers' Liability Act, notwithstanding that a portion of the lumber cut from the logs transported was subsequently sold and shipped to other states. *Nordgard v. Marysville & N. R. Co.*, 134 C. C. A. 415, 218 Fed. 737, affirming 211 Fed. 721.

#### G. Lessors and Lessees.

##### Lessors.

Where an intrastate railroad was leased to an interstate carrier, the lessor was engaged in interstate commerce so as to render it answerable under the Federal Employers' Liability Act for an injury to or the death of an employee of the lessee, where a state law made the lessor responsible for the negligence of the lessee. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 505, Ann. Cas. 1914 C. 159, 9 N. C. C. A. 109, reversing 156 N. C. 496, 72 S. E. 858.

An intrastate railway company which leased its road to an interstate carrier so that it became a part of an interstate system, is answerable under the Federal Employers' Liability Act to an employee of the lessee for injuries resulting from the latter's negligence, where by a state law the lessor was responsible for the negligence of its lessee. *Lloyd v. Southern R. Co.*, 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489, affirmed on other grounds 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210.

##### Lessees.

Where a railway company under a traffic agreement, ran its trains with its own employees over the tracks of another company, such tracks are those of the employer company within the meaning of the Federal Employers' Liability Act, so as to render it liable for an injury received by one of its employees from the negligence of the owner company. *Campbell v. Canadian N. R. Co.*, 124 Minn. 245, 144 N. W. 772.

#### VI. WHAT EMPLOYEES WITHIN THE ACT.

For construction of the term "employment" and "employee" see supra II, D. Employment in interstate commerce as question of law or fact, see infra XIX, B, 2 and C, 3 (m).

Sufficiency of evidence to show employment in interstate commerce, see infra XVIII, E, 2.

When evidence sufficient to take to jury question of employment in interstate commerce, see infra XIX, C, 2 (c).

#### A. In General

##### 1. Necessity for Employment in Interstate Commerce.

##### In General.

In order that there may be a recovery under the Federal Employers' Liability Act both a carrier and an employee must have been engaged in interstate commerce at the time the latter was killed or injured. *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, — L. ed. —, 36 Sup. Ct. Rep. 188, affirming 214 N. Y. 413, 108 N. E. 644; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 505, Ann. Cas. 1914 C. 159, 9 N. C. C. A. 109, reversing 156 N. C. 496, 72 S. E. 858; *Boyle v. Penn. R. Co.*, 221 Fed. 453, affirmed — C. C. A. —, 21 Fed. 266; *Stafford v. Norfolk & W. R. Co.*, 202 Fed. 605; *Charleston & W. C. R. Co. v. Anchors*, 10 Ga. App. 322, 73 S. E. 551; *Thornboro v. Kansas City, M. & O. R. Co.*, 91 Kan. 684, 139 Pac.

410; *Barker v. Kansas City, M. & O. R. Co.*, 88 Kan. 767, 129 Pac. 1151, 43 L. R. A. (N. S.) 1121; *Cantin v. Glen J. T. Co.* — N. H. —, 90 Atl. 303; *Chicago, R. I. & G. R. Co. v. Cosio*, — Tex. Civ. App. —, 182 S. W. 83; *White v. Cent. Vermont R. Co.*, 87 Vt. 330, 89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865; *Gray v. Chicago & N. W. R. Co.*, 153 Wis. 637, 142 N. W. 505, affirmed on other grounds 237 U. S. 399, 59 L. ed. 1018, 35 Sup. Ct. Rep. 620.

Congress intended to confine the Federal Employers' Liability Act to actions for injuries occurring while the particular service in which an employee was engaged at the time of his injury or death was a part of interstate commerce. *Illinois C. R. Co. v. Behrns*, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 464, Ann. Cas. 1914 C. 163, affirming 134 C. C. A. 639, 217 Fed. 967, which reversed 192 Fed. 581.

Only those railway employees who are engaged in interstate commerce are within the protection of the Federal Employers' Liability Act. *Bravis v. Chicago, M. & St. P. R. Co.*, 133 C. C. A. 228, 217 Fed. 234.

A railway employee who was killed while engaged in interstate commerce was within the Federal Employers' Liability Act. *Hearst v. St. Louis, I. M. & S. R. Co.*, 188 Mo. App. 36, 173 S. W. 86.

An interstate carrier by rail is liable to an employee under the Federal Employers' Liability Act only for injuries suffered while both of the parties were engaged in interstate commerce. *Atchison, T. & S. F. R. Co. v. Pitts*, — Okla. —, 145 Pac. 1148, 9 N. C. C. A. 545.

The mere fact that a carrier was engaged in interstate commerce by rail does not bring one of its employees within the protection of the Federal Employers' Liability Act, unless at the time of his injury or death he was actually employed in such commerce. *Gordon v. New Orleans G. N. R. Co.*, 135 La. 137, 64 So. 1014.

The Federal Employers' Liability Act applies only to injuries sustained where the particular service in which an employee was engaged at the time of an accident is a part of the interstate commerce in which a railway company is engaged. *Erie R. Co. v. Jacobus*, 137 C. C. A. 151, 221 Fed. 335.

In order for the plaintiff to recover under the Federal Employers' Liability Act he must show that at the time of his injury he was engaged in interstate commerce. *Cantin v. Glen J. T. Co.*, — N. H. —, 90 Atl. 303.

The Federal Employers' Liability Act applies only to injuries which occur while an employee is engaged in a service that is a part of the interstate commerce of a carrier. *Patry v. Chicago & W. I. R. Co.*,

265 Ill. 310, 106 N. E. 843, reversing 185 Ill. App. 361.

A railway employee is within the Federal Employers' Liability Act where he is injured or killed in the performance of some service in furtherance of the interstate business of a carrier. *Van Brimmer v. Texas & P. R. Co.*, 190 Fed. 394.

Where a carrier was engaged in interstate commerce at the time an employee was injured while performing a work incident to such commerce, he may invoke the protection of the Federal Employers' Liability Act. *Southern R. Co. v. Howerton*, — Ind. App. —, 101 N. E. 121, 103 N. E. 121, reversed on other grounds 182 Ind. 208, 232, 106 N. E. 369, 106 N. E. 1025.

In order to recover under the Federal Employers' Liability Act it must be established that the defendant owned and operated a common carrier railroad, that it was engaged in interstate or foreign commerce, and that the plaintiff was injured while employed by the defendant in such commerce. *Bay v. Merrill & Ring L. Co.*, 211 Fed. 717, affirmed 136 C. C. A. 277, 220 Fed. 295.

In order to bring an employee within the Federal Employers' Liability Act it must appear that at the time he was injured the work in which he was engaged had a real and substantial connection with interstate commerce. *Barker v. Kansas City, M. & O. R. Co.*, 88 Kan. 767, 129 Pac. 1151, 43 L. R. A. (N. S.) 1121.

When a complaint shows that an action is governed by the Federal Employers' Liability Act, in order to maintain the action it must appear that both the injured employee and the defendant carrier were engaged in interstate commerce at the time of the accident. *Alexander v. Great N. R. Co.*, — Mont. —, 154 Pac. 914.

The Federal Employers' Liability Act does not govern an action for the death of a railway employee where the only evidence that his train, which ran exclusively between points in the same state, was engaged in interstate commerce was the testimony of the fireman that some of the cars in the train contained coal, wood or bark which came from another state. *Ingle v. Southern R. Co.*, 167 N. C. 636, 83 S. E. 744.

In order to bring a case within the terms of the Federal Employers' Liability Act it must appear that the defendant was engaged in interstate commerce, that the injured person was in the employ of the carrier and that his injury or death resulted in whole or in part from the negligence of an officer, agent or employee of the defendant while the injured employee was engaged in such commerce. *Grow v. Oregon S. L. R. Co.*, 44 Utah, 160, 138 Pac. 398, Ann. Cas. 1915 B. 481.

Whether injuries received by an employee while working on a railway bridge would effect, hinder, delay or interfere with interstate commerce, will not be determined on a motion to strike from the defendant's answer a defense based on an alleged release of the plaintiff's cause of action. *Kern v. Chicago, M. & P. S. R. Co.*, 201 Fed. 404.

A servant must be employed in interstate commerce at the time of his injury or death in order to bring him within the terms of the Federal Employers' Liability Act. *Watts v. Ohio V. E. R. Co.*, — W. Va. —, 88 S. E. 659.

Liability under the Federal Employers' Liability Act appears only when it is shown that the employer is a common carrier by rail engaged in interstate commerce, and that the injured employee was employed by the carrier in such commerce at the time of his injury. *Hurley v. Illinois C. R. Co.*, — Minn. —, 157 N. W. 1005; *Crandall v. Chicago G. W. R. Co.*, 127 Minn. 498, 150 N. W. 165; *McKee v. Ohio V. E. R. Co.*, — W. Va. —, 88 S. E. 616; *Lucchetti v. Philadelphia & R. R. Co.*, 233 Fed. 137.

## 2. Test of Employment in Interstate Commerce.

### In General.

The true test of employment in interstate commerce is whether an employee at the time of his injury or death was engaged in interstate transportation, or in work so closely related thereto as to be practically a part thereof. *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, — L. ed. —, 36 Sup. Ct. Rep. 188, L. R. A. 1916 C. 797, affirming 214 N. Y. 413, 108 N. E. 644.

In determining, in an action under the Federal Employers' Liability Act, the nature of a railway employee's work at the time of an injury, the true test is whether it was a part of the interstate commerce in which his employer was engaged. *Pederson v. Delaware, L. & W. R. Co.* 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914 C. 153, 3 N. C. C. A. 779, reversing 117 C. C. A. 33, 197 Fed. 537, and 184 Fed. 737.

The true test of a carrier's liability under the Federal Employers' Liability Act, is whether the work in which an employee was engaged at the time of his injury or death, was a part of the interstate commerce in which the carrier was engaged. *Illinois Cent. R. Co. v. Behrns*, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914 C. 163, 10 N. C. C. A. 153, affirming 134 C. C. A. 639, 217 Fed. 967, which reversed 192 Fed. 581.

In determining whether a state law or the Federal Employers' Liability Act governs an action for the death of an employee, the test is whether at the time of

the accident both employer and employee were engaged in interstate commerce. *Louisville & N. R. Co. v. Strange*, 156 Ky. 439, 161 S. W. 239.

When an employer is engaged in interstate commerce the specific labor in which an employee is engaged at a given time takes its character as a part of state or interstate commerce, within the meaning of the Federal Employers' Liability Act, not from the nature of the specific work but from its relation to interstate commerce. *Bolch v. Chicago, M. & St. P. R. Co.* — Wash. —, 155 Pac. 422.

The general duties of a railroad employee may be taken into consideration in determining in an action based on the Federal Employers' Liability Act, whether he was engaged in interstate commerce at the time he received an injury. *Montgomery v. Southern P. Co.*, 64 Oreg. 597, 131 Pac. 507, 47 L. R. A. (N. S.) 13.

An employee need not be directly engaged in movement of trains to be within the protection of the Federal Employers' Liability Act, the test being whether the work in which he was employed is a part of interstate commerce in which a carrier is engaged. *Law v. Illinois C. R. Co.*, 126 C. C. A. 27, 208 Fed. 869, L. R. A. 1915 C. 17.

Whether an action arises under and is within the Federal Employers' Liability Act does not depend solely upon the allegation of the plaintiff's petition, but is to be determined by the character of the employment of a person at the time of his injury, and whether it was a part of the interstate commerce in which a carrier was engaged. *Chicago, R. I. & P. R. Co. v. Felder*, — Okla. — 155 Pac. 529.

When an employee is injured while engaged in employment that is essential to the successful operation of a railway by a carrier that is engaged in interstate commerce, he also is engaged in such commerce within the meaning of the Federal Employers' Liability Act. *Coal & Coke R. Co. v. Deal*, — C. C. A. —, 231 Fed. 604, affirming 215 Fed. 285.

Employment or work in interstate commerce is not restricted, for the purposes of the Federal Employers' Liability Act, to employment or work in actual interstate transportation, since the scope of the act includes work in the operation or repair of cars, engines, appliances, machinery, tracks, roadbeds, works, boats, wharves and other equipment actually used in interstate commerce. *McKee v. Ohio V. E. R. Co.*, — W. Va. —, 88 S. E. 616.

One who performs work in putting prospective subjects of interstate commerce in a state of preparedness for transportation is not engaged in such commerce within the meaning of the Federal Employers'



Liability Act. *Sullivan v. Chicago, M. & St. P. R. Co.*,—Wis.—, 158 N. W. 321.

### 3. Employees of Interstate Carriers Engaged in Intrastate Commerce.

#### Injuries Received While Engaged in Intrastate Commerce.

A servant employed to work a part of his time on an interstate train and the remainder on an intrastate train cannot recover under the Federal Employers' Liability Act for an injury sustained while engaged in operating the latter train. *Southern R. Co. v. Murphy*, 9 Ga. App. 190, 70 S. E. 972.

An employee of an interstate carrier cannot recover under the Federal Employers' Liability Act for injuries suffered while coupling an engine to the passenger and baggage cars of an intrastate mixed train, although it was intended to place in such train immediately thereafter freight cars moving in interstate traffic. *Atchison, T. & S. F. R. Co. v. Pitts*,—Okla.—, 145 Pac. 1148, 9 N. C. C. A. 545.

A railway employee is not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, where he sustains an injury or is killed while performing some service in connection with the intrastate business of an interstate carrier. *Van Brimmer v. Texas & P. R. Co.* 190 Fed. 394.

An employee of a railway company engaged in both interstate and intrastate commerce, cannot recover under the Federal Employers' Liability Act for injuries received while working wholly in intrastate commerce. *Cantin v. Glenn J. T. Co.*—N. H.—, 90 Atl. 303.

An employee of a carrier engaged in both interstate and intrastate commerce, cannot recover under the Federal Employers' Liability Act for injuries sustained while moving a car, where it does not appear in which class of commerce it was employed at the time of the accident. *Cantin v. Glen T. J. Co.*—N. H.—, 90 Atl. 303.

### B. Scope of Employment.

Instructions as to scope of employment, see *infra* XIX, E, 21.

Scope of employment as question for jury, see *infra* XIX, C, 3, (u).

#### 1. What Within.

##### Fireman Running Engine.

A fireman in running an engine at the direction of an engineer in violation of a rule of a carrier, acted within the scope of his employment. *Callaghan v. Chicago*

& N. W. R. Co. 161 Wis. 288, 154 N. W. 449.

A fireman in running a locomotive in the absence of the engineer, in violation of a rule of a carrier, did not act without the scope of his employment so as to relieve his employer from liability under the Federal Employers' Liability Act for injuries inflicted on another employee through the negligence of the fireman, where he moved the engine in furtherance of the employer's business. *Callaghan v. Chicago & N. W. R. Co.* 161 Wis. 288, 154 N. W. 449.

##### Fireman Obeying Order of Hostler.

A fireman did not act within the scope of his employment in attempting, at the direction of a hostler, to latch a turntable, where the former had nothing to do with the engine that was being turned until it was placed by the hostler on a siding. *Byram v. Illinois C. R. Co.*,—Ia.—, 154 N. W. 1006.

##### Brakeman Firing Engine.

Where a freight brakeman was ordered by his conductor to fire a locomotive which the conductor was running while the regular crew were at dinner, in the absence of any rule prohibiting the brakeman obeying the orders of the conductor, the latter had authority to direct the brakeman to fire, and the latter acted within the scope of his employment in doing so. *Martin v. Atchison, T. & S. F. R. Co.*, 93 Kan. 681, 145 Pac. 849.

##### Baggageman Entering Express Car.

A baggageman on an interstate train was acting within the scope of his employment, so as to permit a recovery under the Federal Employers' Liability Act, when he was injured in a collision just as he left the baggage car and entered an express car in which through baggage was carried, as the train was approaching a station at which such baggage might have been delivered. *Duvall v. Seaboard A. L. R. Co.*, 152 N. C. 524, 67 S. E. 1008, writ of error dismissed 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790.

##### Ordering Employee to Jump From Train.

Where a section foreman, under the erroneous belief that a switch had been left open and that a collision with a rapidly approaching train was inevitable, directed his men to jump from a work train and one of them was struck and killed by the passing train, the foreman acted within the scope of his employment. *Cincinnati, N. O. & T. P. R. Co. v. Wilson*, 161 Ky. 640, 171 S. W. 430.

Where a section foreman, under the erroneous belief that a switch had been left open and that a collision with a rapidly approaching train was inevitable,

directed his men to jump from a work train and one of them was struck and killed by the passing train, the employer is answerable under the Federal Employers' Liability Act, since the foreman acted within the scope of his employment in giving such order. *Cincinnati, N. O. & T. P. R. Co. v. Wilson*, 161 Ky. 640, 171 S. W. 430.

Where an inexperienced call boy, while on his way to call a train crew, was killed by jumping from a moving train which, in defiance of the carrier's orders he boarded and jumped from at the direction of an older boy who had been delegated to instruct him in his duties, the giving of such orders was not within the scope of the former's duties. *Vanordstrand v. Northern P. R. Co.*, 87 Wash. 91, 151 Pac. 89.

#### **Work Train Employee on Way for Mail on Sunday.**

A person employed by an interstate carrier on a work train doing local work wholly within a state, was not within the Federal Employers' Liability Act where he was injured on Sunday, when, at the direction of his superior, he attempted to board a passing train in order to go to a nearby town to procure mail. *Meyers v. Norfolk & W. R. Co.*, 162 N. C. 343, 78 S. E. 280, 48 L. R. A. (N. S.) 987.

#### **Violating Rules.**

The fact that an engineer at the time he was killed in a collision with a locomotive which was negligently left on a cross-over track so as not to clear the main track, may have acted imprudently, negligently or even contrary to the rules of his employer in running an engine at night at high speed against the current of traffic, does not show that he was acting without the scope of his employment. *Louisville & N. R. Co. v. Fleming*, —Ala.—, 69 So. 125.

#### **When Death in Discharge of Duties Inferred.**

An inference that a brakeman was in the performance of his duties and attempting to set a defective brake when he was killed in a collision between stationary cars and two kicked cars which he was riding, arises in an action based on the Federal Employers' Liability Act, where he was last seen alive setting the brake on one of the cars and after the accident the brake on the other cars was found to be defective. *Worthington v. Elmer*, 125 C. C. A. 50, 207 Fed. 306.

#### **2. Injuries Received Without**

##### **Liability for.**

A carrier is not answerable under the Federal Employers' Liability Act for in-

juries received by an employee while not acting within the scope of or while doing some act not incidental to his employment. *Hobbs v. Great N. R. Co.*, 80 Wash. 678, 142 Pac. 20, L. R. A. 1915 D. 503; *Cincinnati, N. O. & T. P. R. Co. v. Wilson*, 161 Ky. 640, 171 S. W. 430; *Byram v. Illinois C. R. Co.*, —Ia.—, 154 N. W. 1006.

A hostler whose duty it was to coal, sand and water engines used in interstate commerce was not within the protection of the Federal Employers' Liability Act where he was killed 150 feet from his working place while assisting a mechanic in moving a disused clam-shell bucket so as to enable the latter to remove a portion thereof. *Erie R. Co. v. Van Buskirk*, 143 C. C. A. 71, 228 Fed. 489.

Where a fireman while acting at the direction of a hostler who had no control over him, attempted to latch a turntable on which his engine was standing and was injured by the negligence of an assistant hostler, he cannot recover under the Federal Employers' Liability Act, when it was no part of his duty and custom did not require him to do anything with his engine until turned and placed by the hostler on the proper track, since under the circumstances he was a mere volunteer and acted without the scope of his employment. *Byram v. Illinois C. R. Co.*, —Ia.—, 154 N. W. 1006.

#### **C. Employees Engaged in Original Construction Work.**

##### **1. In General.**

(No decisions.)

##### **2. Tracks, Bridges and Tunnels Not Open for Traffic.**

##### **In General.**

Persons employed in the preparation or construction of roadbeds, rails, ties, cars, engines or other instrumentalities intended for use in interstate commerce, but which have never been and are not in use therein, are not within the protection of the Federal Employers' Liability Act. *Bravis v. Chicago, M. & St. P. R. Co.*, 133 C. C. A. 228, 217 Fed. 234.

##### **Roadbeds and Tracks.**

For injuries received by an employee while engaged in construction work on an interstate railway which has not been opened for traffic, the Federal Employers' Liability Act does not afford a remedy. *Chicago, R. I. & P. Co. v. Trout*, —Tex. Civ. App.—, 152 S. W. 1137.

##### **Second Tracks.**

A brakeman was not engaged in interstate commerce so as to be within the

Federal Employers' Liability Act, where he was injured while working with a train on a track used in such commerce, distributing ties along the right of way for use in constructing a second track, no part of which had ever been employed in such commerce. *Chicago & E. R. Co. v. Steele*, 183 Ind. 444, 108 N. E. 4.

### Bridges.

An employee of an interstate carrier, while engaged in the construction of a bridge 600 feet distant from a railroad on a roadbed intended as a cut-off to be used in interstate commerce when completed, was not within the protection of the Federal Employers' Liability Act, where the cut-off had never been used for railroad purposes or rails laid thereon. *Bravis v. Chicago, M. & St. P. R. Co.*, 133 C. C. A. 228, 217 Fed. 234.

An employee who was killed while working in an excavation beneath a wooden trestle, which carried an interstate railway over a stream, was not within the protection of the Federal Employers' Liability Act, although the excavation was for the abutment of a steel bridge which, when completed, was to take the place of the wooden structure. *McKee v. Ohio V. E. R. Co.*, — W. Va. —, 88 S. E. 616.

A contractor and his employees were the servants of a railway company, within the meaning of the Federal Employers' Liability Act, while they were engaged in constructing cement piers beneath a wooden bridge, over which interstate traffic constantly passed, where the piers were intended to eventually sustain a new bridge. *State v. Bates & Rogers Const. Co.*, — Wash. —, 157 Pac. 482.

### Tunnels.

An employee of an interstate carrier was not within the Federal Employers' Liability Act, where he was injured while employed in the construction of a tunnel that had not become an instrumentality of interstate commerce, but which when completed, was intended to be used in such commerce. *Jackson v. Chicago, M. & St. P. R. Co.*, 210 Fed. 495.

An employee was not within the protection of the Federal Employers' Liability Act, where he sustained injury while working in a tunnel which, when completed, was intended for use by an interstate railway, in the expeditious and efficient operation of interstate trains. *Raymond v. Chicago, M. & St. P. R. Co.*, — C. C. A. —, 233 Fed. 239.

### Ditching Roadway.

A person employed with a work train ditching the sides of an interstate railway in the course of construction, and in con-

veying the earth removed for use in fills, was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, where he was injured by the negligence of a carrier while he was unfastening a chain which held a tackle-block used in removing earth from the train with a plow. *Ft. Smith & W. R. Co. v. Blivens*, 35 Okla. 378, 130 Pac. 525.

### 3. Buildings.

#### Stations.

An employee who was killed while engaged in the construction of a railway station that was being used at the time for both interstate and intrastate traffic, was within the terms of the Federal Employers' Liability Act. *Chrosciel v. New York C. & H. R. R. Co.*, — App. Div. —, 159 N. Y. Supp. 924.

An employee was within the Federal Employers' Liability Act where he was killed by the giving away of a scaffold on which he was working boring holes in a concrete wall for the purpose of placing a fence between tracks leading to different levels of a terminal railway station in course of construction, and which, at the time, was being used for both interstate and intrastate traffic. *Chrosciel v. New York C. & H. R. R. Co.*, — App. Div. —, 159 N. Y. Supp. 924.

#### Shop Extensions.

A carpenter was within the Federal Employers' Liability Act, where he was injured while assisting in constructing an extension to a shop belonging to an interstate carrier, which when completed, was to be used for the repair of engines used in both intrastate and interstate commerce. *Thompson v. Cincinnati, N. O. & T. P. R. Co.*, 165 Ky. 256, 176 S. W. 1006.

A carpenter was within the Federal Employers' Liability Act, where he was injured while assisting in constructing an extension to a shop belonging to an interstate carrier, in which engines used in both interstate and intrastate commerce were repaired, where such extension had been used temporarily for the housing of engines used in interstate commerce. *Thompson v. Cincinnati, N. O. & T. P. R. Co.*, 165 Ky. 256, 176 S. W. 1006.

#### Coal Chutes.

A carpenter engaged in building a coal chute for an interstate railway company, who was killed by an engine as he was crossing a track on his way to procure tools from a bunk car, was not within the Federal Employers' Liability Act. *Voris v. Chicago, M. & St. P. R. Co.*, 172 Mo. App. 125, 157 S. W. 835.

**Freight Office.**

An employee who was injured while framing up a new office in a freight shed and in sawing boards and nailing them in place on the wall, was within the Federal Employers' Liability Act, where such shed was used by an interstate carrier in its business. *Eng v. Southern P. Co.*, 210 Fed. 92.

**4. Signal Systems.****Block Signal System.**

A person employed in installing a block signal system on the line of an interstate railway was within the purview of the Federal Employers' Liability Act. *Grow v. Oregon S. L. R. Co.* 44 Utah, 160, 138 Pac. 398, Ann. Cas. 1915 B. 481, S. C. — Utah —, 150 Pac. 970.

A signal repairman was within the Federal Employers' Liability Act, where, while binding the rails of an interstate road with copper wire as a part of the installation of an electric signal system, he was struck and killed by a train as he stepped onto an adjoining track in order to avoid a train coming from the opposite direction on the track on which he was working. *Glunt v. Penn. R. Co.*, 249 Pa. 522, 95 Atl. 109.

An employee engaged in installing a new block signal system on the line of an interstate railroad, was within the Federal Employers' Liability Act, where he was struck and killed by a negligently operated train as he was crossing a main track at a station on his way to a work train on which he was being transported, after a brief absence for a necessary purpose. *Saunders v. Southern R. Co.*, 167 N. C. 375, 83 S. E. 573.

A lineman employed in nailing cross arms on poles beside the track of an interstate electric interurban railway, was within the Federal Employers' Liability Act, where the arms were intended to carry wires for a new automatic signal system which was in course of construction. *Ross v. Sheldon*, — Ia. —, 154 N. W. 499.

**D. Employees Demolishing Buildings.****Roundhouse Injured by Fire.**

A railway carpenter who was injured by the fall of a timber while tearing down a portion of a roundhouse used for the storage of engines employed in interstate commerce, in order to make repairs after the building had been partly destroyed by fire, was within the protection of the Federal Employers' Liability Act. *Thomas v. Boston & M. R. Co.*, 134 C. C. A. 554, 219 Fed. 180, 8 N. C. C. A. 981, reversing 218 Fed. 143.

**E. Employees Engaged in Maintenance and Repair Work.****1. In General.****Roadmaster.****— Inspecting Repairs on Car.**

That an assistant roadmaster was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, may be inferred where he was killed while inspecting the repairs on a brakebeam of the caboose of a freight train on which he was traveling, when, unless repairs were immediately made, the track might have been damaged or the train derailed. *Lynch v. Central Vt. R. Co.*, — Vt. —, 95 Atl. 683.

**Lumber Yard Employee.**

An employee of an interstate carrier, who was killed while obtaining lumber from a pile in a lumber yard owned by the carrier and in which repairs and construction material was fitted up for the road, was not within the Federal Employers' Liability Act, although at the time of the accident he was getting out lumber for shipment to another state for the subsequent use of his employer. *Sullivan v. Chicago, M. & St. P. R. Co.*, — Wis. —, 158 N. W. 321.

**2. Inspectors.****In General.**

An employee while engaged in inspecting the main track of a railway lying entirely within one state was within the protection of the Federal Employers' Liability Act, where such track was used for transporting cars carrying both interstate and intrastate commerce. *Anest v. Columbia & P. S. R. Co.*, 89 Wash. 609, 154 Pac. 1100.

**Removing Hand-Car from Track.**

A section foreman was within the Federal Employers' Liability Act, where, while inspecting the track under his control, which was used in both interstate and intrastate commerce, he was injured by the negligence of the men under him while removing a heavy hand-car from the track so as to avoid an approaching interstate train. *Louisville & N. R. Co. v. Kemp*, 140 Ga. 657, 79 S. E. 558.

**3. Bridges.****In General.**

The work of keeping in a proper state of repair such an instrumentality of an interstate railway as a bridge, is so closely related to interstate commerce as to be a part thereof in practice and legal contemplation and within the meaning of the Federal Employers' Liability Act. *Peder-*

son v. Delaware, L. & W. R. Co., 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914 C. 153, 3 N. C. C. A. 779, reversing 117 C. C. A. 33, 197 Fed. 537, 184 Fed. 737.

A railway employee who was killed while assisting in repairing a bridge on an interstate railway was within the protection of the Federal Employers' Liability Act. *Thomson v. Columbia & P. S. R. Co.*, 205 Fed. 203, 4 N. C. C. A. 925.

An employee was within the protection of the Federal Employers' Liability Act, where he was killed by the fall of a portion of a bridge used in interstate traffic, which had been destroyed by a freshet, while he was removing debris from beneath it in order that a temporary structure might be erected to carry such traffic over a stream. *Columbia & P. S. R. Co. v. Sauter*, 139 C. C. A. 150, 223 Fed. 604.

An employee while assisting in repairing a bridge used by a carrier in interstate commerce was not engaged in such commerce within the meaning of the Federal Employers' Liability Act, although he worked generally on bridges in different states for the carrier. *Taylor v. Southern R. Co.*, 178 Fed. 380.

A bridge repairer was within the protection of the Federal Employers' Liability Act when injured while removing drift bolts from timbers that had been taken from a bridge employed in interstate commerce, although such timbers had been moved away from the tracks, and were being sorted and the good ones piled along the right of way, preparatory for removal for future use. *Long v. Lusk*, — Ark. —, 186 S. W. 601.

#### **Bridge Used for Both Intrastate and Interstate Traffic.**

The fact that a railway bridge was used in both interstate and intrastate commerce does not prevent those engaged in its repair or in keeping it in suitable condition for use, from being engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *Pederson v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914 C. 153, 3 N. C. C. A. 779, reversing 117 C. C. A. 33, 197 Fed. 537, and 184 Fed. 737.

#### **Conveying Repair Material to Bridge.**

An employee who was struck and killed by an intrastate train as he was carrying a sack of bolts or rivets to a bridge for use in its repair, was within the protection of the Federal Employers' Liability Act, where the bridge was used for both interstate and intrastate traffic. *Pederson v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914 C. 153, 3 N. C. C. A. 779, revers-

ing 117 C. C. A. 33, 197 Fed. 537, and 184 Fed. 737.

#### **4. Signal Systems.**

##### **In General.**

An electrician employed to keep in order and repair an electric signal system used on an interstate railway line for directing and controlling the operation of both intrastate and interstate trains, was within the Federal Employers' Liability Act. *Cincinnati, N. O. & T. P. R. Co. v. Bonham*, 130 Tenn. 435, 171 S. W. 79.

A lineman who was killed while placing cross arms on poles beside the track of an interstate electric interurban railway, was, within the meaning of the Federal Employers' Liability Act, engaged in maintenance or repair work rather than new construction, where such arms were to carry the wires of a new automatic signal system which was in course of installation. *Ross v. Sheldon*, — Ia. —, 154 N. W. 499.

#### **5. Telegraph Lines.**

##### **In General.**

A person who was injured while employed by an intrastate railway company in repairing a telegraph line used for the purpose of directing the operation of its trains, was within the protection of the Federal Employers' Liability Act. *Deal v. Coal & Coke R. Co.*, 215 Fed. 285, affirmed — C. C. A. —, 231 Fed. 604.

A telegraph lineman in the employ of a railway lying wholly within one state, but over which interstate traffic was transported, was within the protection of the Federal Employers' Liability Act, where he was injured while assisting in raising a new telegraph pole to carry the wires over which messages were transmitted in directing the operation of trains. *Coal & Coke R. Co. v. Deal*, — C. C. A. —, 231 Fed. 604, affirming 215 Fed. 285.

#### **6. Tracks Used for Interstate Traffic.**

##### **In General.**

The work of maintaining and keeping in proper condition the roadbed and tracks of a carrier after they have become instrumentalities of interstate commerce is within the purview of the Federal Employers' Liability Act. *Tralich v. Chicago, M. & St. P. R. Co.*, 217 Fed. 675.

An employee who was injured while repairing a track over which interstate commerce was transported, was employed in such commerce within the meaning of the Federal Employers' Liability Act of 1906. *Kelley v. Great N. R. Co.*, 152 Fed. 211.

A section hand may invoke the Federal Employers' Liability Act where he was injured while engaged in repairing a

track over which interstate commerce was transported. *Southern R. Co. v. Howerton*, — Ind. App. —, 101 N. E. 212, 103 N. E. 121 reversed on other grounds 182 Ind. 208, 232, 106 N. E. 369, 105 N. E. 1025.

A member of a railway construction gang who was injured through the negligent operation of a steam shovel by an engineer, was within the protection of the Federal Employers' Liability Act, where at the time of the accident the plaintiff was engaged in the repair and maintenance of a roadbed and tracks used by a carrier in interstate commerce. *Tralich v. Chicago, M. & St. P. R. Co.*, 217 Fed. 675.

#### **Yard Tracks.**

A laborer repairing a yard track that was constantly used as an instrumentality of interstate commerce, was within the protection of the Federal Employers' Liability Act, where, while crossing intervening tracks with tools on his shoulder which he was directed by his foreman to procure with directions to hurry, he was struck by a negligently operated locomotive. *Waina v. Penn. Co.*, 251 Pa. 213, 96 Atl. 461.

#### **7. Tracks Used for Interstate and Intrastate Traffic.**

##### **In General.**

The fact that a railway track may be used both in interstate and intrastate commerce does not prevent those engaged in its repair or in keeping it in suitable condition for use, from being engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *Pederson v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914 C. 153, 3 N. C. C. A. 779, reversing 117 C. C. A. 33, 197 Fed. 537, and 184 Fed. 737.

A section hand who was injured through the negligence of a coemployee was within the protection of the Federal Employers' Liability Act, where at the time of the accident they were engaged in repairing a track used by a carrier in both intrastate and interstate commerce. *Zikos v. Oregon R. R. & N. Co.*, 179 Fed. 893.

An employee who was injured while laying new rails in a track sometimes used for interstate and sometimes for intrastate traffic, was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *Pierson v. New York, S. & W. R. Co.*, 83 N. J. L. 661, 85 Atl. 233.

A foreman of a gang of track hands, whose eye was injured by a particle of iron put in flight by the negligent stroke of a hammer in the hands of one of the men under him, was not within the protection of the Federal Employers' Liabil-

ity Act, although the accident occurred while the men were taking up and relaying a rail in a track over which both interstate and intrastate trains were operated by a carrier which in a general sense was engaged in interstate commerce. *Charleston & W. C. R. Co. v. Anchors*, 10 Ga. App. 322, 73 S. E. 551.

#### **8. Switches and Switch Tracks.**

##### **In General.**

A trackwalker while repairing a switch in a terminal yard at night was within the protection of the Federal Employers' Liability Act, where he was struck and killed by cars which were negligently kicked into a station preparatory to receiving passengers on the arrival of a ferry boat from a foreign state, for transportation to points in the domestic state. *Central R. of N. J. v. Colasurdo*, 113 C. C. A. 379, 192 Fed. 901, affirming 180 Fed. 852, writ of error dismissed 226 U. S. 617, 57 L. ed. 383, 33 Sup. Ct. Rep. 111.

An employee who, after oiling a switch connecting tracks used in both interstate and intrastate commerce, was struck and killed by a car as he was replacing a cover to the switch mechanism, was not within the protection of the Federal Employers' Liability Act, where such car was not employed in interstate commerce and its movement did not relate to the making up of an interstate train. *Granger v. Penn. R. Co.*, 84 N. J. L. 338, 86 Atl. 264.

An employee engaged in repairing side tracks of an interstate carrier by shoveling earth from between the ties, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *Lombardo v. Boston & M. R. Co.*, 223 Fed. 427.

A section hand who was injured while carrying a new rail to replace another in a switch track of an interstate carrier, was engaged in interstate commerce and within the protection of the Federal Employers' Liability Act. *Truesdell v. Chesapeake & O. R. Co.*, 159 Ky. 718, 169 S. W. 471.

An employee engaged in repairing a switch track constructed and used by a carrier to expedite the movement of interstate passenger and freight trains, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *Jones v. Chesapeake & O. R. Co.*, 149 Ky. 566, 149 S. W. 951.

A section foreman employed in a railway yard to keep the tracks and switches in order, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, where he was killed by a backing train as he was crossing the tracks which were used for breaking up, storing and making up trains

used in interstate commerce, notwithstanding that his reason for crossing the tracks did not appear. *Willever v. Delaware, L. & W. R. Co.*, 87 N. J. L. 348, 94 Atl. 595.

### 9. Relaying Rails.

#### Handling New Rails.

A section hand was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, where he was injured while carrying a rail to place in a main track which extended into another state. *Cincinnati, N. O. & T. P. R. Co. v. Tucker*, 168 Ky. 149, 181 S. W. 940.

### 10. Pumping Plants.

#### In General.

A workman engaged in repairing a pump-house and pumping plant that supplied water for engines used in interstate commerce was within the Federal Employers' Liability Act, where he was struck and killed by a train while he was on his way to procure necessary timbers for use in such work. *Newkirk v. Pryor*, — Mo. App. —, 183 S. W. 682.

### 11. Work Train Employees.

#### In General.

A work train conductor in the employ of an interstate carrier was not within the protection of the Federal Employers' Liability Act, where he was injured while working on a branch line lying wholly within one state, picking up new ties to be subsequently removed to a plant maintained by the carrier for treatment, from which they would ultimately be sent to various points upon the main or branch lines of the defendant or its affiliated companies within or without the state, as might be required for construction, renewal or repairs. *Alexander v. Great N. R. Co.*, — Mont. —, 154 Pac. 914.

#### Employee Injured on Sunday.

An employee of an interstate carrier was not within the Federal Employers' Liability Act, where, while doing local repair work with a work train, wholly within a state, he was injured on Sunday when he was not working, while obeying an order of an assistant foreman, to board a passing freight train to go to a neighboring town for mail. *Meyers v. Norfolk & W. R. Co.*, 162 N. C. 343, 78 S. E. 280, 48 L. R. A. (N. S.) 987.

#### Moving Gravel.

An employee on a train hauling gravel for the improvement and repair of a railway track over which interstate traffic is regularly transported, is within the Fed-

eral Employers' Liability Act. *Holmberg v. Lake Shore & M. S. R. Co.*, — Mich. —, 155 N. W. 504.

### 12. Ballasting Track.

#### In General.

A section hand while ballasting a main track of a railroad over which freight and passengers were carried between different states, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *San Pedro, L. A. & S. L. R. Co. v. Davide*, 127 C. C. A. 454, 210 Fed. 870.

### 13. Clearing Up Wrecks.

#### Falling Over Obstructions.

Where a car inspector was called from his duties of making a record of interstate cars inspected by him, to assist in jacking up a wrecked car in order to release an imprisoned coemployee, and to clear the track for an interstate train, the former was within the Federal Employers' Liability Act where he was injured while he was carrying blocks used in raising the cars, by falling over obstructions negligently left on the roadbed. *Southern R. Co. v. Puckett*, 16 Ga. App. 551, 85 S. E. 809.

#### Handling Crooked Rail at Wreck.

A section hand who was injured in handling a crooked rail while assisting in clearing up a wreck on an interstate railway, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *Missouri, K. & T. R. Co. v. Mooney*, — Tex. Civ. App. —, 181 S. W. 543.

### 14. Handling Old Rails.

#### Loading on Cars.

An employee on a work train who was injured while loading on a car old rails that had been removed from a track over which both interstate and intrastate traffic was transported by an interstate carrier, was within the protection of the Federal Employers' Liability Act. *Phila., B. & W. R. Co. v. McConnell*, 142 C. C. A. 555, 228 Fed. 263.

A track laborer who was injured while loading on a flat car rails which had been removed from the track of an interstate carrier, was not within the Federal Employers' Liability Act, where it did not appear that the rails were fit for use or were intended to be used elsewhere in such track. *Illinois C. R. Co. v. Kelly*, 167 Ky. 745, 181 S. W. 375.

An employee of an interstate railway who was injured while loading on a flat car rails which had been used in repairing

the main line, was not within the protection of the Federal Employers' Liability Act, where it was not shown whether the rails were old or new, where they came from or where they were going when loaded. *Tamura v. Great N. R. Co.*, 58 Wash. 316, 108 Pac. 774.

The conductor of a work train was engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act, where he was killed while moving to a station, to place on a side track, a car containing old rails which had been removed from a main track extending from the United States into Canada, when such rails were intended for subsequent distribution along the line for use in repairing the main track whenever necessary to replace worn or broken rails. *Canadian P. R. Co. v. Thompson*, — C. C. A. —, 232 Fed. 353.

### 15. Removing Snow.

#### Cleaning Snow from Switches.

An employee cleaning snow and ice from switch points in a railway yard on the lines of an interstate carrier, is within the Federal Employers' Liability Act. *Zitnek v. Union P. R. Co.*, 95 Neb. 152, 145 N. W. 344. Writ of error dismissed. 239 U. S. 650, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

A section man was within the protection of the Federal Employers' Liability Act where he was killed by a passing train while he was removing snow and ice from the switches on an interstate railway. *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328.

### 16. Turntables.

#### Making Repairs.

An employee may recover under the Federal Employers' Liability Act, for injuries received while repairing a turntable on which engines used in both interstate and intrastate commerce were turned, as the result of the negligent operation of the table while turning a locomotive which had just completed a trip with an interstate train. *Chesapeake & O. R. Co. v. Kornhoff*, 167 Ky. 353, 180 S. W. 523.

### 17. Repairmen Sleeping in Bunk Cars.

#### In General.

A person employed in relaying rails on an interstate railway was within the Federal Employers' Liability Act, when injured by the negligence of his employer while he was sleeping in a shanty car placed on a sidetrack for the accommodation of the track layers. *Sanders v.*

*Charleston & W. C. R. Co.*, 97 S. C. 50, 81 S. E. 283.

### 18. Moving Buildings on Cars.

Where a bridge crew in the employ of an interstate carrier, whose duties were all performed in one state, loaded a new outhouse on a train for transportation within the state to take the place of an old one at a station provided for the use of both interstate and intrastate passengers, and in transit the building fell from a car and was broken and on the following day a member of such crew was injured through the negligence of a fellow servant while they were moving the outhouse on a push car, the injured employee was within the protection of the Federal Employers' Liability Act. *Nash v. Minneapolis & St. L. R. Co.*, 131 Minn. 209, 154 N. W. 957.

### F. Employees Connected With Movement of Interstate Trains.

#### 1. In General.

##### What Movements Within Act.

The Federal Employers' Liability Act applies to all cases of injury to employees in connection with any movement of cars incidental to or rendered necessary by the presence on the tracks of an interstate carrier of a car loaded with interstate traffic, between the place of its receipt by the carrier and its destination. *Bolch v. Chicago, M. & St. P. R. Co.*, — Wash. —, 155 Pac. 422.

##### Engineer Talking With Coemployee.

An engineer was not within the Federal Employers' Liability Act, where, an hour and a half before the time to begin his regular run with an interstate train, he was struck by another train while he was standing on the ground beside an engine discussing a personal matter with another engineer. *El Paso & S. W. R. Co. v. La Londe*, — Tex. —, 184 S. W. 498, affirming — Tex. Civ. App. —, 173 S. W. 890.

#### 2. Particular Employees.

##### (a) Air Hose Couplers.

##### Adjusting Defective Coupler.

An employee whose duty it was to couple the air hose of cars in a railway yard, was within the Federal Employers' Liability Act, where he was injured by the movement of cars which stood on a side-track, while he was adjusting a defective coupler of a car employed in such commerce, so that its air hose might be coupled to that of another car. *Johnson v. Great N. R. Co.*, 102 C. C. A. 89, 178 Fed. 643.



**(b) Baggage-men.****Scope of Employment.**

The fact that a baggageman on an interstate train had just left the baggage car and entered the express car when he was injured in a collision, does not affect his employment, or the liability of the carrier under the Federal Employers' Liability Act, where through baggage was carried in the express car, and at the time of the accident the train was approaching a station where such baggage might have been received. *Duvall v. Seaboard A. L. R.*, 152 N. C. 524, 67 S. E. 1008, writ of error dismissed 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790.

**(c) Boat Employees.****In General.**

An employee on a vessel was not within the Federal Employers' Liability Act, where the boat was not a part of a railroad system, nor engaged in carrying goods for the general public, but only under special arrangement for specific cargoes, since the act applies only to common carriers by rail. *The Pawnee*, 205 Fed. 333.

The Federal Employers' Liability Act applies only to interstate carriers by rail, and does not render a railway company liable for injuries received by a servant employed on a canal leased by such a carrier. *Hammill v. Penn. R. Co.*, 87 N. J. L. 388, 94 Atl. 313.

**Boat Used for Continuing or Completing Interstate Journey.**

Where a person was injured while employed on a tug boat owned and operated by an interstate railway company and used by it in continuing or completing interstate traffic, it cannot be said as a matter of law in an action based on the Federal Employers' Liability Act, that they were not engaged in interstate commerce when the plaintiff's evidence tended to show that the accident occurred while the boat, after moving freight from one state to another, was backing into a slip at its home dock because another tow which it expected to move immediately in such commerce was not ready, and the testimony for the defendant was to the effect that in absence of further orders the boat was tying up at its home dock. *Erie R. Co. v. Jacobus*, 137 C. C. A. 151, 221 Fed. 335.

**Ferry Boat Employee.**

A person employed on a ferry boat owned by a carrier and used in interstate commerce, is within the Federal Employers' Liability Act. *The Passaic*, 190 Fed. 644, affirmed 182 C. C. A. 466, 204 Fed. 266.

**Unloading Vessel.**

A person who was injured by negligence while employed in unloading a vessel engaged in commerce by water with foreign nations, was within the Federal Employers' Liability Act of 1906. *Lancer v. Anchor Line*, 155 Fed. 433.

A person employed in unloading a steamship which plies between different states, is not brought within the Federal Employers' Liability Act by reason of the fact that the boat was owned by an interstate carrier, where it was not operated in connection with a line of railroad. *Jensen v. Southern P. Co.*, 215 N. Y. 514, 109 N. E. 600, 9 N. C. C. A. 286, L. R. A. 1916 A. 403, Ann. Cas. 1916 B. 276, affirming 167 App. Div. 945, 152 N. Y. Supp. 1120; *Burns v. Southern P. Co.*, 215 N. Y. 738, 109 N. E. 606, 1068, affirming 167 App. Div. 945, 152 N. Y. Supp. 1101.

**(d) Car Inspectors.****Disconnecting Steam Line.**

A car inspector while disconnecting the steam line of a passenger train which was passing through a state on an interstate journey, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *Kansas City S. R. Co. v. Miller*, 117 Ark. 396, 175 S. W. 1164.

**(e) Caretaker on Dead Engine.****In General.**

An employee who was injured while acting as caretaker or watchman on a dead engine which was being hauled in an interstate train from one state to another, was within the Federal Employers' Liability Act. *Atlantic C. L. R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 693, reversed on other grounds, — Ala. —, 67 So. 256.

**(f) Cinder Pit Cleaner.****In General.**

A person is within the Federal Employers' Liability Act where he was killed while cleaning ashes from a pit into which they were dumped from locomotives employed in both interstate and intrastate commerce. *Grybowski v. Erie R. Co.* — N. J. —, 95 Atl. 764.

An employee engaged in throwing from an ash pit ashes removed from locomotives employed in both interstate and intrastate commerce, was within the protection of the Federal Employers' Liability Act, where, while so employed, he was struck and injured by a switch engine. *Cincinnati, N. O. & T. P. R. Co. v. Clarke*, — Ky. —, 185 S. W. 94.

**(g) Coal Dock Hands.**

Acts of coal dock hands without scope of employment, see *Supra* VI, B, 2.

Movement of cars of fuel in general, see *infra* VI, H.

**In General.**

Where a hostler was killed as the result of injuries received while coaling a locomotive tender preparatory to its use in hauling an interstate train, he was within the Federal Employers' Liability Act. *Armbruster v. Chicago, R. I. & P. R. Co.*, 166 Ia. 155, 147 N. W. 337.

A hostler who was killed by injuries received while coaling a locomotive, was within the Federal Employers' Liability Act, where it appeared from records of engines coaled that the one in question was to be attached to an interstate train. *Armbruster v. Chicago, R. I. & P. R. Co.*, 166 Ia. 155, 147 N. W. 337.

An employee working on a coal chute coaling engines on an interstate railroad, was within the Federal Employers' Liability Act, where he was injured by a defect in or the rotten condition of the floor of the chute over which he was wheeling coal preparatory to coaling the engine of an interstate train which would arrive soon. *Southern R. Co. v. Peters*, — Ala. —, 69 So. 611.

A person employed on a coal chute by an interstate carrier to unload coal from cars for subsequent use in engines moving in interstate commerce, was within the Federal Employers' Liability Act, where he was killed by the derailment of a car of coal on the trestle as the result of a defective rail, as he was waiting to block the wheels of the car in order to unload it. *Kamboris v. Oregon, W. R. & N. Co.*, 75 Oreg. 358, 146 Pac. 1097.

A coal dock employee was not within the protection of the Federal Employers' Liability Act, where he was killed at night while cleaning the floor of a basement room in a coal dock by shoveling coal that had spilled during the day, into a moving conveyor which carried the coal to elevated bins from which it was deposited in the tenders of locomotives employed in interstate commerce. *Zavitowsky v. Chicago, M. & St. P. R. Co.*, 161 Wis. 461, 154 N. W. 974.

**Independent Contractor.**

A person who supplied coal for a coal dock and placed it on the engines of an interstate carrier under a contract by which the company had no control over his movements except as to results, was an independent contractor and not an employee of the company within the meaning of the Federal Employers' Liability Act. *Chicago, R. I. & P. R. Co. v. Bond*, 240

U. S. 449, — L. ed. —, 36 Sup. Ct. Rep. 403, reversing — Okla. —, 148 Pac. 103.

**(h) Coal Miners.****Mining Coal for Use in Interstate Engines.**

An employee who was injured while mining coal in a mine owned by an interstate railroad company, was not within the Federal Employers' Liability Act, notwithstanding that the coal mined was to be used in the carrier's engines in moving interstate commerce. *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902, affirming 137 C. C. A. 23, 220 Fed. 429, which affirmed 213 Fed. 537.

**(i) Crossing Watchmen.****Injury by Intrastate Train.**

A crossing watchman was not within the protection of the Federal Employers' Liability Act where he was stuck by an intrastate train while in the performance of his duties. *Louisville & N. R. Co. v. Barrett*, 143 Ga. 742, 85 S. E. 923.

**(j) Deadheading Employees.****In General.**

An extra brakeman was within the Federal Employers' Liability Act where he was injured while returning, under pay, to his headquarters on an interstate passenger train on a pass after having moved an interstate train on an intrastate portion of its journey. *St. Louis S. W. R. Co. v. Brothers*, — Tex. Civ. App. —, 165 S. W. 488.

The conductor of an interstate freight train which, because of the Hours of Labor Act, was abandoned en route and consolidated with another train on which he was deadheading to a terminal point, was within the Federal Employers' Liability Act, and did not act as a mere volunteer, where he was injured while assisting at the request of the conductor of the latter train in switching. *Seaboard A. L. R. Co. v. McMichael*, 143 Ga. 589, 85 S. E. 891.

**(k) Electric Railway Employees.****When Within Federal Act.**

A conductor employed by an interstate street railway company was not within the Federal Employers' Liability Act, where he was killed while operating an intrastate car which did not contain any interstate passengers, although transfers for an interstate trip might have been issued them had they been requested. *Kiser v. Metropolitan St. R. Co.*, 188 Mo. App. 169, 175 S. W. 98.

A conductor in the employ of an in-

terstate electric railway company was not within the protection of the Federal Employers' Liability Act, where he was injured while operating a local car running wholly within one state, through a collision with an interstate car. *Miller v. Kansas City W. R. Co.*, 180 Mo. App. 371, 168 S. W. 336.

Where an electric interurban railway company, under a traffic arrangement with a street car company, ran its cars to the state line, from which point the latter company then furnished power and conductors, but not motormen, to take the cars across the state line and return them, the cars being operated over the whole distance on schedules prepared by the interurban company, and passengers being transported in interstate commerce, a motorman on such a car was within the Federal Employers' Liability Act. *McAdow v. Kansas City W. R. Co.*, — Mo. App. —, 164 S. W. 188, affirmed 240 U. S. 51, 60 L. ed. —, 36 Sup. Ct. Rep. 252.

An employee of an electric railway company that operated both an urban system and connecting interstate lines, was not within the protection of the Federal Employers' Liability Act, when injured while operating on the urban lines a street car which contained neither interstate passengers nor traffic. *Watts v. Ohio V. E. R. Co.*, — W. Va. —, 88 S. E. 659.

#### (l) Engine Dispatchers.

##### In General.

An employee whose duty it was to care for and dispatch engines used in both interstate and intrastate commerce, was not within the Federal Employers' Liability Act, when injured during a period of rest while waiting for the arrival of an engine. *Gray v. Chicago & N. W. R. Co.*, 153 Wis. 637, 143 N. W. 505, affirmed on other grounds 237 U. S. 399, 59 L. ed. 1018, 35 Sup. Ct. Rep. 620.

#### (m) Express Messengers.

##### When Employees of Railway Company.

A messenger employed by an express company, who was killed through the negligence of an interstate carrier over whose lines he ran, was not an employee of the railway company within the meaning of the Federal Employers' Liability Act, although under the contract between the two companies, the decedent handled the baggage of interstate and intrastate passengers of the railway company. *Missouri, K. & T. R. Co. v. West*, 38 Okla. 581, 134 Pac. 655, writ of error dismissed 232 U. S. 682, 58 L. ed. 795, 34 Sup. Ct. Rep. 471.

An agent employed and paid by an express company, who was entitled to ride

on the cars of an interstate railway company under a contract between it and the express company, was not an employee of the railway company within the meaning of the Federal Employers' Liability Act, although he handled baggage for the latter company but without compensation. *Missouri, K. & T. R. Co. v. Blalack*, 105 Tex. 296, 147 S. W. 559 affirming — Tex. Civ. App. —, 128 S. W. 706.

##### Operating Electric Plant.

An express messenger who received pay from an express company with a supplemental from a railway company for attending to the train's electric lighting plant in the express car, was within the protection of the Federal Employers' Liability Act where he was injured while turning on the electric current to illuminate an interstate passenger train, although it did not appear whether at the time it carried either interstate passengers, freight or express. *Wesseler v. Great N. R. Co.*, — Wash. —, 155 Pac. 1063.

#### (n) Freight Handlers.

##### Truckman.

A truckman while engaged in transferring interstate freight from a warehouse of an interstate carrier to a freight car, was within the Federal Employers' Liability Act. *Illinois C. R. Co. v. Porter*, 125 C. C. A. 55, 207 Fed. 311.

#### (o) Gardeners.

##### Assistant Gardner.

An assistant gardner who collected and burned trash and cultivated the grounds about a railway station is not within the Federal Employers' Liability Act. *Galveston, H. & S. A. R. Co. v. Chojnacky*, — Tex. Civ. App. —, 163 S. W. 1011.

#### (p) Logging Road Employees.

##### When Within Federal Act.

A person employed on a logging road used for transporting timber cut from the land of the owner of the road to a point in the same state where it was sold and the finished products shipped to points in other states, was not within the protection of the Federal Employers' Liability Act. *Bay v. Merrill & Ring L. Co.*, 136 C. C. A. 277, 220 Fed. 295, affirming 211 Fed. 717.

An employee who was injured while moving logs over a logging railway lying entirely within one state, was not within the Federal Employers' Liability Act, although a portion of the timber subsequently cut from such logs was sold and shipped to other states. *Nordgard v. Marysville & N. R. Co.*, 134 C. C. A. 415, 218 Fed. 737, affirming 211 Fed. 721.

**(q) Pullman Porters.****In General.**

A Pullman porter was an employee of a railway company, within the meaning of the Federal Employers' Liability Act, where the car on which he was working at the time he was killed was owned jointly by and operated for the mutual benefit of such company and the Pullman company. *Oliver v. Northern P. R. Co.*, 196 Fed. 432.

A porter in the employ of the Pullman Company was not, within the meaning of the Federal Employers' Liability Act, an employee of a railway company over the road of which he was traveling in a sleeping car at the time he sustained an injury through the negligence of the railway company. *Robinson v. Baltimore & O. R. Co.*, 237 U. S. 84, 59 L. ed. 849, 35 Sup. Ct. Rep. 491, affirming 40 App. D. C. 169, L. R. A. 1915 D. 510.

The fact that a sleeping car porter, who was employed by and under the control of the Pullman Company, took up and delivered to the train conductor tickets and fares of passengers who boarded the car after three a. m. did not make him an employee of the railroad company within the meaning of the Federal Employers' Liability Act. *Robinson v. Baltimore & O. R. Co.*, 237 U. S. 84, 59 L. ed. 849, 35 Sup. Ct. Rep. 491, affirming 40 App. D. C. 169, L. R. A. 1915 D. 510.

**(r) Special Officers.****In General.**

A special officer or watchman in the employ of a carrier, was within the Federal Employers' Liability Act, where, after frightening trespassers from an interstate train he was injured, after having left the train, while he was driving them from his employers' premises. *Smith v. Industrial Accident Comm.*, 26 Cal. App. 560, 147 Pac. 600.

A yard watchman or detective was not within the Federal Employers' Liability Act, where he was injured while inspecting cars which were not shown to have been employed in interstate commerce, although there were some cars in the yard at the time that were employed in such commerce. *Chicago, R. I. & P. R. Co. v. Industrial Board*, — Ill. —, 113 N. E. 80.

**(s) Station Agents.****Handling Express.**

Where a station agent, who was also employed by another company as express agent, was struck and killed by an engine while he was removing interstate express matter from between double tracks where it had been deposited from a train, he was

not engaged in interstate commerce in the service of the railway company within the meaning of the Federal Employers' Liability Act. *Bogart v. New York C. & H. R. R. Co.* — App. Div. —, 157 N. Y. Supp. 420.

**(t) Student Employees.****In General.**

A student brakeman was the employee of a railway company, within the meaning of the Federal Employers' Liability Act, where he was expected to and did perform such tasks as were assigned him by the members of the train crew who were instructing him, such as loading and unloading freight at way stations, throwing switches and doing whatever he was directed to do in the operation of the train, notwithstanding that his contract with the carrier did not indicate that he was to render any services for it. *Rief v. Great N. R. Co.*, 126 Minn. 430, 148 N. W. 309.

A student fireman was within the protection of the Federal Employers' Liability Act when injured while on a train moving among others, cars containing interstate freight. *Findley v. Coal & C. R. Co.*, — W. Va. —, 87 S. E. 198.

**(u) Yard and Seal Clerks.****In General.**

A yard clerk in the employ of an interstate carrier, who was killed by a locomotive while he was in the performance of his daily duties of going into the yard to make a record of all incoming and outgoing cars, was within the protection of the Federal Employers' Liability Act, where there was a constant movement in the yard of interstate traffic. *Pitts., C. & St. L. R. Co. v. Farmers' T. & S. Co.*, 183 Ind. 287, 108 N. E. 108.

A finding that a ticket clerk whose duty required him to be in and about a railway yard to make a record of the numbers of outgoing freight cars and to seal those requiring it, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, is sustained by evidence that while he was walking beside an outgoing train consisting, with one exception, of cars moving in interstate commerce, observing and noting car numbers, he was struck and killed by a switch engine moving a ballast car on an adjoining track. *Pecos & N. T. R. Co. v. Rosenbloom*, 240 U. S. 439, 60 L. ed. —, 36 Sup. Ct. Rep. 390, reversing — Tex. —, 173 S. W. 217, 177 S. W. 952, — Tex. Civ. App. —, 141 S. W. 175.

There may be a recovery under the Federal Employers' Liability Act, for the death of a yard clerk who was killed

while on his way to meet an incoming interstate freight train to record the numbers and initials of the cars and their door seals, and to check the numbers with the conductor's list, and also to place labels on the cars, all of which were at their destination, in order to guide switchmen in distributing the cars. *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914 C. 156, 3 N. C. C. A. 800, reversing — *Tex. Civ. App.* —, 148 S. W. 1099.

### (2) Callers.

A yard clerk was not within the protection of the Federal Employers' Liability Act, where he was injured while on his way through the yard to call a train crew to move an interstate train. *Mitchell v. Louisville & N. R. Co.*, 194 Ill. App. 77.

## 3. Preparations for Trip.

### (a) In General

#### Procuring Ice.

An employee who was injured while removing ice from a box to place in the water coolers of an interstate passenger train, was within the Federal Employers' Liability Act. *Freeman v. Powell*, — *Tex. Civ. App.* —, 144 S. W. 1033.

### (b) Making Up Trains.

#### Moving Engine.

A person employed as a general worker in a railway yard was within the Federal Employers' Liability Act, where, while operating an engine which it was his duty to fire preparatory to an interstate trip, he was injured while on the way with the engine to procure a barrel of oil for such trip. *Tonsellito v. New York C. & H. R. R. Co.*, 87 N. J. L. 651, 94 Atl. 804.

### (c) Preparing and Inspecting Engines.

#### In General.

##### —Explosion of Lubricator Glass.

An engineer who was injured by the explosion of a glass attached to the lubricator of an engine, was within the Federal Employers' Liability Act, where, at the time he was preparing his engine to haul an interstate train. *Bower v. Chicago & N. W. R.*, 96 Neb. 419, 148 N. W. 145, affirmed 241 U. S. 470, 60 L. ed. —, 36 Sup. Ct. Rep. 403.

#### Turning Engine.

A fireman who, while assisting in turning his engine on a turntable preparatory to moving an interstate train, was injured by the negligence of a hostler, was within the Federal Employers' Liability Act. By-

ram v. Illinois C. R. Co., — Ia. —, 154 N. W. 1006.

#### Inspections.

##### —In General.

The work of a fireman in inspecting, oiling, firing and preparing his engine to move an interstate train on a portion of its journey wholly within a state, was a part of interstate commerce within the meaning of the Federal Employers' Act, notwithstanding that the engine had not been attached to such train. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 505, Ann. Cas. 1914 C. 159, 9 N. C. C. A. 109, reversing 156 N. C. 496, 72 S. E. 858.

##### —Preparing for Trial Run.

An engineer was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, where he was injured by a defect in a locomotive just from the repair shop, while he was inspecting it preparatory to making a trial run entirely within the state, before the engine was returned to its regular interstate run. *Lloyd v. Southern R. Co.*, 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489, affirmed 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210.

### (d) Setting Switches.

#### In General.

A passenger brakeman was within the Federal Employers' Liability Act, where, while setting switches to let an interstate train onto the main track at a terminal point preparatory to its trip, he was injured by the negligence of a coemployee. *Cincinnati, N. O. & T. P. R. Co. v. Goode*, 155 Ky. 153, 159 S. W. 695 (for facts see 153 Ky. 247, 154 S. W. 941).

### (e) Leaving Train for Private Purposes.

#### In General.

A fireman who, after inspecting, firing, oiling and preparing his engine to be attached to an interstate train, was killed by a switch engine as he was crossing a track on his way to his nearby boarding place, was within the protection of the Federal Employers' Liability Act. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 505, Ann. Cas. 1914 C. 159, 9 N. C. C. A. 109, reversing 156 N. C. 496, 72 S. E. 858.

#### To Procure Drinking Cup.

A freight brakeman who left his train while it was being prepared for an interstate trip, and was injured while crossing a railway yard in search of a tool boy to

procure a drinking cup for the use of the engine crew, was within the protection of the Federal Employers' Liability Act. *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

#### 4. Movement of Trains.

##### (a) In General.

###### Roadmaster Inspecting Repairs of Car.

An inference that an assistant division roadmaster was engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act, is justified by evidence that he was killed while inspecting the repairs of a broken brakebeam on a caboose in an interstate train, where such defect, unless repaired, might have caused injury to the track or the derailment of the train. *Lynch v. Central Vt. R. Co.*, — Vt. —, 95 Atl. 683.

###### Moving Interstate Traffic.

A brakeman who was killed while employed on an interstate freight train was within the protection of the Federal Employers' Liability Act. *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144.

A train transporting any goods from without a state to points within the state, or from points therein to points without the state, is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *Lynch v. Central Vt. R. Co.*, — Vt. —, 95 Atl. 683.

Where a freight crew including two brakemen were called to run an extra passenger train in interstate commerce, and were all paid therefor, and the head brakemen, while riding on the engine, was injured in a collision, he was engaged in such commerce within the meaning of the Federal Employers' Liability Act, although it was not customary to place a head brakeman on such a train. *Pelton v. Illinois C. R. Co.*, 171 Ia. 236, 150 N. W. 236, writ of error dismissed, 239 U. S. 655, 60 L. ed. —, 36 Sup. Ct. Rep. 166.

###### Movement of Cars After Termination of Interstate Shipment.

Where cars of coal were consigned in interstate commerce to a point within a state with no definite subsequent place of destination in the mind of the shipper, but depending on the demand for coal after its arrival at its original destination, an engineer, who was injured while moving a train containing some of such cars of coal destined to points within the state, was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *Missouri, K. & T. R. Co. v. Pace*, — Tex. Civ. App. —, 184 S. W. 1051.

##### (b) Moving Interstate Train on Intra-state Portion of Journey.

###### In General.

A brakeman whose run with an interstate train lies entirely within one state, was within the protection of the Federal Employers' Liability Act where, at the time he was injured, his train was moving merchandise in interstate traffic. *Noel v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 182 S. W. 787, writ of error dismissed 239 U. S. 652, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

###### Engine on Way to Repair Shop.

An engineer who participates in running an engine not in commercial use from a point in one state to a repair shop in another, is within the Federal Employers' Liability Act, notwithstanding that his orders were that between certain points in the same state such engine had the rights of an extra train. *Chicago, R. I. & P. R. Co. v. Wright*, 239 U. S. 548, — L. ed. —, 36 Sup. Ct. Rep. 185, affirming 96 Neb. 87, 146 N. W. 1024, S. C. 94 Neb. 317, 143 N. W. 220.

##### (c) Injuries Caused by Intrastate Car.

###### In General.

A brakeman on a local freight train running between different states may recover under the Federal Employers' Liability Act for injuries caused by a defective intrastate car, which was moved in the train; since he was within the act if injured while discharging his duties on a train engaged in interstate commerce. *Kansas City S. R. Co. v. Cook*, 100 Ark. 467, 140 S. W. 579.

##### (d) Picking Up and Setting Out Intrastate Cars.

###### Picking Up Cars.

A brakeman was within the protection of the Federal Employers' Liability Act where he was injured while taking an intrastate car from a siding and placing it in an interstate freight train. *Thornboro v. Kansas City, M. & O. R. Co.*, 91 Kan. 684, 139 Pac. 410, Ann. Cas. 1916 D. 314, affirmed on rehearing 92 Kan. 681, 142 Pac. 250.

###### Setting Out Cars.

A brakeman on an interstate freight train was not within the protection of the Federal Employers' Liability Act, where he was injured while setting out a car containing intrastate freight being transported wholly within one state. *Van Brimmer v. Texas & P. R. Co.*, 190 Fed. 394.

**(e) Empty Cars.****In General.**

The hauling of empty cars from one state to another is interstate commerce within the meaning of the Federal Employers' Liability Act. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 505, Ann. Cas. 1914 C. 159, 9 N. C. C. A. 109, reversing 156 N. C. 496, 72 S. E. 858.

An employee of an interstate carrier who was killed while moving empty freight cars in a train from one state to another, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *Thompson v. Wabash R. Co.*, 262 Mo. 468, 171 S. W. 364.

**(f) Returning with Engine and Caboose after Moving Interstate Train.****In General.**

A freight conductor in the employ of an interstate carrier, who made regularly a daily round trip wholly within one state, ordinarily moving interstate traffic both ways, was within the protection of the Federal Employers' Liability Act, where he was injured on a return trip while hauling only a disabled engine and a pile driver belonging to his employer. *Peery v. Illinois C. R. Co.*, 123 Minn. 264, 143 N. W. 724, affirmed on rehearing 128 Minn. 119, 150 N. W. 382.

An employee of an interstate carrier was not within the Federal Employers' Liability Act, where while going from one state to another with an engine and caboose, after moving interstate commerce, he was struck and killed by an interstate train as he was crossing a track to obtain orders. *McAuliffe v. New York C. & H. R. R. Co.*, 164 App. Div. 846, 150 N. Y. Supp. 512.

**(g) Cooling Hot Boxes.****Procuring Ice.**

A brakeman who was struck and injured by moving cars as he was on his way to an interstate train with ice to cool a hot box, was within the protection of the Federal Employers' Liability Act. *Illinois C. R. Co. v. Nelson*, 122 C. C. A. 258, 203 Fed. 956.

**5. Conduct at End of Run.****(a) In General.**  
(No decisions.)**(b) Switching.****In General.**

An engineer who was killed after his arrival at the end of his run with an interstate freight train, while he was switching

cars therefrom pursuant to orders, was within the Federal Employers' Liability Act. *Kansas City, M. & O. R. Co. v. Pope*, — Tex. Civ. App. —, 152 S. W. 185.

**Taking Passing Track.**

An employee was within the protection of the Federal Employers' Liability Act where he was injured while his train, at the end of an interstate run, was backing onto a lead track in order to permit another interstate train to pass, notwithstanding that the former train was about to pick up another car and make an extra run entirely within the state. *Chesapeake & O. R. Co. v. Shaw*, 168 Ky. 537, 182 S. W. 653.

**(c) Leaving Carrier's Premises for Private Purposes.****Going to Saloon.**

Where a brakeman, at the end of an interstate run, went to a saloon near the right of way and while on his way back to the station to report to his conductor and to obtain further orders before going to his supper, he was injured by the sudden starting of a freight train which obstructed his way, as he was climbing between the cars thereof, he was within the purview of the Federal Employers' Liability Act. *Graber v. Duluth, S. S. & A. R. Co.*, 159 Wis. 414, 150 N. W. 498.

**6. Termination of Employment.****In General.**

Where an engineer employed in interstate commerce was struck and injured by a train while he was on his way along the customary route through a yard to a roundhouse to begin work, it was held in an action based on the Federal Employers' Liability Act, that the fact that at the time of the accident he had stopped for several minutes to talk with another employee, did not suspend the relation of master and servant. *Missouri, K. & T. R. Co. v. Rentz*, — Tex. Civ. App. —, 162 S. W. 599.

**Employee Violating Orders.**

The fact that a motorman left a terminal with an electric car in violation of his orders, did not terminate the relation of master and servant so as to relieve his employer from liability under the Federal Employers' Liability Act for injuries sustained in a collision with another car in consequence of the failure of the brakes on the plaintiff's car to work. *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. ed. —, 36 Sup. Ct. Rep. 683, affirming 133 C. C. A. 370, 217 Fed. 518.

**Cleaning Up at End of Run.**

The relation of master and servant be-

tween a carrier and a brakeman does not necessarily terminate the instant an interstate train reaches its destination, or when the employee ceases to labor, but continues for a reasonable time thereafter so as to permit him to wash himself and change his clothing in a caboose provided with conveniences therefor, before departing for his lodging place; and the employer is liable under the Federal Employers' Liability Act, where a brakeman was struck and injured by a negligently operated locomotive while he was crossing a yard on his way from his caboose to his boarding place. *Easter v. Virginian R. Co.*, — W. Va. —, 86 S. E. 37.

It cannot be said as a matter of law, in an action based on the Federal Employers' Liability Act for injuries received by a brakeman while crossing a railway yard on his way to his boarding place, that the relation of master and servant had terminated between him and the defendant, on the ground that an hour was an unreasonable time for him to take to wash himself and change his clothing in the caboose of his train after its arrival at its destination. *Easter v. Virginian R. Co.*, — W. Va. —, 86 S. E. 37.

The fact that after the arrival of an interstate freight train at its destination, a brakeman took about an hour to wash himself and change his clothing in the caboose before leaving for his boarding place, does not warrant an inference, in an action based on the Federal Employers' Liability Act for injuries received by him from the negligent operation of a backing locomotive as he was crossing the yard on his way to his boarding place, that the time consumed by him was so unreasonable as to terminate the relation of master and servant. *Easter v. Virginian R. Co.*, — W. Va. —, 86 S. E. 37.

#### G. Employees Connected with Movement of Intrastate Trains.

##### 1. In General.

(No decisions.)

##### 2. Car Inspectors.

##### In General.

Where a car inspector employed by an interstate carrier, while inspecting a train which ran on a branch line wholly within one state, was struck and killed by another train similarly employed, there can be no recovery under the Federal Employers' Liability Act, when neither train carried passengers nor baggage destined for points in other states, although the carrier held itself out as ready and willing to transport interstate passengers over such branch line and to transfer them to interstate trains. *Boyle v. Penn. R. Co.*, 221 Fed. 453, affirmed 142 C. C. A. 558, 228 Fed. 266.

#### 3. Trains Containing Interstate Traffic.

##### In General.

An engineer was engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act, where he was injured while hauling a freight train containing cars consigned to points in other states. *Horton v. Seaboard A. L. R. Co.*, 157 N. C. 146, 72 S. E. 958, S. C. 169 N. C. 108, 85 S. E. 218, affirmed 239 U. S. 595, — L. ed. —, 36 Sup. Ct. Rep. 180.

A person employed on a train was engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act, notwithstanding that his run was confined to one state, where the train itself, or any of the cars or the merchandise therein, were being moved from one state to another. *Mattocks v. Chicago & A. R. Co.*, 187 Ill. App. 529.

Where a brakeman was injured in a collision between trains operating exclusively between points in the same state, he can recover only under the Federal Employers' Liability Act when there were two cars in each train containing merchandise consigned to points in another state. *Fernette v. Pere Marquette R. Co.*, 175 Mich. 653, 672, 141 N. W. 1084, 144 N. W. 834.

A student fireman is within the purview of the Federal Employers' Liability Act when injured while on a freight train hauling, among others, cars containing interstate freight. *Findley v. Coal & C. R. Co.*, — W. Va. —, 87 S. E. 198.

##### Delivering Clearance Card to Engineer.

The conductor of a freight train containing cars employed in both interstate and intrastate commerce, who was injured while returning from the engine to the caboose after delivering a clearance card to the engineer, was within the Federal Employers' Liability Act, since his act was one of preparation for the movement of his train in such commerce. *Neil v. Idaho & W. N. R.*, 22 Idaho 74, 125 Pac. 331.

##### 4. Picking Up and Setting Out Cars.

##### Interstate Cars.

A brakeman on an intrastate train was within the Federal Employers' Liability Act, where he was injured while setting out from his train cars destined for transportation in another train to a foreign state. *Nashville, C. & St. L. R. Co. v. Banks*, 156 Ky. 609, 161 S. W. 554.

A brakeman on an intrastate train was engaged in interstate commerce and was within the protection of the Federal Employers' Liability Act, where he was injured while setting out an interstate car from his train. *Moliter v. Wabash R. Co.*, 180 Mo. App. 84, 168 S. W. 250.



**Intrastate Cars.**

A brakeman on an intrastate freight train moving both interstate and intrastate freight, may under the Federal Employers' Liability Act, recover for injuries received through the negligence of a fellow servant after cars containing intrastate freight only had been cut from the train and while they were being placed on a side track, since he was engaged in interstate commerce at the time of the accident. *New York C. & H. R. R. Co. v. Carr*, 238 U. S. 260, 59 L. ed. 1298, 35 Sup. Ct. Rep. 788, 9 N. C. C. A. 1, affirming 157 App. Div. 941, 142 N. Y. Supp. 1111, S. C. 158 App. Div. 891, 143 N. Y. Supp. 1109.

**5. Empty Cars.****In General.**

An employee of an intrastate railway who was killed while uncoupling empty cars of a passenger train which ran wholly within the state, was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, notwithstanding that such train had on its last trip carried baggage destined for points in another state. *Fairchild v. Penn. R. Co.*, 170 App. Div. 135, 155 N. Y. Supp. 751.

Where, after empty freight cars were delivered in one state to the interstate carrier which owned them, they were moved over its lines empty to another state, when they were moved by such carrier from point to point within that state in order to find a place where they might be employed, and during one of such trips an employee was injured by one of such cars, he was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *Penn. R. Co. v. Knox*, 134 C. C. A. 426, 218 Fed. 748.

A brakeman was not within the Federal Employers' Liability Act, where he was killed while working on an intrastate train containing a number of empty cars that were being moved from a place to which they had been consigned in interstate commerce without directions for their further disposition. *Louisville & N. R. Co. v. Strange*, 156 Ky. 439, 161 S. W. 239.

**H. Moving Cars of Fuel and Water.****Cars of Fuel.****—In General.**

A fireman on a switch engine who was injured while hauling cars of coal which at a later time might become a part of an instrumentality of interstate commerce, was not within the Federal Employers' Liability Act. *Barker v. Kansas City, M. & O. R. Co.*, 94 Kan. 176, 146 Pac. 358.

A member of a switch crew who was

injured while moving a car of fuel oil intended for the use of his engine as well as others which were engaged in interstate commerce, was within the Federal Employers' Liability Act, although his duties, which consisted of handling cars intended both for intrastate and interstate commerce, were all performed within the same state. *Montgomery v. Southern P. Co.*, 64 Oreg. 597, 131 Pac. 507, 47 L. R. A. (N. S.) 13.

A brakeman who was killed while moving a car which came from another state, after it had stood for some days in a railway yard, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, where the car contained coal none of which had been removed, which was intended for the use of the defendant at that point. *Pitts., C. C. & St. L. R. Co. v. Stewart*, 21 Oh. C. C. R. (N. S.) 399, affirming 11 Oh. L. R. 430.

**—Placing on Coal Trestle.**

An engineer was within the Federal Employers' Liability Act, where he was injured while placing cars of coal which had been moved in interstate commerce from another state, on a trestle to be used in coaling engines employed in such commerce, notwithstanding that the cars had stood on a sidetrack for several days, since that was a mere interruption and not a termination of their interstate journey. *Barlow v. Lehigh V. R. Co.*, 214 N. Y. 116, 107 N. E. 814, affirming 158 App. Div. 768, 143 N. Y. Supp. 1053.

A switchman who was killed while moving cars of coal to a coal shed from a track on which they had been stored for some time, was not within the protection of the Federal Employers' Liability Act, although the coal was intended to be placed in bins or chutes and supplied as needed to locomotives, some of which were employed in interstate commerce. *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. ed. —, 36 Sup. Ct. Rep. 517, affirming — Mo. App. —, 180 S. W. 443.

A switchman who was killed while placing cars of coal on a coal trestle, was not within the Federal Employers' Liability Act, where the coal was to be placed in bins or chutes before being supplied as needed to engines engaged in both interstate and intrastate commerce. *Harrington v. Chicago, B. & Q. R. Co.*, — Mo. App. —, 180 S. W. 443, affirmed 241 U. S. 177, 60 L. ed. —, 36 Sup. Ct. Rep. 517.

**Water Cars.**

A brakeman who was killed while employed on a water train transporting from one place to another within the same state, water for use in the locomotives of a carrier, was not within the Federal Employers' Liability Act, although the water might ultimately be used in engines em-

ployed in interstate commerce, where other employees would first have to pump it from the cars into elevated tanks. *Missouri, K. & T. R. Co. v. Fesmire*, — Tex. Civ. App. —, 150 S. W. 201.

## I. Employees Engaged in Switching.

### 1. In General.

#### When Interstate Character of Cars Not Shown.

Where a switchman was killed while moving cars of fruit which were left by a train at a station near the state line, it cannot be said in an action under the Federal Employers' Liability Act, in the absence of testimony showing whether such train or cars crossed the state line, that they were moved in interstate commerce. *Osborne v. Gray*, 241 U. S. 15, — L. ed. —, 36 Sup. Ct. Rep. 486, affirming 5 Tenn. Civ. App. 519.

A switchman was not within the Federal Employers' Liability Act where he was struck and injured by a train which was not shown to have been engaged in interstate commerce, while he was protecting a switch with a flag as his crew were placing on a private siding empty freight cars the ultimate use and destination of which did not appear. *Shanley v. Phila. & R. R. Co.*, 221 Fed. 1012.

#### In Yards Used by Different Carriers.

Where two railway companies use a common switching yard in which the employees of one of them form a switching crew actually making up cars into a train all of which is to go beyond the state line, they are engaged in interstate commerce within the meaning of the Federal Employers' Liability Act even though they are not moving the cars of their immediate employer. *Ruppell v. New York C. R. Co.*, — App. Div. —, 157 N. Y. Supp. 1095.

Where a switchman was killed while working in the yards of his employer making up an interstate train of cars owned by another carrier and which were to be run over the latter's own road, the decedent was the servant of the employing carrier so as to render it answerable under the Federal Employers' Liability Act. *Ruppell v. New York C. R. Co.*, — App. Div. —, 157 N. Y. Supp. 1095.

#### Engineer of Switch Engine.

The engineer of a switch engine was within the Federal Employers' Liability Act while hauling in a railway yard a string made up of cars moving in both interstate and intrastate commerce. *Snyder v. Great N. R. Co.*, 88 Wash. 49, 152 Pac. 703.

#### Setting Switches.

A switchman was within the Federal

Employers' Liability Act where, while setting switches at night for a switch engine, in order to obtain more cars after having disposed of cars containing both interstate and intrastate commerce, he was struck and killed by a negligently operated train running backwards. *Pitts., C. C. & St. L. R. Co. v. Glinn*, 135 C. C. A. 46, 219 Fed. 148.

#### Moving Cars to Warehouse for Unloading.

A switchman was within the Federal Employers' Liability Act, where he was injured while moving a freight car which came from another state, to a warehouse for unloading. *Hall v. Vandalia R. Co.*, 169 Ill. App. 12.

If an employee of an intrastate carrier is injured while moving a car engaged in interstate commerce, he is within the Federal Employers' Liability Act, although the accident happens while the car is being moved to a consignee's place of business at a point on the intrastate line some distance from the point to which it was billed by a connecting interstate carrier. *Trowbridge v. Kansas City & W. B. R. Co.*, — Mo. App. —, 179 S. W. 777.

#### Employee on Way for Orders.

An employee who after completing his work of handling interstate cars in a railway yard was injured while on his way to the yardmaster's office for further orders, was not within the Federal Employers' Liability Act. *Erie R. Co. v. Welsh*, 89 Ohio St. 81, 105 N. E. 189.

#### Moving Both Interstate and Intrastate Cars.

A switchman was within the protection of the Federal Employers' Liability Act where he was injured by the giving away of a hand-hold on a car loaded with intrastate freight the brake of which he had just set in order to control a string of cars some of which were moving in interstate commerce. *Texas & P. R. Co. v. Sherer*, — Tex. Civ. App. —, 183 S. W. 404.

#### Fireman Standing Beside Engine.

A switch engine fireman was within the Federal Employers' Liability Act where, while engaged in making up an interstate train, he was injured as he was standing beside his engine straightening a flue-auger between the driving wheels during the temporary absence of the switch crew at the yard office for some undisclosed purpose. *Alabama G. S. R. Co. v. Skotzy*, — Ala. —, 71 So. 335.

## 2. Interstate Cars.

### In General.

A person employed in a railway yard to handle or assist in handling cars used in

interstate commerce, either by taking them from or putting them into trains or in shifting them about the yard, is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *Erie R. Co. v. Welsh*, 89 Ohio St. 81, 105 N. E. 189.

A switchman was within the Federal Employers' Liability Act when injured while switching in a division yard cars laden with merchandise which was being moved from one state to another. *Rich v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379, 148 S. W. 1011.

A member of a switch crew while moving a cut of cars containing some employed in interstate commerce, from one point to another in a city, was within the Federal Employers' Liability Act, where the crew handled cars coming from all parts of the country and made them into trains for movement in interstate commerce. *Vandalia R. Co. v. Holland*, 183 Ind. 438, 108 N. E. 580.

#### **Distributing Cars from Interstate Trains.**

A switchman engaged in distributing cars from an interstate freight train and in clearing a track for the arrival of another interstate train, is within the Federal Employers' Liability Act. *Seaboard A. L. v. Koennecke*, 239 U. S. 352, — L. ed. —, 36 Sup. Ct. Rep. 126, affirming 101 S. C. 86, 85 S. E. 374.

Where a switchman was injured while distributing cars from an interstate freight train, the fact that it was a local and might have dropped all cars that came from other states and taken up others before the accident, is too remote a possibility to warrant the withdrawal from the jury of an action based on the Federal Employers' Liability Act. *Seaboard A. L. v. Koennecke*, 239 U. S. 352, — L. ed. —, 36 Sup. Ct. Rep. 126, affirming 101 S. C. 86, 85 S. E. 374.

#### **Moving "Bad Order" Car.**

A switchman was within the Federal Employers' Liability Act if injured while removing a "bad order" car from a freight train that had just been made up of cars destined for points in another state, and which, with engine attached, was ready to proceed on its way when the defective car was discovered. *Sears v. Atlantic C. L. R. Co.*, 169 N. C. 446, 86 S. E. 176.

#### **Moving Cars Between Terminals.**

A conductor while transferring cars used in interstate commerce from the terminal yards of one carrier to those of another, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *Wagner v. Chicago & A. R. Co.*, 180 Ill. App. 196, affirmed 265 Ill. 245, 106 N. E. 809, Ann. Cas. 1916 A. 778,

239 U. S. 452, — L. ed. —, 36 Sup. Ct. Rep. 135.

### **3. Intrastate Cars.**

#### **In General.**

A fireman employed on a switch engine which was used exclusively within a city in moving both interstate and intrastate commerce, was not within the protection of the Federal Employers' Liability Act where he was killed while shifting cars containing intrastate freight, notwithstanding that his next employment would have been in interstate commerce. *Illinois C. R. Co. v. Behrns*, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914 C. 163, 10 N. C. C. A. 153, affirming 134 C. C. A. 639, 217 Fed. 967, which reversed 192 Fed. 581.

A switchman who was killed by an intrastate car in a string containing both interstate and intrastate cars which he was placing in a train employed in interstate traffic, was within the Federal Employers' Liability Act. *Crandall v. Chicago G. W. R. Co.*, 127 Minn. 498, 150 N. W. 165.

A switchman was not within the purview of the Federal Employers' Liability Act where he was injured while shifting cars brought into a yard by an intrastate train, when none of the cars contained interstate traffic and at no time during their journey were they outside of the state. *Norton v. Erie R. Co.*, 163 App. Div. 466, 148 N. Y. Supp. 769.

#### **To Aid in Movement of Interstate Traffic.**

A switch engine fireman who was injured while removing an intrastate freight car from one part of a yard to another so that his crew might get an interstate car from another track and place it in an interstate train, was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *Louisville & N. R. Co. v. Parker*, 165 Ky. 658, 177 S. W. 465.

A switchman engaged in shifting cars employed in intrastate commerce was within the purview of the Federal Employers' Liability Act, where such movement was for the purpose of making up a train to which cars engaged in interstate commerce were to be attached. *Southern R. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99; affirmed on other grounds 241 U. S. 229, 60 L. ed. —, 36 Sup. Ct. Rep. 588.

A switchman employed during the greater portion of his time in moving passenger cars used in interstate traffic to and from a terminal station was not within the Federal Employers' Liability Act, where he was injured while removing from the station an empty coach employed in intrastate traffic only. *Patry v. Chicago & W. I. R. Co.*, 185 Ill. App. 361, reversed

on other grounds 265 Ill. 310, 106 N. E. 843.

#### 4. Empty Cars.

##### In General.

An employee who was injured by a coal car after its interstate cargo had been removed and the car moved to a junction point to await future orders for cars, was not within the Federal Employers' Liability Act, since, at the time of the accident, the car was not engaged in interstate commerce. *Moran v. Cent. R. of N. J.*, — N. J. —, 96 Atl. 1023.

##### Moving Preparatory to Interstate Trip.

A switchman who was injured while placing empty freight cars in a train for interstate transportation, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *St. Louis S. W. R. Co. v. Anderson*, 117 Ark. 41, 173 S. W. 834.

A brakeman who was killed while making up an intrastate freight train was within the Federal Employers' Liability Act, where the accident happened when he was moving empty foreign cars in order to start them on the return journey to other states. *Bruckshaw v. Chicago, R. I. & P. R. Co.*, — Ia. —, 155 N. W. 273.

Where a switchman in the employ of an intrastate railway was injured while moving an empty car on its return from the consignee's place of business to a connecting carrier from whom it was received in interstate commerce, the former was within the Federal Employers' Liability Act, where the connecting carrier intended to and did take such car from the connecting point and transport it to another state for reloading, although at the time of the accident the switchman's employer did not know the ultimate destination of the car, which was originally billed to the connecting point and moved from there by the employer to the consignee's place of business some distance away. *Trowbridge v. Kansas City & W. B. R. Co.*, — Mo. App. —, 179 S. W. 777.

##### Coupling Empty Cars.

A brakeman cannot recover under the Federal Employers' Liability Act for injuries received while coupling empty cars in a railway yard, where the only evidence tending to show their use in interstate commerce was that cars used in both interstate and intrastate commerce were received, stored, shifted and reloaded in the yard. *Hench v. Penn. R. Co.*, 246 Pa. 1, 91 Atl. 1056, L. R. A. 1915 D. 557.

#### 5. Private Cars.

##### Superintendent's Private Car.

A switchman who was injured while coupling an engine to the private car of a

division superintendent, which was used wholly within one state, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, where his general duties were to use such engine indiscriminately in a railway yard moving cars employed in both interstate and intrastate traffic. *Oberlin v. Oregon-W. R. & N. Co.*, 71 Ore. 177, 142 Pac. 554.

#### 6. Cars on Repair Tracks.

##### In General.

The fact that a car is loaded with merchandise moving in interstate commerce fixes its status within the meaning of the Federal Employers' Liability Act, so that the work to which it is devoted is not ended merely because the car becomes temporarily disabled during its journey and is placed on a repair track to await its turn for repairs. *Bolch v. Chicago, M. & St. P. R. Co.*, — Wash. —, 155 Pac. 422.

A switchman was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, where, after removing from a repair track empty cars that had been repaired, he was injured while replacing an interstate car on such track where it was awaiting necessary repairs while its journey was temporarily interrupted. *Bolch v. Chicago, M. & St. P. R. Co.*, — Wash. —, 155 Pac. 422.

Every movement of an interstate car necessary to its remaining on a repair track awaiting its turn for repairs, is an incident to its furtherance on its interstate journey. *Bolch v. Chicago, M. & St. P. R. Co.*, — Wash. —, 155 Pac. 422.

#### J. Roundhouse Employees.

##### Steaming Up Engine.

An employee whose duty it was to care for locomotives when brought into a roundhouse and to prepare them for use when called for, was not within the protection of the Federal Employers' Liability Act, where he was killed while steaming up an engine which was last used on an intrastate trip, although it was used in interstate commerce whenever needed. *LaCasse v. New Orleans, T. & M. R. Co.*, 135 La. 129, 64 So. 1012.

##### Repairing Engines.

A roundhouse employee was within the purview of the Federal Employers' Liability Act when killed while repairing a switch engine used for moving both interstate and intrastate commerce, which had been withdrawn from service three days before and which was returned thereto three days after the accident. *Southern P. Co. v. Pillsbury*, 170 Cal. 782, 151 Pac. 377.

**Hostlers.**

A hostler who was injured while turning an engine, was not within the purview of the Federal Employers' Liability Act, where the engine was employed in hauling a local freight and it did not appear that it had been or was about to be used in interstate commerce. *Chicago, R. I. & P. R. Co. v. Felder*, — Okla. —, 155 Pac. 529.

**K. Shop Employees.****1. In General.****Painters.****—In General.**

A person employed to paint engines and cars used in interstate commerce is within the protection of the Federal Employers' Liability Act. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

**—Cleaning Stencil.**

A person employed by an interstate carrier about a paint shop was not within the protection of the Federal Employers' Liability Act, where, while cleaning stencils used in marking cars owned by the defendant and used in interstate commerce, he was struck and killed by a locomotive. *Illinois C. R. Co. v. Rogers*, 136 C. C. A. 530, 221 Fed. 52.

**2. Repairs in General.**

There can be no recovery under the Federal Employers' Liability Act for the death of a car repairer who, while engaged in correcting the defective condition of the standards that held piling on a car moving in interstate commerce, was killed by the giving away of such standard, since the negligent loading of the car was not the cause of the accident but was the cause of his employment. *Hooks v. New Orleans & N. E. R. Co.*, — Miss. —, 72 So. 147.

**Vehicles Used in Interstate Traffic.**

A boilermaker's helper was within the Federal Employers' Liability Act while repairing a locomotive regularly employed in interstate transportation, which was intended to be returned thereto on the completion of repairs, notwithstanding that the engine had been dismantled for three weeks preceding the injury. *Law v. Illinois C. R. Co.*, 126 C. C. A. 27, 208 Fed. 869, L. R. A. 1915 C. 17.

A shop employee was within the Federal Employers' Liability Act where he was injured while repairing a locomotive which for some time before the accident and immediately thereafter had been and was used in interstate commerce. *Winters v. Minneapolis & St. L. R. Co.*, 126 Minn. 260, 148 N. W. 106.

A repairman who, while making tem-

porary repairs on a locomotive used in interstate commerce, as it was being prepared at a terminal station for a return journey, was injured by the act of a fellow servant in charge of the engine, was within the Federal Employers' Liability Act. *Baltimore & O. R. Co. v. Darr*, 124 C. C. A. 565, 204 Fed. 751, 47 L. R. A. (N. S.) 4, affirming 197 Fed. 665.

A car repairer was within the Federal Employers' Liability Act when killed while working on a car which had been removed from an interstate train for necessary repairs. *St. Louis, I. M. & S. R. Co. v. Sharp*, 115 Ark. 308, 171 S. W. 95, writ of error dismissed 238 U. S. 697, 59 L. ed. 1504, 35 Sup. Ct. Rep. 939.

A car repairer was within the Federal Employers' Liability Act where he was injured while lifting into place a coupler on a car engaged in interstate commerce which had dropped below the standard height, such car having been temporarily stopped for such repairs before being turned over to a connecting carrier. *Lorick v. Seaboard A. L. R. Co.*, 102 S. C. 276, 86 S. E. 675.

A shop employee of an interstate carrier is within the Federal Employers' Liability Act where he was injured while overhauling a car used in interstate commerce, preparatory to going out on the defendant's road. *Nystrom v. Lake Shore & M. S. R. Co.*, 17 Ohio C. C. Rep. (N. S.) 507.

**Engine Withdrawn from Interstate Use.**

An employee is not within the purview of the Federal Employers' Liability Act where he was injured while repairing a locomotive that had been withdrawn from interstate service and which was being used wholly within one state in drawing a work train that was engaged in making repairs to a track employed in interstate commerce. *Louisville & N. R. Co. v. Carter*, — Ala. —, 70 So. 655.

**Employee on Way to Make Repairs.**

A machinist in the employ of a railway company was within the protection of the Federal Employers' Liability Act, where he was struck and killed by a switch engine used in moving both interstate and intrastate freight, as he was crossing a railway yard on his way to make slight repairs on another engine similarly employed. *Staley v. Illinois C. R. Co.*, 268 Ill. 356, 109 N. E. 342, L. R. A. 1916 A. 450, reversing 186 Ill. App. 593.

**Switch Engines.**

An employee was within the protection of the Federal Employers' Liability Act when injured while repairing a switch engine used for handling both interstate and intrastate traffic, which was withdrawn from service three days before and which

was returned to such traffic three days after the accident. *Southern P. R. Co. v. Pillsbury*, 170 Cal. 782, 151 Pac. 277.

### 3. Cars Used in Intrastate and Interstate Commerce.

#### In General.

A carpenter in the employ of an interstate carrier, who was injured by the negligence of a fellow servant while they were repairing on a repair track a car used indiscriminately in interstate and intrastate commerce, was within the protection of the Federal Employers' Liability Act. *Northern P. R. Co. v. Maerkl*, 117 C. C. A. 237, 198 Fed. 1.

An employee who was injured while making repairs on a car which had been idle in a shop for some time, was within the protection of the Federal Employers' Liability Act, where the car was used indiscriminately in both interstate and intrastate commerce, its last employment before the accident and the first thereafter being interstate. *Missouri, K. & T. R. Co. v. Denahy*, — Tex. Civ. App. —, 165 S. W. 529.

### 4. Empty Cars.

#### In General.

An employee of an intrastate carrier who was killed while repairing an empty car belonging to another carrier, was not within the Federal Employers' Liability Act where it was not shown how long the car had been empty or that it was used in interstate traffic prior to the time it came into the yards for repair, or that it would be used in such commerce after the repairs were completed. *San Antonio & A. P. R. Co. v. Littleton*, — Tex. Civ. App. —, 180 S. W. 1194.

#### Cars on Return Journey to Foreign State.

A car repairer was not within the protection of the Federal Employers' Liability Act, where he was killed while making repairs on a car of another company after its interstate journey had been completed and its cargo unloaded. *Heimbach v. Lehigh V. R. Co.*, 197 Fed. 579.

Where a freight car owned by a foreign company, after completing an interstate trip, came empty into another state and was sent to a repair shop, where a workman was injured while making necessary repairs thereon, he was not within the Federal Employers' Liability Act, although the car after repairs were made was sent empty to another point within the state, where it was loaded and dispatched on an interstate journey. *Parsons v. Delaware & H. Co.*, 167 App. Div. 536, 153 N. Y. Supp. 179.

A car repairer who was injured while, in obedience to the Federal law, repairing

the drawbar of an empty freight car owned by a foreign carrier, was within the purview of the Federal Employers' Liability Act, where the car was on its return journey to its home state after having brought interstate freight into the state where the accident happened. *Gaines v. Detroit, G. H. & M. R. Co.*, 181 Mich. 376, 148 N. W. 397.

### 5. Wrecking Cars.

#### Repairing Boiler.

A boilermaker's helper who was injured while repairing the boiler of a wrecking car or derrick owned by an interstate carrier, was not within the Federal Employers' Liability Act, although the work was intended to put the car in readiness for interstate or intrastate use as future occasion might require. *Ruck v. Chicago, M. & St. P. R. Co.*, 153 Wis. 158, 140 N. W. 1074.

### 6. Miscellaneous Employees.

#### Foreman Unloading Paint.

Where a foreman, while superintending the unloading of paint from a car, was injured when a coemployee negligently permitted a barrel to escape from him, the former was not within the Federal Employers' Liability Act, notwithstanding that the paint was intended for future use in painting the buildings of an interstate carrier, and in its repair shop in painting cars repaired or built for use in both interstate and intrastate commerce. *Salmon v. Southern R. Co.*, 133 Tenn. 223, 180 S. W. 165.

#### Machinist Moving Countershaft.

A machinist in a railway repair shop whose duty it was to run a shaper used generally, but not exclusively, in repairing engines used in interstate commerce, was not within the protection of the Federal Employers' Liability Act, when injured while assisting in taking down and changing a countershaft which supplied power to the shaper, in order to permit the installation of a new machine. *Shanks v. Delaware, L. & W. R. Co.*, 214 N. Y. 413, 108 N. E. 644, affirming 163 App. Div. 565, 148 N. Y. Supp. 1034, affirmed 239 U. S. 556, — L. ed. —, 36 Sup. Ct. Rep. 188, L. R. A. 1916 C. 797.

#### Employee Wheeling Coal into Shop.

An employee of an interstate carrier, who, while wheeling a barrow of coal into a car repair shop for heating purposes, was injured by the negligence of a fellow servant, was within the purview of the Federal Employers' Liability Act, where many if not all of the cars repaired in such shop were used exclusively in interstate commerce. *Cousins v. Illinois C. R. Co.*

126 Minn. 172, 148 N. W. 58, 6 N. C. C. A. 182, reversed 241 U. S. 64, — L. ed. —, 36 Sup. Ct. Rep. 446.

### **L. Employees on Way to or from Work.**

#### **In General.**

The employment of a person does not, within the meaning of the Federal Employers' Liability Act, either begin or end with the actual work of the day, but it may begin when he enters the premises of his employer for the purpose of going to his work, and may continue while he is going from his work at the close of the day, on the premises of his employer. *Louisville & N. R. Co. v. Walker*, 162 Ky. 209, 172 S. W. 517.

#### **Means of Transportation Provided by Carrier.**

##### **— Trains.**

A railway employee who was killed while riding to his home on a train of his employer, with the permission of those in charge thereof, was not within the protection of the Federal Employers' Liability Act, where it did not appear that he had been engaged in interstate commerce previously to the accident. *Bennett v. Lehigh V. R. Co.*, 197 Fed. 578.

A freight conductor, after completing an interstate journey and registering his arrival, was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, where he was killed by the derailment of an engine of another train which he boarded in order to ride a short distance towards his home. *Dodge v. Chicago G. W. R. Co.*, 164 Ia. 627, 146 N. W. 14.

An extra conductor was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, where he was injured while traveling on a train entirely within one state to a point to take charge of and to receive orders for the movement of a work train. *Feaster v. Phila. & R. R. Co.*, 197 Fed. 580.

##### **— Hand Cars.**

A section foreman was within the Federal Employers' Liability Act where, while returning on a hand car from repairing a broken rail in a track of an interstate railway, he was injured in helping to lift the car from the track in order to avoid an approaching interstate train. *Texas & P. R. Co. v. White*, — Tex. Civ. App. —, 177 S. W. 1185.

A section hand, while assisting in propelling a hand car furnished by a railway company for conveying trackmen to their camp at night as the concluding act of their day's work of ballasting a track used for interstate traffic, was engaged in interstate commerce within the meaning of the

Federal Employers' Liability Act. *San Pedro, L. A. & S. L. R. Co. v. Davide*, 127 C. C. A. 454, 210 Fed. 870.

##### **— Tricycles.**

A person engaged in installing a block signal system on the line of an interstate railway was a servant of a carrier within the meaning of the Federal Employers' Liability Act, where he was killed by the negligence of other employees while he was being conveyed on a railway tricycle from his work to a boarding car, at the conclusion of the day's labor. *Grow v. Oregon S. L. R. Co.*, 44 Utah 160, 138 Pac. 398, Ann. Cas. 1915 B 481, S. C. — Utah —, 150 Pac. 970.

A person employed to run a pumping plant which supplied water for both interstate and intrastate trains, and who was struck and killed by an interstate train while riding from his home to his place of work on a railway "speeder" provided by his employer for that purpose, was within the Federal Employers' Liability Act. *Horton v. Oregon-W. R. & N. Co.*, 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8.

#### **Injury While on Carrier's Premises.**

##### **— In General.**

A railway employee who was injured by the negligence of his employer while walking to or from his work on the premises of the latter in a place selected or set apart either by express directions or by well-established usage or custom, may recover under the Federal Employers' Liability Act, as if the accident had occurred through the negligence of the employer while the employee was being carried to or from his work by the former. *Louisville & N. R. Co. v. Walker*, 162 Ky. 209, 172 S. W. 517.

##### **— To Obtain Transportation.**

A railroad fireman is within the Federal Employers' Liability Act where, while on his way to a station to obtain transportation to another point to relieve an engine crew of an interstate train, he was struck and killed when crossing a track in the station yard, by the sudden closing without warning of a gap between the cars of an interstate freight train. *Lamphere v. Oregon R. & N. Co.*, 116 C. C. A. 156, 196 Fed. 336, 47 L. R. A. (N. S.) 1, reversing 193 Fed. 248.

##### **— Engineer on Way to Inspect Engine.**

Where an engineer employed on an interstate run was killed in the night by falling into a deep pit in a dark roundhouse where his engine was stored, the jury, in an action founded on the Federal Employers' Liability Act, could find that he was engaged in interstate commerce at the time of his death, where it could be in-

ferred that he was on his way to make a necessary inspection of his engine, although such inspection was not required at that time, yet it was not forbidden by the rules of his employer. *Padgett v. Seaboard A. L. R. Co.*, 99 S. C. 364, 83 S. E. 633, affirmed 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481.

#### — On Way to Work.

A locomotive fireman was within the protection of the Federal Employers' Liability Act of 1906 where, while on his way to his work along a pathway on his employer's premises, which was customarily used by employees in going to and from their work, he was struck and killed by a passing train. *Philadelphia, B. & W. R. Co. v. Tucker*, 35 App. D. C. 123, L. R. A. 1915 C. 39, affirmed 220 U. S. 608, 55 L. ed. 607, 31 Sup. Ct. Rep. 725.

Where an engineer employed in interstate commerce was struck by a train and injured while he was in the yard of his employer on his way along the customary route to a roundhouse to begin his work, it was held, in an action founded on the Federal Employers' Liability Act, that the relation of master and servant existed at the time of the accident. *Missouri, K. & T. R. Co. v. Rentz*, — Tex. Civ. App. —, 162 S. W. 599.

#### — On Way From Work.

A carrier is answerable under the Federal Employers' Liability Act for injuries sustained by a brakeman while leaving a railway yard on the termination of an interstate trip, notwithstanding that he remained in his caboose for about an hour after the arrival of his train in order to wash himself and change his clothing. *Easter v. Virginian R. Co.*, — W. Va. —, 86 S. E. 37.

#### — Walking on Tracks.

A laborer employed in repairing or rebuilding a trestle on the line of an interstate carrier, which was used in interstate commerce, was within the Federal Employers' Liability Act where, at the end of the day's work, he was killed while walking on the track at the direction of a foreman, to boarding cars provided by his employer which were a mile from the trestle. *Louisville & N. R. Co. v. Walker*, 162 Ky. 209, 172 S. W. 517.

### VII. NEGLIGENCE FOR WHICH CARRIER ANSWERABLE.

Instructions generally as to negligence, see *infra* XIX, E.

Negligence as question for jury, see *infra* XIX, C, 3.

Sufficiency of evidence to show negligence, see *infra* XVIII, E, 4.

### A. In General.

#### What Negligence Within Act.

The intent and purpose of the Federal Employers' Liability Act was to include every phase of negligence for which a common carrier in interstate commerce might be answerable to its employees. *DeAtley v. Chesapeake & O. R. Co.*, 201 Fed. 591.

There may be a recovery under the Federal Employers' Liability Act where injury results to a servant employed in interstate commerce, in whole or in part from the negligence of any officer, agent or other employee of a common carrier engaged in such commerce. *Molzoff v. Chicago, M. & St. P. R. Co.*, — Wis. —, 156 N. W. 467.

When there were no eye witnesses to the accident that caused the death of a freight conductor, a carrier cannot be charged with liability under the Federal Employers' Liability Act from the fact that his body was found between the rails of a switch track where he had evidently been struck by shunted cars, and it appeared that there was sufficient space on either side of the track in which he might have performed his duties in safety. *Swartwood v. Lehigh V. R. Co.*, 169 App. Div. 759, 155 N. Y. Supp. 778.

Willfulness on the part of the defendant is not an element of recovery in an action under the Federal Employers' Liability Act. *Dutton v. Atlantic C. L. R. Co.*, — S. C. —, 88 S. E. 263.

#### Negligent Treatment by Carrier's Surgeon.

In an action based on the Federal Employers' Liability Act for injuries sustained by an employee where his negligent treatment by the carrier's surgeon is alleged, the evidence must show either the defendant's actual knowledge of the surgeon's unfitness or that his general reputation was so bad as to impute such knowledge, and it is not sufficient to show specific acts of unskillfulness not brought home to the defendant. *Atlantic C. L. R. Co. v. Whitney*, 62 Fla. 124, 56 So. 937.

### B. Employer as Insurer.

#### In General.

The Federal Employers' Liability Act does not make a carrier an insurer of the safety of its employees. *Miller v. Michigan C. R. Co.*, 185 Mich. 432, 152 N. W. 235.

### C. Negligence as Foundation of Liability.

#### In General.

Negligence on the part of a carrier is the foundation of liability under the Federal Employers' Liability Act either for injuries to or the death of an employee while engaged in interstate commerce.



*Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, L. R. A. 1915 C. 1, Ann. Cas. 1915 B. 475, 8 N. C. C. A. 834, reversing 162 N. C. 424, 78 S. E. 494; *Hawkins v. St. Louis & S. F. R. Co.*, 189 Mo. App. 201, 174 S. W. 129; *Manson v. Great N. R. Co.*, — N. D. —, 155 N. W. 32; *Easter v. Virginian R. Co.*, — W. Va. —, 86 S. E. 37; *Culp v. Virginian R. Co.*, — W. Va. —, 87 S. E. 187; *Southern R. Co. v. Gray*, 241 U. S. 333, 60 L. ed. —, 36 Sup. Ct. Rep. 558, reversing 167 N. C. 433, 83 S. E. 849; *Wilson v. Grand Trunk R. Co.*, — N. H. —, 97 Atl. 981.

Under the Federal Employers' Liability Act an employer is not answerable for injuries received by an employee from defects or insufficiencies in cars, engines, appliances, machinery, tracks, roadbeds, works, boats, wharves or other equipment which are not attributable to negligence. *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, L. R. A. 1915 C. 1, Ann. Cas. 1915 B. 475, 8 N. C. C. A. 834, reversing 162 N. C. 424, 78 S. E. 494.

Under the Federal Employers' Liability Act a carrier's liability depends on negligence, and the evidence must establish actionable negligence with reasonable certainty before there can be a recovery for the death of an employee. *Hull v. Virginian R. Co.*, — W. Va. —, 88 S. E. 1060.

#### Recovery in Absence of Showing of Negligence.

There can be no recovery under the Federal Employers' Liability Act in the absence of a showing of negligence on the part of the employing carrier. *Louisville & N. R. Co. v. Holloway*, 163 Ky. 125, 173 S. W. 343; *Cincinnati, N. O. & T. P. R. Co. v. Goldston*, 156 Ky. 410, 161 S. W. 246, S. C. 163 Ky. 42, 173 S. W. 161; *Miller v. Michigan C. R. Co.*, 185 Mich. 432, 152 N. W. 235; *Hollingshead v. Detroit, G. H. & M. R. Co.*, 181 Mich. 547, 148 N. W. 171; *Winfield v. New York C. & H. R. R. Co.*, 168 App. Div. 351, 153 N. Y. Supp. 499, affirmed 216 N. Y. 284, 110 N. E. 614.

Since negligence is the basis of the liability of a carrier under the Federal Employers' Liability Act, there can be no recovery in the absence of a showing of negligence on the part of the defendant or some of its employees. *Manson v. Great N. R. Co.*, — N. D. —, 155 N. W. 32.

In order to recover under the Federal Employers' Liability Act the plaintiff must show that his injuries were caused in whole or in part by the negligence of the defendant carrier, its officers or employees. *Louisville & N. R. Co. v. Kemp*, 140 Ga. 657, 79 S. E. 558.

In order to recover under the Federal Employers' Liability Act it must appear

that the plaintiff's injury was the result in whole or in part of the negligence of the officers, agents or employees of the defendant, or of some defect or insufficiency in its road or appliances. *Long v. Southern R. Co.*, 155 Ky. 286, 159 S. W. 779.

There can be no recovery under the Federal Employers' Liability Act for injuries received by an employee in the absence of any showing of primary negligence on the part of the employer. *Chesapeake W. R. v. Shiffett*, 118 Va. 63, 86 S. E. 860.

An employer is not liable under the Federal Employers' Liability Act for an injury to an employee, in the absence of negligence on the part of the former, and a recovery cannot be based on the sole fact that the employee sustained injury while in the service of the master. *Chesapeake & O. R. Co. v. Walker*, 159 Ky. 237, 167 S. W. 128.

The Federal Employers' Liability Act does not give a cause of action for injuries not occasioned by negligence, and there can be no recovery under it merely on a showing that at the time of an accident the plaintiff was engaged in interstate commerce. *Hobbs v. Great N. R. Co.*, 80 Wash. 678, 142 Pac. 20, L. R. A. 1915 D. 503.

Before the plaintiff can recover in an action under the Federal Employers' Liability Act, he must allege and prove some negligence towards him on the part of the defendant, and his action will fail where there is a total absence of proof of such fact. *Kentucky & T. R. Co. v. Minton*, 167 Ky. 516, 180 S. W. 831.

No right of action existed under the Federal Employers' Liability Act of 1906 unless negligence on the part of the defendant was shown. *Missouri, K. & T. R. Co. v. Poole*, 104 Tex. 36, 133 S. W. 239, reversing — Tex. Civ. App. —, 123 S. W. 1176.

Negligence will not be inferred in an action based on the Federal Employers' Liability Act, from proof of facts and circumstances which are just as consistent with due diligence as with some theory of negligence. *Hull v. Virginian R. Co.*, — W. Va. —, 88 S. E. 1060.

#### Collision Occurring Without Negligence.

There can be no recovery under the Federal Employers' Liability Act for the death of a freight conductor caused by a rear end collision on a curve, when his train was running on the time of the following train, and no negligence on the part of those in charge of the latter train was shown, its speed having been reduced on torpedo signals. *Martin v. Northern P. R. Co.*, 87 Wash. 91, 151 Pac. 113.

### **Collision Due to Flagman Falling from Bridge.**

Where by reason of falling from a bridge, a flagman was unable to stop a following train and his conductor was killed in an ensuing rear end collision, a carrier is not answerable therefor under the Federal Employers' Liability Act. *Culp v. Virginian R. Co.* — W. Va. —, 87 S. E. 187.

### **Use of Hand-Cars and Tricycles.**

Where, while fourteen men were riding on a hand-car, one of them let go of the handle bar to put on his coat and lost his balance, when the foreman in order to save the man, released his hold on the car and as the result fell from it and was injured, there was no negligence on the part of carrier rendering it answerable under the Federal Employers' Liability Act, where it did not appear that the plaintiff requested more cars or complained of the crowded condition of the one he was using. *Manson v. Great N. R. Co.*, — N. D. —, 155 N. W. 32.

No negligence on the part of the defendant was shown in an action under the Federal Employers' Liability Act for injuries received by a section foreman while assisting in removing a heavy hand-car from the track in the face of an approaching train at a point where he knew that trains might be met, since the accident was in no way attributable to the negligence of the carrier or its employees. *Louisville & N. R. Co. v. Kemp*, 140 Ga. 657, 79 S. E. 558.

Where an experienced section man riding on a railway tricycle with his foreman, in obeying the latter's order to apply the brake, was injured when his hand came into contact with the gearing as the result of it striking some tools he had placed on the vehicle, there was no liability under the Federal Employers' Liability Act, since negligence on the part of the foreman or the employer was not shown. *Cincinnati, N. O. & T. P. R. Co. v. Hill*, 161 Ky. 237, 170 S. W. 599.

### **D. Necessity that Injury be Caused by Person or Instrumentality Employed in Interstate Commerce.**

#### **In General.**

The right to recover under the Federal Employers' Liability Act arises only when injury is suffered while a carrier is engaged in interstate commerce, by a person employed by it in such commerce. *Phila. B. & W. R. Co. v. McConnell*, 142 C. C. A. 555, 228 Fed. 263.

An interstate carrier is liable under the Federal Employers' Liability Act for injuries received by an employee through the negligence of a fellow employee, where at the time both were engaged in interstate

commerce. *Zikqs v. Oregon R. & N. Co.*, 179 Fed. 893.

### **Injury Caused by Person Engaged in Intrastate Commerce.**

There may be a recovery under the Federal Employers' Liability Act for injuries received by a person while engaged in interstate commerce as the result of the negligence of a coemployee although the latter was employed in intrastate commerce only. *Pederson v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914 C. 153, 3 N. C. C. A. 779, reversing 117 C. C. A. 33, 197 Fed. 537, and 184 Fed. 737.

There may be a recovery under the Federal Employers' Liability Act for injuries sustained by or for the death of an employee engaged in interstate commerce, through the negligence of coemployees engaged at the time in intrastate commerce. *Louisville & N. R. Co. v. Walker*, 162 Ky. 209, 172 S. W. 517.

### **Injury Caused by Intrastate Engine or Cars.**

There may be a recovery under the Federal Employers' Liability Act for the death of an employee who, while carrying material to a bridge for its repair, was killed by an intrastate train, where the bridge was used for both intrastate and interstate traffic. *Pederson v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914 C. 153, 3 N. C. C. A. 779, reversing 117 C. C. A. 33, 197 Fed. 537, and 184 Fed. 737.

The Federal Employers' Liability Act permits a recovery for the death of a person employed in interstate commerce although the engine that struck and killed him was not engaged in such commerce. *Pitts., C. & St. L. R. Co. v. Farmer's T. & S. Co.*, 183 Ind. 287, 108 N. E. 108.

In order to recover under the Federal Employers' Liability Act, for the death of an employee who was struck by an engine, it must appear that both he and the engine were engaged in interstate commerce at the time of the accident. *Illinois C. R. Co. v. Rogers*, 136 C. C. A. 530, 221 Fed. 52.

A switchman was within the protection of the Federal Employers' Liability Act where he was killed while placing in an interstate train a string made up of cars containing both interstate and intrastate traffic. *Crandall v. Chicago G. W. R. Co.*, 127 Minn. 498, 150 N. W. 165.

Where a switchman was injured while moving intrastate freight cars for the purpose of making up a train to which cars engaged in interstate commerce were to be attached, he may recover under the Federal Employers' Liability Act. *Southern R. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99.

There cannot be a recovery under the Federal Employers' Liability Act for the death of a fireman of a switch engine which was used exclusively within a city in moving both interstate and intrastate traffic, where at the time of the disaster he was shifting cars containing intrastate freight, notwithstanding that his next employment would have been in interstate commerce. *Illinois C. R. Co. v. Behrns*, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914 C. 163, 10 N. C. C. A. 153, affirming 134 C. C. A. 639, 217 Fed. 967, which reversed 192 Fed. 581.

A switchman cannot recover under the Federal Employers' Liability Act for injuries sustained while shifting cars brought into a yard by an intrastate freight train, where it did not appear that any of the cars contained interstate traffic or that at any time during their journey they were outside of the state. *Norton v. Erie R. Co.*, 163 App. Div. 466, 148 N. Y. Supp. 769.

The Federal Employers' Liability Act will not permit a recovery for injuries sustained by a switchman who was struck by a train not shown to have been engaged in interstate commerce, while he was protecting a switch with a flag as his crew were placing on a private siding empty freight cars the ultimate destination and use of which did not appear. *Shanley v. Phila. & R. Co.*, 221 Fed. 1012.

Where a switch engine fireman was injured while removing an intrastate freight car from one part of a yard to another so as to permit an interstate car to be taken from a track and placed in an interstate train, he cannot recover under the Federal Employers' Liability Act. *Louisville & N. R. Co. v. Parker*, 165 Ky. 658, 177 S. W. 465.

There can be no recovery under the Federal Employers' Liability Act for the death of an employee who, after oiling a switch connecting tracks used for both interstate and intrastate traffic, was struck and killed as he was replacing the cover to the switch mechanism, by a car not being used in interstate commerce the movement of which did not have any immediate relation thereto. *Granger v. Penn. R. Co.*, 84 N. J. L. 338, 86 Atl. 264.

A watchman at a street crossing was not engaged in interstate commerce so as to be within the Federal Employers' Liability Act, where he was struck by an intrastate train as he was protecting the crossing against a freight train approaching on a parallel track from the opposite direction, where the latter train, although running between interstate points, was not shown to have carried any interstate freight at the time of the accident. *Louisville & N. R. Co. v. Barrett*, 143 Ga. 742, 85 S. E. 923.

## E. Accident Attributable to Injured Person's Negligence.

### In General.

When the injury or death of an employee was due solely to his own negligence without fault on the part of the employer there can be no recovery under the Federal Employers' Liability Act. *Southern R. Co. v. Peters*, — Ala. —, 69 So. 611; *Ellis v. Louisville H. & St. L. R. Co.*, 155 Ky. 745, 160 S. W. 512; *Pankey v. Atchison, T. & S. F. R. Co.*, 180 Mo. App. 185, 168 S. W. 274, 6 N. C. C. A. 74.

An employee cannot recover under the Federal Employers' Liability Act for injuries which were the consequence of acts exclusively his own, and which were not caused in whole or in part by the negligence of the officers, agents or employees of his master, or by any defect or insufficiency due to its negligence in its property or equipment. *Illinois C. R. Co. v. Skaggs*, 240 U. S. 66, 60 L. ed. —, 36 Sup. Ct. Rep. 249, affirming 125 Minn. 532, 147 N. W. 1135, S. C. 124 Minn. 503, 145 N. W. 381.

The Federal Employers' Liability Act does not afford a remedy for injuries due solely to an employee's own reckless and indifferent conduct. *Virginian R. Co. v. Linkous*, 144 C. C. A. 386, 230 Fed. 88.

Where the act of an employee was the sole and not the contributing cause of his injury, an employer is not liable therefor under the Federal Employers' Liability Act. *Fletcher v. South Dakota C. R. Co.*, — S. D. —, 155 N. W. 3.

There is no liability under the Federal Employers' Liability Act on the part of a carrier for the death of an employee, when caused wholly by his own negligence or by mere accident. *Hull v. Virginian R. Co.*, — W. Va. —, 88 S. E. 1060.

For injuries sustained in the course of his employment as the result of his own negligence, an employee cannot recover under the Federal Employers' Liability Act. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

## What Accidents Due Solely to Injured Employee's Conduct.

### —In General.

Where a switchman was injured while attempting to kick into place the coupler of a moving switch engine his act cannot be said, in an action under the Federal Employers' Liability Act, to have been the sole cause of his injury when the necessity for his act arose through the failure of an engineer to stop the engine after receiving a signal to do so. *Trowbridge v. Kansas City & W. B. R. Co.*, — Mo. App. —, 179 S. W. 777.

There can be no recovery under the Federal Employers' Liability Act for the death of a freight conductor who, on the

completion of his interstate trip, boarded the engine of another train in order to ride a short distance towards his home, and who was killed by the derailment of the engine when it struck a chain he had insecurely fastened to the rear of his train and which fell across the rails when he placed his train on a siding, since his death was due to his own negligence. *Dodge v. Chicago G. W. R. Co.*, 164 Ia. 627, 146 N. W. 14.

The negligence of an employee in standing on the coal while attempting with an iron bar to open the trap doors in the side of a car of coal which stood on a trestle over a deep bin, was held, in an action based on the Federal Employers' Liability Act, to have been the sole cause of his death when he was precipitated into the bin when the trap opened, where he was familiar with the work of unloading coal cars and had been warned not to stand on the coal when opening the doors in such manner. *Bjornsen v. Northern P. R. Co.*, 84 Wash. 220, 146 Pac. 575.

There cannot be a recovery under the Federal Employers' Liability Act for the death of a freight conductor who at night was killed in a collision between cars standing on a siding in a railway yard and the backing engine of his train, where the decedent was standing on the rear of the tender with a lighted lantern to give warning, and he made use of such track without first examining it for obstructions, and also without obtaining the necessary permission from the yardmaster, since, under the circumstances, the accident was due to the negligence of the decedent. *Gillis v. New York, N. H. & H. R. R. Co.*, — Mass. —, 113 N. E. 212.

Where an employee working on a coal-chute coaling engines, was injured while attempting to lift a coal buggy or cart which, as he was wheeling it, had fallen through a defective or rotten floor, he cannot recover under the Federal Employers' Liability Act, since his own act rather than the negligence of the carrier in permitting the floor to become rotten was the proximate cause of the accident. *Southern R. Co. v. Peters*, — Ala. —, 69 So. 611.

The negligence of the plaintiff cannot be held in an action under the Federal Employers' Liability Act, to have been the sole cause of his injury where his arm was crushed by the unguarded gearing of a gasoline engine used for pumping water for locomotives of an interstate carrier, when he slipped on a greasy floor or his coat was caught in the fly wheel or shaft of the engine. *Knapp v. Great N. R. Co.*, 130 Minn. 405, 153 N. W. 848, affirmed 240 U. S. 464, — L. ed. —, 36 Sup. Ct. Rep. 399.

#### —Failure to Have Train Under Control.

Where an engineer who had notice of

the place of meeting another train approached the passing track he should have taken, at a speed of thirty-five miles an hour without having his train under control, giving the required signals, or attempting to stop until too late to avert the collision in which he was killed, his failure to exercise ordinary prudence under the circumstances will prevent a recovery under the Federal Employers' Liability Act for his death. *Louisville & N. R. Co. v. Heinig*, 162 Ky. 14, 171 S. W. 853.

#### —Fireman's Failure to Warn Engineer of Danger.

A fireman who was injured when his engine collided with a cow, cannot recover under the Federal Employers' Liability Act, where he saw the animal approaching the track on his side of the train, and, without ringing the bell or calling the engineer's attention to the cow, he left his seat and went to shoveling coal. *Calhoun v. Central of G. R. Co.*, 10 Ga. App. 656, 73 S. E. 1077.

The failure of a fireman to warn his engineer of an open switch which the former saw, was held, in an action under the Federal Employers' Liability Act, not to have been the sole proximate cause of the former's death in a collision, where the switch was negligently left open by the crew of another train. *Hackney v. Missouri, K. & T. R. Co.*, 96 Kan. 30, 149 Pac. 421.

#### —Flagman's Failure to Signal Train.

There can be no recovery under the Federal Employers' Liability Act for the death of a flagman whose duty it was to warn trains of danger, where, as the result of his own negligence, he was struck and killed by a train, unless, by the exercise of ordinary care his peril could have been discovered by the train crew in time to avoid striking him. *Ellis v. Louisville, H. & St. L. R. Co.*, 155 Ky. 745, 160 S. W. 512.

The negligence of a brakeman in failing to protect the rear of his train when a defective drawbar broke, cannot, in an action under the Federal Employers' Liability Act, be held to have been the sole proximate cause of his death in an ensuing rear end collision, where the defendant was negligent in providing a car with a defective drawbar. *Wiles v. Great N. R. Co.*, 125 Minn. 348, 147 N. W. 427, 5 N. C. C. A. 60, reversed 240 U. S. 444, — L. ed. —, 36 Sup. Ct. Rep. 406.

#### —Going Between Moving Cars and Platform.

A railway company is not answerable under the Federal Employers' Liability Act for the death of an experienced brakeman who voluntarily went between moving freight cars and a freight house plat-

form and was crushed to death, where the platform was constructed in the usual and customary manner and he was not required to assume such position in the discharge of his duties. *Pankey v. Atchison, T. & S. F. R. Co.*, 180 Mo. App. 185, 168 S. W. 274, 6 N. C. C. A. 74.

There can be no recovery under the Federal Employers' Liability Act for the death of a brakeman who was crushed between moving freight cars and a freight house platform, where, without any negligence on the part of the defendant and without necessity, the decedent voluntarily went from a place of safety into one of known danger. *Pankey v. Atchison, T. & S. F. R. Co.*, 180 Mo. App. 185, 168 S. W. 274, 6 N. C. C. A. 74.

Where a brakeman, after giving an "easy" or "slow" signal, passed onto a house track in front of the moving cars without the knowledge of the engineer, and, on being warned by his conductor of the danger, instead of stepping from the track into a place of absolute safety he attempted to vault onto the platform of a freight house and was caught between it and the moving cars and killed, there cannot be a recovery under the Federal Employers' Liability Act. *Pankey v. Atchison, T. & S. F. R. Co.*, 180 Mo. App. 185, 168 S. W. 274, 6 N. C. C. A. 74.

#### —Slipping From Stand Pipe.

Where a pumpman was injured by slipping from the wet spout of a water column which he was descending after making slight repairs to a valve, there was no actionable negligence on the part of his employer under the Federal Employers' Liability Act. *Davis v. Chesapeake & O. R. Co.*, 166 Ky. 490, 179 S. W. 422.

#### —Standing Close to Track.

There can be no recovery under the Federal Employers' Liability Act for the death of an employee who was struck by a rapidly moving train while he was standing near the track in the discharge of his duties, unless his death resulted in whole or in part from the negligence of the employees in charge of the train. *Cincinnati, N. O. & T. P. R. Co. v. Eastham*, 160 Ky. 458, 169 S. W. 886, L. R. A. 1915 C. 27.

There cannot be a recovery under the Federal Employers' Liability Act for the death of a foreman of a construction gang who was struck by a rapidly moving train running on time, as he was standing close to the track near a station, where it was his duty to know the time of passing trains, to keep the track clear and to protect the track and the men under him. *Cincinnati, N. O. & T. P. R. Co. v. Eastham*, 160 Ky. 458, 169 S. W. 886, L. R. A. 1915 C. 27, S. C. — Ky. —, 179 S. W. 391.

The foreman of a construction gang working close to a railway track near a

station cannot rely on the observance by those in charge of passing trains of rules established for their movements at stations and meeting points, so as to render his employer liable under the Federal Employers' Liability Act for his death from being struck by a passing train, where it was his duty to know the time of the passing of trains, to keep the track clear and to protect the men under him from danger. *Cincinnati, N. O. & T. P. R. Co. v. Eastham*, 160 Ky. 458, 169 S. W. 886, L. R. A. 1915 C. 27, S. C. — Ky. —, 179 S. W. 391.

#### —Walking on or Crossing Track.

A freight conductor of large experience who was struck and injured by a switch engine as he was walking on a passing track beside his train while returning to the caboose after delivering a clearance card to the engineer, cannot recover under the Federal Employers' Liability Act, where his duty did not require him to walk on the passing track, and the bell of the switch engine as well as its exhaust could be heard a quarter of a mile away, notwithstanding that the conductor was seen by the fireman of the switch engine when 500 feet away and not afterwards, since no negligence on the part of the defendant was shown, as those in charge of the switch engine could rightfully assume that under the circumstances the plaintiff would remove himself from a place of danger. *Neil v. Idaho & N. W. R. R.*, 22 Idaho 74, 125 Pac. 331.

A railway company is not answerable under the Federal Employers' Liability Act for the death of a section foreman who was struck by a slowly backing train as he was crossing the tracks of a yard in which thousands of cars were handled daily, where it was part of his duty to guard against injury to himself and the men under him from moving trains. *Will-ever v. Delaware, L. & W. R. Co.*, 87 N. J. L. 348, 94 Atl. 595.

### F. Negligence in General.

#### 1. In General.

##### Failure to Provide Drinking Cup.

The failure of a tool boy to provide a drinking cup for the crew of an engine which was about to move a freight train in interstate commerce, was not negligence sufficient to render a railway company answerable under the Federal Employers' Liability Act for injuries sustained by a brakeman while crossing a railway yard to procure a cup, which was not essential to the movement of the train. *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

**Failure to Remove Rail Brace.****—Rebound of Rail When Thrown to Ground.**

The failure of a section foreman to remove a rail brace after a rail had been taken from a track before permitting another heavy rail to be thrown to the ground by a section crew, was not negligence which will permit a recovery under the Federal Employers' Liability Act for injuries caused a member of the crew from the rebound of the rail when it struck the brace. *Truesdell v. Chesapeake & O. R. Co.*, 159 Ky. 718, 169 S. W. 471.

**Injury to Health From Use of Paint Sprayer.**

An employee was within the protection of the Federal Employers' Liability Act where his health was impaired by the continuous use, in painting cars and engines, of a paint sprayer or "gun" operated by air pressure, which scattered paint about and upon the operator and enveloped him in a poisonous, deleterious and harmful mist or spray that he was obliged to breathe, when he was not aware of the danger, although the employer was, and the latter failed to provide the former with a respirator or nose guard that would have avoided or lessened the danger. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

**2. Insufficient Number of Employees.**  
(No decisions.)**3. Instructing Employees.****In General.**

Where an employee fell and was killed while assisting in placing planks on a track which as the result of a washout hung suspended above a stream, and the jury in an action based on the Federal Employers' Liability Act, found that the negligence which caused the accident was the failure to properly instruct the decedent how to walk on the ties, the defendant was entitled to a judgment where the jury further found that the foreman in charge of the work stated in the presence of the decedent that the ties were unsafe to walk on and gave instructions how to place the planks thereon. *Spinden v. Atchison, T. & S. F. R. Co.*, 95 Kan. 414, 148 Pac. 747.

**Minor Employee.**

Negligence of a carrier in transferring a section hand under 15 years of age to more dangerous work on a gravel train, without giving him adequate warning and instructions, is sufficient to sustain an action under the Federal Employers' Liability Act for his death from falling between the cars. *Maijala v. Great N. R. Co.*, — Minn. —, 158 N. W. 430.

**4. Warning of Danger.**

By Bells and Whistles, see *infra*. VII, F, 17, (d).

**Defective Bridge Timbers.**

Where a member of a gang of men who, while removing defective or rotten bents or piles from a bridge by sawing them off close to the ground, then working them loose from the drift bolts that held them at the top and letting them fall to the ground, was injured by the sudden fall of a bent which was rotten at the top, he cannot recover under the Federal Employers' Liability Act, when he knew that the bents were rotten and unsafe for use, although he did not know the condition of that particular one, since the defendant was under no duty to warn the plaintiff of any particular defect in the bent which caused the accident. *Marshall v. Chicago, R. I. & P. R. Co.*, 131 Minn. 292, 155 N. W. 208.

**Directing Porter to Leave Train on Trestle.**

The failure of a conductor to warn a train porter, who was not familiar with the surroundings, of the danger of alighting at night from a train which stopped for water so that the coaches stood on a trestle only one side of which was floored, was held negligence in an action under the Federal Employers' Liability Act, as well as the proximate cause of injuries sustained by the porter in getting off on the unfloored side in obedience to an order of the conductor. *Missouri, K. & T. R. Co. v. Bunkley*, — Tex. Civ. App. —, 153 S. W. 937.

In an action under the Federal Employers' Liability Act for injuries sustained by a train porter who stepped from a train at night on the unfloored side of a trestle, of the existence and condition of which he was unaware, the failure of the conductor to warn the porter of the danger before ordering him to leave the train when the train stopped at a water tank, was held negligence. *Missouri, K. & T. R. Co. v. Bunkley*, — Tex. Civ. App. —, 153 S. W. 937.

**Failure of Foreman to Give Warning of Approach of Trains.**

That the foreman of a gang engaged in repairing a pumping plant, did not take the precautions which his duty and due care required, may be inferred by the jury in an action based on the Federal Employers' Liability Act, when, with knowledge that a train from the opposite direction was overdue, he directed a workman to go along the track for material without warning him of the danger or taking any precautions to see whether the train was in sight, where there was a general and well known custom for workmen to rely

on the foreman to give warning of the approach of trains. *Newkirk v. Pryor*, — Mo. App. —, 183 S. W. 682.

It cannot be said as a matter of law, in an action founded on the Federal Employers' Liability Act, that the foreman of a gang employed in repairing a pumping plant was free from negligence, where it was his duty to know the time trains were due and with knowledge that one was past due, he directed a workman to go down the track for material at a place where by reason of obstructions it was not easy to step aside, and the latter was struck and killed by a rapidly moving train coming from the rear, when the foreman after giving such order, did not look to see whether the train was in sight or discover it until it was close at hand. *Newkirk v. Pryor*, — Mo. App. —, 183 S. W. 682.

#### Kicked Cars.

A carrier is answerable under the Federal Employers' Liability Act, where a trackwalker while assisting at night in the repairing of a switch in a yard, was struck and killed by kicked cars as the result of the negligence of his fellow servants in not warning him of the danger which they and not the decedent were in a position to see. *Colasurdo v. Central R. of N. J.*, 180 Fed. 832, affirmed 113 C. C. A. 379, 192 Fed. 901, writ of error dismissed 226 U. S. 617, 57 L. ed. 383, 33 Sup. Ct. Rep. 111.

The rapid movement of kicked cars in a railway yard at night without lights, signals or adequate means of control, constituted negligence sufficient to render a carrier liable under the Federal Employers' Liability Act for the death of a trackwalker who was struck while assisting in repairing a switch, where a brakeman on the cars saw the decedent's danger without attempting to warn him or to stop the cars until too late. *Colasurdo v. Central R. of N. J.*, 180 Fed. 832, affirmed, 113 C. C. A. 379, 192 Fed. 901, writ of error dismissed, 226 U. S. 617, 57 L. ed. 383, 33 Sup. Ct. Rep. 111.

It cannot be said as a matter of law, in an action under the Federal Employers' Liability Act, that a car inspector was not justified in inferring that he would receive the customary warning or notice before cars about which he was working were moved by a switch engine, where the switch crew knew or should have known of his position. *Texarkana & Ft. S. R. Co. v. Casey*, — Tex. Civ. App. —, 172 S. W. 729.

It cannot be said as a matter of law, in an action based on the Federal Employers' Liability Act, that a car inspector was bound to know that without warning or notice other cars would be shoved against those about which he was working, al-

though he failed to display the signal required by the rules of his employer, where it was customary for switchmen to give warning before moving cars about which they knew or had reason to believe as they did in the instant case, that an inspector was working. *Texarkana & Ft. S. R. Co. v. Casey*, — Tex. Civ. App. —, 172 S. W. 729.

The failure to warn an air inspector before shunting cars against stationary cars about which he was working, is negligence within the purview of the Federal Employers' Liability Act, where the switching crew that did so must have known of the former's position. *Young v. Lusk*, — Mo. —, 187 S. W. 849.

A switch engine fireman was within the Federal Employers' Liability Act, where, during the making up of an interstate train, while his engine was standing still during the temporary absence of the switch crew at the yard office, he was struck and injured by cars kicked on a parallel track without warning, as he was straightening a flue-auger between the driving wheels of his engine preparatory to cleaning the flues. *Alabama G. S. R. Co. v. Skotzy*, — Ala. —, 71 So. 335.

For a switchman to cause cars to be kicked, without warning and contrary to custom, against a string of cars about which he knew a coemployee was working, is negligence within the meaning of the Federal Employers' Liability Act. *Hurley v. Illinois C. R. Co.*, — Minn. —, 157 N. W. 1005.

A finding that a switchman's death was due to the negligence of a coemployee is justified, in an action based on the Federal Employers' Liability Act, by evidence tending to show that, without warning and contrary to custom, the latter kicked cars against those between which he knew the decedent was working. *Hurley v. Illinois C. R. Co.*, — Minn. —, 157 N. W. 1005.

Evidence that an air inspector was injured when, without warning, cars were shunted against stationary cars about which he was working, is sufficient to establish the defendant's negligence in an action under the Federal Employers' Liability Act, where the switching crew that moved the cars must have known of the inspector's position, and under the circumstances should have taken some precautions to avoid injuring him. *Young v. Lusk*, — Mo. —, 187 S. W. 849.

#### Warning Employee Holding Coupling Lever When Coupling to be Made.

The negligence of a yard conductor in failing to warn a switchman who was holding a coupling lever, to let go when a coupling was about to be made, is imputable to the defendant in an action based on the Federal Employers' Liability Act,

where the switchman was injured as the result of such negligence. *Steele v. Atlantic C. L. R. Co.*, — S. C. —, 87 S. E. 639.

#### 5. Failure to Discover Employee's Peril in Time to Avoid Accident.

##### In General.

Where those in charge of a train could not, in the exercise of ordinary care, have discovered the danger of a flagman until too late to avoid striking him, there can be no recovery for his death under the Federal Employers' Liability Act. *Ellis v. Louisville, H. & St. L. R. Co.*, 155 Ky. 745, 160 S. W. 512.

Where a slowly moving train entered a block under cautionary signals on a clear night, and ran into a preceding train while its tail lights were burning, to the injury of an employee who was sleeping in the caboose, it cannot be said as a matter of law, in an action founded on the Federal Employers' Liability Act, that those in charge of the second train should not, in the exercise of reasonable care, have discovered the preceding train in time to avoid the collision. *Penn. R. Co. v. Cole*, 131, C. C. A. 244, 214 Fed. 948.

#### 6. Failure to Exercise Care After Discovering Employee's Peril.

##### In General.

In an action based on the Federal Employers' Liability Act for the death of a brakeman who was killed at night, evidence that members of his crew saw his lantern go out is not sufficient to charge the defendant with negligence on the ground of a failure of the crew to use due care to prevent the accident after discovering the decedent's peril, where it did not appear that they knew of his position or the danger he was in. *Chesapeake & O. R. Co. v. Walker*, 159 Ky. 237, 167 S. W. 128.

In an action based on the Federal Employers' Liability Act, for the death of a brakeman who at night was crushed between moving freight cars and the platform of a freight house, negligence cannot be predicated on the failure of an engineer to stop the backing train on the disappearance of the decedent's lantern after he gave, when in a place of safety, an "easy" or "slow" signal indicating that a coupling was about to be made, and then, without the knowledge of the engineer, passed onto the track in front of the backing train and attempted to vault onto the platform of a freight house and was caught and killed by the moving cars, since the engineer had no reason to suppose that the decedent would go from a place of safety into one of known danger. *Pankey v. Atchison, T. & S. F. R. Co.*, 180 Mo. App. 185, 168 S. W. 274, 6 N. C. C. A. 74.

An engineer who saw a switchman walking on the track ahead of his engine was held, in an action founded on the Federal Employers' Liability Act, not to have been justified in assuming, until too late to avoid the accident, that the switchman would step aside out of danger, since his unheeding presence on the track until the engine was within from 25 to 50 feet from him, was strongly significant that he was not aware of its dangerous proximity. *Southern R. Co. v. Smith*, 123 C. C. A. 488, 205 Fed. 360.

#### 7. Accidents Ordinary Care Could Not Prevent.

##### In General.

Evidence that an employee was injured when a wet and slippery tie turned and caught his finger as he and two coemployees were tossing it onto a car does not show actionable negligence under the Federal Employers' Liability Act, since his injury was the result of an accident that ordinary prudence could not have anticipated or prevented. *Long v. Southern R. Co.* 155 Ky. 286, 159 S. W. 779.

#### 8. Rules and Regulations.

Abrogation of rule as question for jury, see *infra*, XIX, C, 3, (r).

Instructions as to violation of rules and regulations, see *infra* XIX, E, 19.

Sufficiency of rules as jury question, see *infra* XIX, C, 3, (r).

##### (a) In General.

(No decisions.)

##### (b) Failure to Promulgate.

##### In General.

The failure of the officers, agents or employees of an interstate carrier, who were charged with the duty of promulgating rules for the safety of trainmen, to make such rules, is, when the proximate cause of the injury to a brakeman, the negligence of the carrier for which it is answerable under the Federal Employers' Liability Act. *De Atley v. Chesapeake & O. R. Co.* 201 Fed. 591.

In an action founded on the Federal Employers' Liability Act, negligence cannot be predicated on the failure of a carrier to promulgate rules forbidding the movement of cars in a railway yard without warning, where it was not shown that it was practicable to do so or that the enforcement of such a rule would have averted the death of an experienced freight conductor who was struck by shunted cars. *Swartwood v. Lehigh V. R. Co.* 169 App. Div. 759, 155 N. Y. Supp. 778.



Where an engineer was given orders to meet another train at a designated station, on arriving and examining the train register, he found an entry indicating that such train had passed, when instead it had gone back to another station, and on its return trip it collided with the plaintiff's train to his injury, it was held in an action predicated on the Federal Employers' Liability Act, that the proximate cause of the accident was the employer's failure to establish proper rules and to give the plaintiff appropriate orders. *Bouchard v. Central Vt. R. Co.* 87 Vt. 399, 89 Atl. 475, L. R. A. 1915 C. 33.

Where an air brake inspector employed by an interstate carrier was struck and killed by a shunted car as he was crossing a track in a railway yard, the failure of the carrier to promulgate and enforce a rule requiring cars moved in that manner to be under the control of an employee to give warning of their approach, was not negligence sufficient to permit a recovery under the Federal Employers' Liability Act, where the decedent stepped in front of the moving car when it was but five or six feet from him, and no warning which could have been given would have saved his life. *Gee v. Lehigh V. R. Co.* 163 App. Div. 274, 148 N. Y. Supp. 882.

**(c) Violation by Carrier or Coemployee.**

**Cars Not in Clear.**

A carrier is answerable under the Federal Employers' Liability Act for injuries resulting from leaving cars, in violation of its rules, on a sidetrack so as not to clear a main track. *Wright v. Yazoo & M. V. R. Co.*, 197 Fed. 94, affirmed 125 C. C. A. 25, 207 Fed. 281, 235 U. S. 376, 59 L. ed. 277, 35 Sup. Ct. Rep. 130.

**Failure of Conductor to Stop Train on Engineer Disobeying Orders.**

Where the conductor, brakeman, engineer and fireman of a freight train were all instantly killed in a collision, there can be no recovery under the Federal Employers' Liability Act for the death of the engineer on the theory of the negligence of his coemployee in failing to take the necessary steps, as required by the rules of the carrier, to stop the train when the engineer ran past a meeting point in violation of his orders with which his companions were familiar. *Virginian R. Co. v. Linkous*, 144 C. C. A. 386, 230 Fed. 89.

Where the negligence of an engineer in failing to have his train under control and to give the necessary signals at a meeting point, was the proximate cause of his death in an ensuing collision, it was not the sole cause so as to preclude a recovery under the Federal Employers' Liabil-

ity Act, where the conductor, in the exercise of ordinary care and in compliance with the rules of the carrier, should have been in a position to know that the meeting signal was given, and should have applied the air brakes and stopped the train as soon as he was aware that such signal was omitted and the speed of the train not slackened. *Louisville & N. R. Co. v. Heinig*, 162 Ky. 14, 171 S. W. 853.

**Speed of Trains.**

The negligence of a carrier is shown, in an action founded on the Federal Employers' Liability Act, where an employee, while crossing a main track at a station was struck and killed by a freight train running through a populous city at a speed of from 20 to 25 miles an hour, without giving signals or warning as required by the defendant's rules. *Saunders v. Southern R. Co.* 167 N. C. 375, 83 S. E. 573.

The violation of a rule forbidding the running of trains through railway yards in excess of 6 miles an hour, is not negligence sufficient to charge a railway company under the Federal Employers' Liability Act, for injuries sustained by an employee who was struck by a train operated in excess of such speed, where such rule was customarily and habitually disregarded by employees and not enforced by the defendant. *Missouri, K. & T. R. Co. v. Rentz*, —Tex. Civ. App.—, 162 S. W. 599.

It was reversible error, in an action under the Federal Employers' Liability Act for injuries sustained by an employee who was struck by a train, to submit to the jury, as a ground of negligence, the violation of a rule prohibiting the running of trains through railway yards in excess of 6 miles an hour, where the evidence showed a habitual and customary violation of the rule and its nonenforcement by the company. *Missouri, K. & T. R. Co. v. Rentz*, —Tex. Civ. App.—, 162 S. W. 599.

**Display of Light on Backing Train.**

Where a carrier established a rule requiring the display at night of a white light on the rear of backing engines, which its employees understood as applying to the movement of engines in yards as well as on the main lines, and it became customary for backing engines in yards to display such a signal, the defendant cannot, in an action under the Federal Employers' Liability Act for injuries received by an employee who was struck by a backing engine on which a coemployee had failed to display a white light, escape liability by showing that such rule was not intended to apply to engines moving in yards, where the absence of such signal was the sole or contributing cause of

the accident. *Easter v. Virginia R. Co.*, —W. Va.—, 86 S. E. 37.

#### **Movement of Freight Cars on House Track Without Warning.**

A rule requiring the giving of notice to persons in and about freight cars that are being loaded or unloaded, before they are moved, was held, in an action based on the Federal Employers' Liability Act, not to have been violated by the failure of a switching crew to notify a railway detective of a movement of freight cars between which, without the knowledge of the crew and by whom he could not be seen, he went in order to examine the door seals. *Helm v. Cincinnati, N. O. & T. P. R. Co.* 156 Ky. 240, 160 S. W. 945.

#### **Time Between Trains Moving in Same Direction.**

There can be no recovery under the Federal Employers' Liability Act for the death of a freight conductor in a rear-end collision, on the theory of the violation by the crew of the colliding train of a rule of the defendant forbidding trains to move in the same direction within ten minutes of each other, where the proximate cause of the accident was not the violation of such rule but was the failure of the decedent's flagman to signal the following train by reason of accidentally falling from a bridge while on the way to signal the second train. *Culp v. Virginian R. Co.* —W. Va.—, 87 S. E. 187.

#### **(d) Violation by Injured Employee.**

##### **In General.**

Negligence on the part of the defendant was not shown, in an action founded on the Federal Employers' Liability Act for the death of an engineer of a rapidly-moving extra train, who was killed on a foggy morning by a collision with a switch engine working in the performance of its duties, on the main track of a railway yard, where the rules of the defendant permitted yard engines to occupy main tracks within yard limits by protecting themselves against scheduled trains, and provided that extra trains must run through yards under control, looking out for yard engines and extras, since such reasonable rule required the decedent to have his train under control, but did not require the crew of the yard engine to protect themselves against extra trains. *Central R. Co. of N. J. v. Young*, 118 C. C. A. 465, 200 Fed. 359.

Where a brakeman on the sudden stoppage of a freight train on a dark night as the result of the pulling out of a drawbar, failed to protect the train as the rules of the employer required, and was killed in a resulting rear end collision with a

train that was operated without negligence and which he knew was closely following, there can be no recovery under the Federal Employers' Liability Act for his death. *Great N. R. Co. v. Wiles*, 240 U. S. 444, — L. ed. —, 36 Sup. Ct. Rep. 406, reversing 125 Minn. 348, 147 N. W. 427, 5 N. C. C. A. 60.

An engineer's violation of a rule prohibiting the running of trains through a railway yard in excess of 10 miles an hour, is negligence per se which will preclude a recovery for injuries sustained in a collision with a switch engine, except such as are permitted by the Federal Employers' Liability Act for the comparative negligence properly attributable to the engineer and the employer. *St. Louis, I. M. & S. R. Co. v. Stewart*, — Ark. —, 187 S. W. 920.

#### **Failure of Car Repairer to Display Flag.**

The negligence of a car repairer in going under a car in violation of an unabrogated rule of his employer, without first displaying a blue flag, was the sole cause of his injury, and sufficient to defeat an action under the Federal Employers' Liability Act for injuries received when other cars ran against those under which he was working, notwithstanding that the accident was caused by a coupler on the moving cars which did not comply with the Safety Appliance Act. *Kentucky & T. R. Co. v. Minton*, 167 Ky. 516, 180 S. W. 831.

A railway company is not answerable under the Federal Employers' Liability Act for the death of a car repairer who was killed by a movement of a car on which he was working when an engine was coupled to the other end of a string of cars, where there was no showing of causal negligence on the part of the defendant, and decedent attempted to make repairs without displaying the signals required by the rules of his employer. *Wilson v. Grand Trunk R. Co.*, — N. H. —, 97 Atl. 981.

#### **Boarding Moving Engines.**

A rear brakeman who, on being left by his own train after flagging a following train, in compliance with a rule of his employer, boarded the latter train in order to overtake his own, was held, in an action based on the Federal Employers' Liability Act, not to have violated another rule requiring him to see that the approaching train was stopped, where, after leaving the following train and failing to catch up with his own train, he was injured while attempting to reboard the moving engine of the second train. *Norfolk & W. R. Co. v. Thompson*, 161 Ky. 814, 171 S. W. 451.

#### **Riding on Pilot of Engine.**

For a brakeman to attempt to enter the cab of a moving engine by means of a step on the rear of the pilot beam, was

held, in an action under the Federal Employers' Liability Act, not a violation of a rule prohibiting employes from riding on the pilots of engines. *Norfolk & W. R. Co. v. Thompson*, 161 Ky. 814, 171 S. W. 451.

**Flying Switches.**

The fact that at the time a brakeman was struck and injured by a defective refrigerator car door he was making a flying switch, in violation of a rule of a carrier, is not a defense to an action under the Federal Employers' Liability Act, since the method of performing the work was not the proximate cause of the accident. *Carter v. Kansas City S. R. Co.* —Tex. Civ. App.—, 155 S. W. 638.

**Engineer Leaving Engine While Switching.**

Where at night an engineer ran his engine 200 feet beyond a switch from which he was to take a dead engine that he was informed could not move under its own steam, and while on the ground beside his engine cooling a hot box, the disabled engine, without warning or having its headlight burning, was run, under its own steam, from a passing track onto a main track, and, in defiance of a brakeman's signal to stop ran an unnecessary distance past a fixed danger signal and collided with the first mentioned engine so as to injure the engineer, it was held, in an action under the Federal Employers' Liability Act, that it could not be said as a matter of law that the injured engineer was negligent in leaving his engine in violation of a rule of the defendant requiring firemen and engineers to remain on their engines while engaged in switching. *Pfeiffer v. Oregon, W. R. & N. Co.* 74 Oreg. 307, 144 Pac. 762, 7. N. C. C. A. 685, writ of error dismissed 239 U. S. 658, —L. ed.—, 36 Sup. Ct. Rep. 222.

**Rule Requiring Inspection of Appliances. — Steps of Caboose.**

The steps of a freight caboose which gave away to the injury of a conductor, were held, in an action under the Federal Employers' Liability Act, not to be appliances within the meaning of a rule of the carrier requiring freight conductors to keep their cabooses clean, and all tools and appliances in their proper place and in good order. *Cincinnati, N. O. & T. P. R. Co. v. Goldston*, 163 Ky. 42, 173 S. W. 161.

**(e) Abrogation.**

**Habitual Violation.**

The evidence held to show, in an action under the Federal Employers' Liability

Act for the death of a car repairer, such a uniform and habitual violation of a rule requiring the display of designated signals on cars while undergoing repairs, as to amount to an abrogation of such rule. *St. Louis, I. M. & S. R. Co. v. Sharp*, 115 Ark. 308, 171 S. W. 95, writ of error dismissed, 238 U. S. 697, 59 L. ed. 1504, 35 Sup. Ct. Rep. 939.

Where an engineer was killed in a collision with another engine which was left at night on a crossover track so that it did not clear the main track, while he was testing an engine just from the repair shop, and running it at high speed against the current of traffic, which was forbidden by the rules of his employer except under special circumstances, the plaintiff may prove, in an action under the Federal Employers' Liability Act, as tending to show the negligence of the defendant in leaving the engine in such position, that the running of engines against the current of traffic was of almost nightly occurrence at the point where the accident occurred. *Louisville & N. R. Co. v. Fleming*, — Ala. —, 69 So. 125.

A carrier cannot, in an action under the Federal Employers' Liability Act, be charged with knowledge of the violation of a rule requiring extra trains to pass through yard limits under control, so as to show an abrogation of such rule, by the testimony of one witness that he had frequently violated it, without also showing that the company had knowledge thereof. *Central R. of N. J. v. Young*, 118 C. C. A. 465, 200 Fed. 359.

Evidence of the general nonobservance in a railway yard of the "blue flag" rule, and that an air inspector had been instructed by his superiors to disregard it, is sufficient, in an action under the Federal Employers' Liability Act, to show the master's waiver of the rule. *Young v. Lusk*, — Mo. —, 187 S. W. 849.

A yardmaster's continued acquiescence in the violation of a rule relating to the speed of trains in a railway yard, shows, in an action under the Federal Employers' Liability Act, a pro tanto abrogation of such rule, where it was his duty to enforce the rule or to report infractions thereof. *St. Louis, I. M. & S. R. Co. v. Stewart*, — Ark. —, 187 S. W. 920.

The abrogation of a rule limiting the speed of trains in a railway yard is not shown, in an action under the Federal Employers' Liability Act, by evidence that does not establish a habitual violation thereof. *St. Louis, I. M. & S. R. Co. v. Stewart*, — Ark. —, 187 S. W. 920.

The question of a carrier's negligence in operating a train through a railway yard in excess of the speed prescribed by its

rules, should not be submitted to the jury, in an action under the Federal Employers' Liability Act, where the evidence shows a habitual and customary disregard of such rule and its nonenforcement by the defendant. *Missouri, K. & T. R. Co. v. Rentz*, — Tex. Civ. App. —, 162 S. W. 599.

### 9. Orders Negligently Given.

#### Diverting Runaway Car.

Where a freight conductor was killed by the derailment of a runaway car on which he was riding, when it was diverted from a main to a branch line under orders negligently given by a train dispatcher, such negligence need not have been the sole and only cause of the accident in order to charge a carrier under the Federal Employers' Liability Act, since it was sufficient if it contributed to the disaster. *Sandidge v. Atchison, T. & S. F. R. Co.*, 113 C. C. A. 653, 193 Fed. 867.

### 10. Violation of Orders.

#### Call Boy Jumping from Moving Train.

Where an inexperienced call boy while on the way to call a train crew, was killed by jumping from a moving train on which, in violation of his master's orders, he was riding at the direction of an older boy who had been delegated to instruct him in his duties, the employer is not answerable under the Federal Employers' Liability Act, where the decedent had been especially warned against jumping on or off trains. *Vanordstrand v. Northern P. R. Co.*, 86 Wash. 665, 151 Pac. 89.

### 11. Violation of Municipal Ordinances.

#### Reliance on Ordinance as to Signals from Trains.

It was held in an action based on the Federal Employers' Liability Act, that a section man engaged on a stormy night in cleaning snow and ice from the switches at a station, might rely on the observance of a city ordinance requiring the ringing of locomotive bells within the city, where he was struck and killed by a train which passed the station at high speed without giving warning of its approach. *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328.

### 12. Negligence of Fellow Servants.

Instructions as to negligence of fellow servants, see *infra* XIX, E, 17.

Necessity for employment of negligent servant in interstate commerce, see *supra* VII, D.

### (a) In General.

(No decisions.)

### (b) Abolition of Common-Law Rule.

#### In General.

The fellow-servant doctrine of the common law was abrogated by the Federal Employers' Liability Act. *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, L. R. A. 1915 C. 1, Ann Cas. 1915 B. 475, 8 N. C. C. A. 834, reversing 162 N. C. 424, 78 S. E. 494; *Law v. Illinois C. R. Co.*, 126 C. C. A. 27, 208 Fed. 869, L. R. A. 1915 C. 17; *Devine v. Chicago, R. I. & P. R. Co.*, 266 Ill. 248, 107 N. E. 595, affirming 185 Ill. App. 488, affirmed 239 U. S. 52, 60 L. ed.—, 36 Sup. Ct. Rep. 27; *Southern R. Co. v. Howerton*, 182 Ind. 208, 232, 106 N. E. 369, 105 N. E. 1025, reversing — Ind. App. —, 101 N. E. 121, 103 N. E. 121; *Carter v. Kansas City S. R. Co.*, — Tex. Civ. App. —, 155 S. W. 638.

The common-law rule exempting an employer from responsibility for injuries caused a servant by the negligence of a fellow servant was abolished by the Federal Employers' Liability Act. *Koukouris v. Union P. R. Co.*, — Mo. App. —, 186 S. W. 545; *Elliott v. Illinois C. R. Co.*, — Miss. —, 71 So. 741.

### (c) Liability for Negligence of.

#### In General.

Under the Federal Employers' Liability Act a carrier is answerable for injuries sustained by or for the death of an employee engaged in interstate commerce, as the result of the negligence of a fellow servant. *Caverhill v. Boston & M. R. Co.*, 77 N. H. 330, 91 Atl. 917; *Mattocks v. Chicago & A. R. Co.*, 187 Ill. App. 529.

A carrier is answerable under the Federal Employers' Liability Act, notwithstanding that the plaintiff's injuries may have been caused wholly by the negligence of a fellow servant or the combined negligence of the latter and the plaintiff. *Easter v. Virginian R. Co.*, — W. Va. —, 86 S. E. 37.

Where the cause of an employee's injury was the negligence of a fellow servant, the fact that the former might have assumed the risk of injury from a defective apparatus which contributed to an accident, will not relieve his employer from liability under the Federal Employers' Liability Act, since it is sufficient for the plaintiff to show that one of the co-operating causes was a negligent act or omission for which the master is responsible. *Northern P. R. Co. v. Maerkl*, 117 C. C. A. 237, 198 Fed. 1.

Where it does not appear that the plaintiff was to blame for falling from a

moving hand-car he cannot recover under the Federal Employers' Liability Act for resulting injuries, on the theory that his coemployees must have been guilty of negligence. *Papoutsikis v. Spokane, P. & S. R. Co.*, 89 Wash. 161, 153 Pac. 1053.

In an action founded on the Federal Employers' Liability Act, it was held that a conductor could not assume that a train porter was aware of the existence and construction of a trestle on which a train stopped at night near a water tank, where the latter, without warning from the conductor as to the existence of the bridge or its condition, was injured in alighting on its unfloored side while obeying an order from the conductor. *Missouri, K. & T. R. Co. v. Bunkley*,—Tex. Civ. App.—, 153 S. W. 937.

#### For What Acts Answerable.

##### —In General.

An interstate carrier is liable under the Federal Employers' Liability Act for injuries received by an employee through the negligence of a fellow-employee, where at the time both were engaged in interstate commerce. *Zikos v. Oregon R. & N. Co.*, 179 Fed. 893.

Where an employee of one railway company, while running a train over the track of another company under a traffic agreement, was injured by the negligence of the latter company, it cannot escape liability under the Federal Employers' Liability Act on the ground that the accident was partly due to the negligence of a fellow servant of the injured employee in failing to keep a proper lookout so as to discover a misplaced switch which caused the accident. *Campbell v. Canadian N. R. Co.*, 124 Minn. 245, 144 N. W. 772.

There may be a recovery under the Federal Employers' Liability Act for the death of a truckman in the employ of an interstate carrier, who was killed through the negligence of a coemployee while both were engaged in transferring interstate freight from a warehouse to a freight car for shipment to another state. *Illinois C. R. Co. v. Porter*, 125 C. C. A. 55, 207 Fed. 311.

Where a brakeman who was employed in interstate commerce was injured while attempting to board a moving freight train which he left at the direction of the engineer so as to obtain running orders from a signal tower, the negligence of the engineer in failing to stop the train so as to permit the brakeman to board it in safety, was, within the meaning of the Federal Employers' Liability Act, the negligence of a coemployee. *De Atley v. Chesapeake & O. R. Co.*, 201 Fed 591.

An action based on the Federal Employers' Liability Act for injuries sustained by

a section hand in a collision between hand-cars provided by a carrier for transporting trackmen to their camp as the concluding act of their day's work in ballasting a track used for interstate traffic, was properly submitted to the jury, where the accident was caused by the negligence of a coemployee of the plaintiff. *San Pedro, L. A. & S. L. R. Co. v. Davide*, 127 C. C. A. 454, 210 Fed. 870.

A carrier is answerable under the Federal Employers' Liability Act for the death of an employee engaged in rebuilding a bridge used in interstate commerce, who, at the close of the day's work, while walking on the track at the direction of his foreman to a boarding car furnished by the employer, was struck and killed by a negligently operated push car on which other employees, after the conclusion of their work, were, with the permission of an assistant foreman, taking to their homes scraps of timber for firewood. *Louisville & N. R. Co. v. Walker*, 162 Ky. 209, 172 S. W. 517.

A carrier is answerable under the Federal Employers' Liability Act, where, while assisting in placing a new tie in a track, a section man's foot was injured through the negligence of a fellow servant, who, on the approach of a train, suddenly and without warning lowered a jack that held up the rail, before the plaintiff could shift his position. *Koukouris v. Union P. R. Co.*, — Mo. App. —, 186 S. W. 545.

In an action under the Federal Employers' Liability Act for the death of the conductor of a freight train, who at night was killed in a collision between the backing engine of his train and cars standing in a railway yard on a siding known as No. 8, testimony that when his train entered the yard the decedent informed his engineer that they would go in on track 8 and come out on track 10, and when informed by the latter that the switches were set for track 10, said it did not matter, that they would go in on 10 and come out on 8, did not tend to show that the decedent was directed by the yardmaster to take the course he did. *Gillis v. New York, N. H. & H. R. Co.*, — Mass. —, 113 N. E. 212.

In an action based on the Federal Employers' Liability Act for the death of the conductor of a freight train in a collision at night between the backing engine of his train and cars standing on a side track in a railway yard, negligence cannot be predicated on the conduct of the yardmaster in not looking for the decedent and instructing him as to which track to take, where the former, after going to the rear of the decedent's train to obtain the way bills, and not finding him, returned to his office, when, under the rules of the defendant, the decedent did not have the right to make use of any track without first obtain-

ing permission from the yardmaster, where the latter had no reason to suppose that the decedent would pursue the course he did. *Gillis v. New York, N. H. & H. R. Co.*, — Mass. —, 113 N. E. 212.

Where a freight conductor, with the permission of a yardmaster, brought his train into a yard at night, and after disposing of his train, he was killed in a collision between the backing engine of his train and cars standing on a side track, negligence cannot, in an action under the Federal Employers' Liability Act, be predicated on the failure of the yardmaster to warn the decedent of the presence of such cars on the side track, where it was the decedent's duty to obtain permission from the yardmaster before using such track. *Gillis v. New York, N. H. & H. R. Co.*, — Mass. —, 113 N. E. 212.

In an action based on the Federal Employers' Liability Act for the death of a freight conductor at night in a collision between the backing engine of his train and cars standing on a side track in a railway yard, negligence cannot be predicated on the fact that the head brakeman of the train, after setting the brakes on cars that were left on another track, climbed over the obstructed track and sat down on an adjoining track to await the return of the engine, and failed to warn the decedent of the presence of the cars on the other track, where the brakeman had no reason to suppose that the decedent would attempt to make use of the obstructed track. *Gillis v. New York, N. H. & H. R. Co.*, — Mass. —, 113 N. E. 212.

Where a freight conductor, after a switching movement of his train, was killed at night in a collision between the backing engine of his train and cars standing on a side track in a yard, the engineer cannot be held equally culpable with the decedent, in an action based on the Federal Employers' Liability Act, on the theory that the defendant's rules made the engineer equally responsible with the conductor for the safety of his train, where another rule cast upon the conductor the responsibility for all switching movements. *Gillis v. New York, N. H. & H. R. Co.*, — Mass. —, 113 N. E. 212.

In an action based on the Federal Employers' Liability Act for the death of a freight conductor in a collision at night between the backing engine of his train and cars standing on a siding in a railway yard, as the decedent was riding on the rear of the tender with his lantern in order to give warning, the failure of the engineer to observe the cars was not negligence, since under the circumstances it was not his duty to see that the track was clear. *Gillis v. New York, N. H. & H. R. Co.*, — Mass. —, 113 N. E. 212.

In an action founded on the Federal Em-

ployers' Liability Act for the death of a freight conductor in a collision at night between the backing engine of his train, while he was riding on the rear of the tender, and cars standing on a side track in a yard, negligence cannot be found from the fact that the fireman should have seen the cars when the engine passed them on an adjoining track, and warned the decedent of their presence, where it was no part of the fireman's duty to examine tracks and to notify the conductor which to take. *Gillis v. New York, N. H. & H. R. Co.*, — Mass. —, 113 N. E. 212.

#### — Fireman or Conductor Running Engine.

Even if a fireman, in running an engine in the absence of the engineer in violation of a rule of a carrier, acted without the scope of his employment so as not to bind his employer, it was held, in an action under the Federal Employers' Liability Act, for injuries sustained by another employee as the result of the fireman's negligent operation of the engine, that the engineer was negligent in directing the fireman to run the engine in his absence, and that the carrier was answerable therefor. *Callaghan v. Chicago & N. W. R. Co.*, 161 Wis. 288, 154 N. W. 449.

Where a freight brakeman was ordered by his conductor to fire a locomotive while the regular crew were in the caboose of a train eating dinner, and the brakeman was injured through the negligent manner in which the conductor operated the engine, the employer was answerable under the Federal Employers' Liability Act. *Martin v. Atchison, T. & S. F. R. Co.*, 93 Kan. 681, 145 Pac. 849.

Where the petition in an action under the Federal Employers' Liability Act alleged that a brakeman was injured by a defect in the tire of a locomotive driving wheel which had been loose for a sufficient length of time to charge the defendant with notice, and the jury found that it came loose but a few minutes before the accident as the result of the negligent management of the engine by a freight conductor while the regular crew were in the caboose of a train eating their dinner, it was held that as such finding as well as the evidence showed that the plaintiff's injury was caused by the negligence of the conductor, the defendant was answerable irrespective of notice of the condition of the tire. *Martin v. Atchison, T. & S. F. R. Co.*, 93 Kan. 681, 145 Pac. 849.

#### 13. Concurring Negligence of Coemployee and Injured Servant.

##### In General.

Where a trainman was killed by the derailment of a heavily loaded runaway freight car he was riding, a carrier was

not relieved from liability under the Federal Employers' Liability Act, by reason of the negligence of the decedent in setting the car, the brakes of which were unable to hold it, on a main track at a heavy grade, where the subsequent negligence of the train dispatcher in ordering the car diverted to a branch line without sufficient inquiry, contributed to the wreck. *Sandridge v. Atchison, T. & S. F. R. Co.*, 113 C. C. A. 653, 193 Fed. 867.

#### 14. Safe Place.

Instructions as to safe place, see *infra* XIX, E. 20.

##### (a) In General.

##### **Employer as Insurer of Safety.**

Under the Federal Employers' Liability Act an employer is not an insurer of the safety of the place in which an employee is required to work. *Hawkins v. St. Louis & S. F. R. Co.*, 189 Mo. App. 201, 174 S. W. 129.

##### **Falling Walls.**

Where an employee, while erecting a scaffold on the inside of the wall of a brick roundhouse from which the roof had been blown in a storm, was injured by the falling of the inside course of brick, negligence on the part of the defendant was shown, in an action based on the Federal Employers' Liability Act, by evidence that, although the plaintiff knew that the outer course of brick leaned dangerously outward, he was not aware, although his foreman was, that the inner course had parted from the outer course, since the rule exempting an employer from liability for injuries to servants while engaged in making an unsafe place safe, did not apply. *Winter v. Chicago, R. I. & P. R. Co.*, — Mo. App. —, 185 S. W. 1172.

##### **Failure to Lower Aprons on Gravel Train.**

Where a section hand fell between cars of a gravel train and was killed, the failure to have the iron aprons in position between the cars does not amount to negligence under the Federal Employers' Liability Act, since such appliances were intended to facilitate the passage of a plow over the cars and not to make a safe passage for employees. *Maijala v. Great N. R. Co.*, — Minn. —, 158 N. W. 430.

##### (b) Tracks.

##### **Ordinary Care.**

Where a main track at a place a car was derailed on a curve and an employee killed, was constructed by a competent engineer, inspected daily, and had been in constant use for many years without accident, it was held in an action based on the Fed-

eral Employers' Liability Act that the defendant exercised ordinary care, notwithstanding that the outer rail, because of a diverging track, did not have sufficient elevation. *St. Louis & S. F. R. Co. v. Fithian*, 106 Ark. 491, 155 S. W. 88.

##### **Inference of Defects.**

Where an engineer was killed by the derailment of an engine on a curve at a point where the outside rail of the track was badly worn and beveled off by use, and the engine was of a type not in common use, having rigid pony trucks and flangeless or "bald" front driving wheels, it is not an unwarranted inference, in an action under the Federal Employers' Liability Act, that the condition of the track and the engine caused the disaster. *Chesapeake & O. v. Kelly*, 160 Ky. 296, 169 S. W. 736.

##### (c) Inspection.

##### **Working Place.**

That the work of inspecting a tunnel was thoroughly done before directing an employee to work therein, is not so conclusively shown in an action under the Federal Employers' Liability Act for his death from the falling of a rock, where the evidence tends to show that the defendant knew or ought to have known that the place was unsafe. *Louisville & N. R. Co. v. Thomas*, — Ky. —, 185 S. W. 840.

Proof of the inspection and preparation of a tunnel in which an employee was directed to work, and that it was considered safe, is not conclusive of the defendant's freedom from negligence in an action founded on the Federal Employers' Liability Act, where the statements of the defendant's witnesses were contradicted by the physical facts. *Louisville & N. R. Co. v. Thomas*, — Ky. —, 185 S. W. 840.

##### **At Night.**

Evidence that it was not customary among railways to inspect main line tracks at night is not sufficient, as a matter of law, to relieve a carrier from liability under the Federal Employers' Liability Act, for the death of an engineer who was killed when his train was derailed at night by a defective switch. *Gulf, C. & S. F. R. Co. v. McGinnis*, — Tex. Civ. App. —, 147 S. W. 1188, reversed on other grounds 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806.

##### (d) Tracks Close Together.

##### **In General.**

Where an experienced fireman who was familiar with the situation in a railway yard was killed at night, when, as he was leaning from the gangway of a switch

engine drawing drinking water from a tap in the side of the tender, he was struck by a car on a parallel track at a point where the tracks were closer together than the standard generally adopted by a carrier, an action under the Federal Employers' Liability Act was properly taken from the jury on the ground that no negligence on the part of the defendant was shown. *Reese v. Phila. & R. R. Co.*, 239 U. S. 463; — L. ed. —, 36 Sup. Ct. Rep. 134, 10 N. C. C. A. 926, affirming 140 C. C. A. 660, 225 Fed. 518.

A railway company which, under municipal authority, located its switch tracks closer together than the usual standard, so as to leave less than two feet clearance between cars, was not answerable under the Federal Employers' Liability Act, where a fireman was struck and killed by a car standing on a curve as he was leaning out of the tender gangway drawing from the tank drinking water for himself and the engineer. *Reese v. Phila. & R. R. Co.*, 140 C. C. A. 660, 225 Fed. 518, affirmed 239 U. S. 463, 60 L. ed. —, 36 Sup. Ct. Rep. 134, 10 N. C. C. A. 926.

#### (e) Structures Near Tracks

##### Switch Stands.

A finding of the negligence of the defendant in an action based on the Federal Employers' Liability Act is sustained by evidence that at night a switchman was injured by coming into contact with the handle of an unlighted switch stand located so close to a track that, when set in one position, it endangered the safety of employees in the act of boarding or alighting from the side of cars. *McDonald v. Railway Transfer Co.*, 121 Minn. 273, 141 N. W. 177.

#### (f) Cars Not in Clear.

##### In General.

It is negligence sufficient to charge a railway with liability under the Federal Employers' Liability Act, to leave cars on a side track in violation of its rules, within striking distance of trains on a parallel track. *Wright v. Yazoo & M. V. R. Co.*, 197 Fed. 94, affirmed 125 C. C. A. 25, 207 Fed. 281, 235 U. S. 376, 59 L. ed. 277, 35 Sup. Ct. Rep. 130.

Where a brakeman engaged in interstate commerce, was injured while switching cars on a dark night by being caught between the tender of an engine and cars left by a coemployee on a side track which the latter assured the former were in the clear, his employer is answerable under the Federal Employers' Liability Act. *Skaggs v. Illinois C. R. Co.*, 124 Minn. 503, 145 N. W. 381, affirmed 240 U. S. 66, 60 L. ed. —, 36 Sup. Ct. Rep. 249.

#### (g) Failure to Provide Derail.

##### When Negligence.

The failure of a railway company to provide a siding with a derailling device is not such negligence as will render it answerable under the Federal Employers' Liability Act for the death of a fireman who was killed in a collision with cars which, although left with brakes set and wheels blocked, escaped from the siding onto a main line. *Delaware, L. & W. R. Co. v. Troxell*, 105 C. C. A. 593, 183 Fed. 373, reversing 180 Fed. 871, but see S. C. 227 U. S. 434, 57 L. Ed. 586, 33 Sup. Ct. Rep. 274.

#### (h) Bridges

##### Absence of Railing.

The failure of a railway company to provide guard rails or walks on its bridges and trestles for the protection of its employees, is not actionable negligence under the Federal Employers' Liability Act. *Hull v. Virginian R. Co.*, — W. Va. —, 88 S. E. 1060.

No negligence on the part of the defendant was shown in an action based on the Federal Employers' Liability Act for the death of an employee who fell from the unguarded side of a bridge that was 14 feet wide, where the evidence did not show whether the proximate cause was the negligence of the decedent, some unexplained happening, or the negligence of the defendant in leaving one side of the bridge unguarded. *Delaware, L. & W. R. Co. v. Ketzer*, — C. C. A. —, 233 Fed. 31.

##### Engine Falling Through Bridge.

There may be a recovery under the Federal Employers' Liability Act for the death of an engineer who was killed when his engine fell through a bridge as the result of burned timbers giving away. *Copper R. & N. W. R. Co. v. Reed*, 128 C. C. A. 39, 211 Fed. 111.

Evidence that, as the result of some of the burned timbers of a bridge giving away, an engineer was killed while operating a snow plow, shows negligence on the part of a carrier sufficient to sustain a verdict for the plaintiff under the Federal Employers' Liability Act. *Copper R. & N. W. R. Co. v. Reed*, 128 C. C. A. 39, 211 Fed. 111.

#### (i) Overhead Obstructions.

##### Low Bridges.

##### —Approval by State Railroad Commission.

Notwithstanding the fact that an overhead bridge was approved by a state railroad commission, a carrier is liable under the Federal Employers' Liability Act for



injuries received by a switchman who at night was knocked from the roof of a box car by the bridge, which was not of sufficient height to permit the passage of a tall box car with the brakeman lying flat on the roof. *Portland Term. Co. v. Jarvis*, 141 C. C. A. 562, 227 Fed. 8.

The fact that a telltale at a low overhead bridge was of the horizontal bar and whipcord type which had been generally approved by the state railroad commission, does not show its sufficiency under all circumstances so as to relieve a carrier from liability under the Federal Employers' Liability Act for the death of a brakeman who was knocked by the bridge from the roof of a freight car when he was sitting on its side with his feet hanging off, where the telltale at the bridge, which was not of sufficient width to give warning to a person occupying the position assumed by the decedent, had not been specially approved by the commission. *Boston & M. R. Co. v. Brown*, 134 C. C. A. 383, 218 Fed. 625.

— **Bridge Maintained by Municipality.**

The fact that an unusually low bridge was maintained by a city over a railroad track, does not relieve a carrier from liability under the Federal Employers' Liability Act for the death of a brakeman who was knocked by the bridge from the top of a freight car as he was sitting on its edge with his feet hanging off, if the passage beneath the bridge was not reasonably safe under all circumstances, since its condition might be such that it was negligence to permit trains to pass beneath it. *Boston & M. R. Co. v. Brown*, 134 C. C. A. 383, 218 Fed. 625.

— **Failure to Light at Night.**

The failure of a railway company to illuminate at night a low overhead bridge was not negligence which would render it liable under the Federal Employers' Liability Act for the death of a brakeman who was struck by such bridge, where it did not appear that such precautions were customary in railway practice. *Raub v. Lehigh V. R. Co.*, 87 N. J. L. 603, 94 Atl. 567.

**Timbers Above Track.**

For a railway company to permit switching to be done on a private side track which was obstructed by a timber with a clearance of 3 feet 4½ inches above the top of an ordinary box car, clearly shows negligence on the part of the carrier in an action based on the Federal Employers' Liability Act for the death of a brakeman who was knocked from the top of a box car by such timber. *Kanawha R. v. Kerse*, 239 U. S. 576, — L. ed. —, 36 Sup. Ct. Rep. 174.

**Wires Over Track.**

Where a switchman was knocked from the top of a car by a telephone wire which an independent contractor had left hanging in dangerous proximity to the track, a carrier was held answerable under the Federal Employers' Liability Act, when the evidence showed that an agent of the carrier, who was charged with the duty of removing the danger, had notice thereof and failed to act or to notify the plaintiff of the danger. *Riley v. Minneapolis & St. L. R. Co.* — Minn. —, 156 N. W. 272.

(j) **Narrow Freight or Roundhouse Doors.**

**Injury to Employee on Engines or Cars.**

There can be no recovery under the Federal Employers' Liability Act for the death of an experienced hostler who unnecessarily attempted to board a moving engine when it was about to enter a roundhouse, and who was caught between the side thereof and the door post, where there was not sufficient clearance for a man's body, and the danger was obvious. *Hogan v. New York C. & H. R. R. Co.*, 139 C. C. A. 328, 223 Fed. 890.

A carrier is not answerable under the Federal Employers' Liability Act for injuries sustained by a roundhouse helper while riding through a doorway on a step at the corner of a locomotive tender, where there was a clearance of but ten and one-half inches, he being thoroughly familiar with the conditions, and a posted notice warned employees to keep off the steps of engines and cars when entering the roundhouse, since the danger was obvious, and the defendant's failure to give warning thereof was not negligence. *Hollingshead v. Detroit, G. H. & M. R. Co.*, 181 Mich. 547, 148 N. W. 171.

**Employee Caught Between Doorpost and Moving Cars.**

Where a railway company built a freight house of the character in general use at the time, according to plans prepared by its engineers, and used it for upwards of thirty years, when a conductor of a switching crew, who had worked for six years about the building, with which he was thoroughly familiar, was caught and killed between the side of a narrow doorway of the house and the side of a refrigerator car with open doors, which he was placing in the house, the fact that the carrier had not enlarged the doors of the house so as to keep pace with the increased width of cars, so that it was necessary to open back the doors of refrigerator cars before placing them in the house, was not actionable negligence under the Federal Employers' Liability Act. *Miller v. Michigan C. R. Co.*, 185 Mich. 432, 152 N. W. 235.

**(k) Defective Platforms.****In General.**

Where the evidence, in an action under the Federal Employers' Liability Act for the death of a brakeman who was thrown under a moving train from which in the course of his employment he alighted at a station, tended to prove that the platform was out of repair, that nails protruded above its surface, that there were holes in the boards, and that some of the planks were rotten near the track, while others would spring when stepped on, the jury may reasonably infer that such defects were the cause of the accident. *St. Louis & S. F. R. Co. v. Clampitt*, —Okla.—, 154 Pac. 40.

A brakeman who was injured by the neglect of a carrier to keep a platform in proper repair at a station in the Indian Territory could recover under the Federal Employers' Liability Act of 1906. *Missouri, K. & T. R. Co. v. Rogers*, —Tex. Civ. App.—, 128 S. W. 711.

**(l) Obstructions on Floors.****Falling Over.**

Evidence that an old piece of hose was permitted to lie for several days on the floor of a roundhouse instead of being cast on the scrap heap, was held sufficient to sustain a finding of the defendant's negligence in an action under the Federal Employers' Liability Act for injuries sustained by a hostler who, as he descended from a ladder, stepped on the hose and sprained his ankle. *Cross v. Chicago, B. & Q. R. Co.*, —Mo. App.—, 177 S. W. 1127, S. C. —Mo. App.—, 186 S. W. 1130.

Where a night assistant roundhouse foreman was injured by falling over a small jackscrew negligently left on the floor between two stalls by the shift of the preceding day, the former was held, in an action based on the Federal Employers' Liability Act, not to have been charged with the duty of inspecting the floors for obstructions, where the day employees were required by a rule of the defendant to remove all tools from the floor at the end of the day's work, and the defendant employed two sweepers to keep the floors clean. *Hawkins v. St. Louis & S. F. R. Co.*, 189 Mo. App. 201, 174 S. W. 129.

**(m) Pits.****Falling Into.**

There can be no recovery under the Federal Employers' Liability Act for the death of workman who fell into a deep pit in a railway repair shop in which he had worked for some time, where he was aware of the existence of the pit, and at the time of the accident his work did not

take him into its vicinity. *Glenn v. Cincinnati, N. O. & T. P. R. Co.*, 157 Ky. 453, 163 S. W. 461.

**(n) Ways and Paths.****Defects.**

A pathway across a railway company's property which employees had used for upwards of two years in going to and from their work, was a way within the meaning of the Federal Employers' Liability Act of 1906. *Philadelphia, B. & W. R. Co. v. Tucker*, 35 App. D. C. 123, L. R. A. 1915 C. 39, affirmed 220 U. S. 608, 55 L. ed. 607, 31 Sup. Ct. Rep. 725.

A pathway crossing railroad tracks which had been used for upwards of two years by employees in going to and from their work was insufficient, within the meaning of the Federal Employers' Liability Act of 1906, where no provisions were made by the employer for the protection of employees from passing trains. *Philadelphia, B. & W. R. Co. v. Tucker*, 35 App. D. C. 123, L. R. A. 1915 C. 39, affirmed 220 U. S. 608, 55 L. ed. 607, 31 Sup. Ct. Rep. 725.

**Ice.**

Where a pump repair man in the employ of an interstate carrier was injured at night while on his way to procure repairs for a pump, by falling on ice thinly covered with snow, which had formed over a path from water which was negligently permitted to overflow from a tank, it was held, in an action under the Federal Employers' Liability Act, that the carrier failed to provide the plaintiff with a reasonably safe place in which to work, where the latter had no knowledge of the condition of the path which the carrier had failed to make safe, although it had had ample time to do so. *Renn v. Seaboard A. L. R.* 170, N. C. 128, 86 S. E. 964, affirmed on other grounds, 241 U. S. 290, 60 L. ed. —, 36 Sup. Ct. Rep. 567.

**15. Defective Appliances and Tools.**

Instructions as to defective instrumentalities, see *infra* XIX, E, 7.

**(a) In General**

(No decisions.)

**(b) Engines.****Explosion of Gauge Glasses.**

Evidence that an engineer was injured by the explosion of a defective water gauge glass on the trip after he had reported its condition to the defendant company and requested that a guard or shield be supplied, and had been informed that

the defendant had none in stock, is sufficient to sustain a finding of the defendant's negligence in an action founded on the Federal Employers' Liability Act. *Horton v. Seaboard A. L. R. Co.*, 157 N. C. 146, 72 S. E. 958, S. C. 169, N. C. 108, 85 S. E. 218, affirmed 239 U. S. 595, L. ed. —, 36 Sup. Ct. Rep. 180.

In an action under the Federal Employers' Liability Act for injuries caused an engineer by the explosion of a glass lubricator indicator tube under a steam pressure of but 145 pounds, it was held to have been the duty of the defendant to have tested the tensile strength of the tube before permitting its use on an engine where it would have to withstand a steam pressure of 150 pounds. *Woodruff v. Yazoo & M. V. R. Co.*, 127 C. C. A. 411, 210 Fed. 849, S. C. 137 C. C. A. 567, 222 Fed. 29.

It cannot be said as a matter of law, in an action under the Federal Employers' Liability Act for injuries sustained by an engineer from the bursting of a tubular glass lubricator indicator, that the defendant was free from negligence where it continued to use such devices on high pressure boilers for several years after their insufficiency had been demonstrated. *Chicago & N. W. R. Co. v. Bower*, 241 U. S. 470, 60 L. ed. —, 36 Sup. Ct. Rep. 624, affirming 96 Neb. 419, 148 N. W. 145.

#### (c) Cars.

##### **Defective Brakes.**

A verdict for the plaintiff cannot be sustained under the Federal Employers' Liability Act, for injuries received by a switchman from a defective brake-rod, where the length of time the defect had existed was not shown, nor did it appear how easily it could have been discovered by such an inspection as was practicable. *Penn. R. Co. v. Knox*, 134 C. C. A. 426, 218 Fed. 748.

Where there were no eyewitnesses to the death of a brakeman, evidence that when last seen alive he was braking a freight car which had both a defective brake and platform on which he was compelled to stand, justifies an inference, in an action based on the Federal Employers' Liability Act, that his death was caused by such defects. *Pitts. C. C. & St. L. R. Co. v. Stewart*, 21 Ohio C. C. R. (N. S.) 399, affirming 11 Ohio L. R. 430.

##### **Latent Defects.**

A carrier is not answerable under the Federal Employers' Liability Act for the death of an employee attributable to a latent defect in a car wheel which could not have been discovered by a reasonably careful inspection. *Birch v. American R. Co.*, 5 Porto Rico Fed. Rep. 273, reversed on other grounds 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603.

#### **Motor Cars.**

A finding that a carrier was negligent was justified, in an action based on the Federal Employers' Liability Act for injuries sustained by an employee while attempting to board a moving motor car after pushing it along the track at the direction of his foreman, to start the motor, where the evidence tended to show that the car was not safe to board while in motion and that the track was uneven and rough. *Chicago R. I. & G. R. Co. v. Cosio*, — Tex. Civ. App. —, 182 S. W. 83.

#### (d) Machinery

##### **Failure to Provide Device to Prevent Coal Bucket Slipping.**

A finding that it was negligence for a carrier not to equip its coal chute machinery with a device to prevent the slipping of loaded coal buckets, was justified in an action under the Federal Employers' Liability Act for the death of an employee who was killed when a loaded bucket slipped backwards while he was removing an obstruction from the bottom of an elevator pit. *Brizendine v. Union P. R. Co.*, 96 Kan. 691, 153 Pac. 495.

#### (e) Tools

##### **Duty to Exercise Care in Providing.**

The nonassignable duty of a master to exercise reasonable care in providing an employee with safe tools and appliances with which to perform the work required of him, was not affected by the Federal Employers' Liability Act. *Coal & Coke R. Co. v. Deal*, — C. C. A. —, 231 Fed. 604, affirming 215 Fed. 285.

It is duty of a carrier under the Federal Employers' Liability Act to exercise ordinary care to supply section hands with tools which are free from defects. *Louisville & N. R. Co. v. Patrick*, 167 Ky. 118, 180 S. W. 55.

##### **Failure to Provide Suitable Tools.**

##### **— For Handling Rails.**

Where, when section men threw to the ground a heavy rail they were carrying with their hands, one of them was injured by the rebound of the rail, which was to be placed in the track of an interstate carrier, the latter was not answerable under the Federal Employers' Liability Act, for the failure to furnish tongs for handling rails, where the method adopted by the section men was customary and usual, and reasonably safe if ordinary care was exercised, and there was no evidence that the accident would have been prevented had tongs been used. *Truesdell v.*

Chesapeake & O. R. Co., 159 Ky. 718, 169 S. W. 471.

—Adz.

Where a section man while cutting brush, was injured by a piece of steel which flew from a defective adz he was using, he may recover under the Federal Employers' Liability Act for the negligence of his employer in furnishing him a defective tool. *Gerkas v. Oregon*, W. R. & N. Co., 75 Oreg. 243, 146 Pac. 970, 8 N. C. C. A. 386.

—Chisels.

A steel chisel used for cutting iron rails, was held, in an action under the Federal Employers' Liability Act, not to be a simple tool which the employer was not required to use ordinary care in providing, where if not properly tempered, slivers of steel were liable to fly from its head when struck with a hammer, and it further appeared that it was necessary to carefully test several chisels from each lot manufactured. *New York, N. H. & H. R. Co. v. Vizvari*, 126 C. C. A. 632, 210 Fed. 118, L. R. A. 1915 C. 9.

—Spike Maul.

The "simple tool" doctrine does not apply to an action under the Federal Employers' Liability Act for injuries received by a section hand from a sprawl or sliver of steel which flew from a spike maul in the hands of a fellow employee. *Louisville & N. R. Co. v. Patrick*, — Ky. —, 180 S. W. 55.

—Skid.

The conclusion is warranted, in an action under the Federal Employers' Liability Act for injuries sustained by an employee from the breaking of a skid used in moving piling, that the skid was defective, where the evidence tended to show that it should have safely sustained several times the weight of the piling that caused it to break. *St. Louis, I. M. & S. R. Co. v. Ingram*, — Ark. —, 187 S. W. 452.

## 16. Violation of Safety Statutes.

Instructions as to violation of safety statutes, see *infra* XIX, E, 24.

(a) In General.

(No decisions.)

(b) Federal Laws.

### Hours of Labor Act.

See generally Hours of Labor Act.

### Safety Appliance Act.

See Safety Appliance Act.

(c) State Statutes.

### Violation.

The fact that Congress has not enacted a statute governing the safety of certain appliances does not render a state statute on the subject applicable to an action founded on the Federal Employers' Liability Act. *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, L. R. A., 1915 C. 1, Ann. Cas. 1915, B. 475, 8 N. C. C. A. 834, reversing 162 N. C. 424, 78 S. E. 494.

## 17. Movement of Engines and Cars.

(a) In General.

### Working Train at Both Ends.

In the absence of knowledge or notice of a custom to work a manifest freight train from both ends at the same time in switching, a head brakeman is not, in an action under the Federal Employers' Liability Act, bound by such custom unless it was such as a reasonably careful employer would have adopted. *Chesapeake & O. R. Co. v. Proffitt*, 241 U. S. 462, 60 L. ed. —, 36 Sup. Ct. Rep. 620, affirming 134 C. C. A. 37, 218 Fed. 23.

(b) Orders.

### Failure to Give.

Where an engineer was given orders to meet another train at a designated station, and on arrival found an entry on the train register indicating that such train had passed, when in fact it had returned to another station, and on its return trip it collided with the plaintiff's train to his injury, it was held in an action under the Federal Employers' Liability Act, that the proximate cause was the failure of the defendant to give the plaintiff proper orders and to establish proper rules. *Bouchard v. Central Vt. R. Co.*, 87 Vt. 399, 89 Atl. 475, L. R. A. 1915 C. 33.

Where a train dispatcher must have been aware of the dangerous proximity of two trains moving in the same direction, the second being the faster, and did nothing to prevent a collision between them, which was due to large quantities of steam escaping from the leaking cylinders of the second engine so as to prevent the signals of the preceding train from being seen, the jury in an action under the Federal Employers' Liability Act, might reasonably say that the defendant did not take such precautions to protect the first train as the exigencies of the occasion required. *White v. Central Vermont R. Co.*, 87 Vt. 330, 89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916 B. 252.

**(c) Improper Meeting Point.**

**Obstructed View of Passing Track.**

It cannot be held actionable negligence, in an action under the Federal Employers' Liability Act for the death of an engineer in a collision, to select as a meeting point for two trains a place where a curve in the track together with an embankment and trees obstructed the view from the approaching train of the passing track, where the engineer, who was familiar with the conditions, so negligently operated his train as to cause the disaster. *Louisville & N. R. Co. v. Heinig*, 162 Ky. 14, 171 S. W. 853.

**(d) Lookout and Warning Signals.**

Instructions as to lookout and warning signals, see *infra* XIX, E, 10.

**Failure to Maintain Lookout.**

**—For Preceding Train.**

In an action under the Federal Employers' Liability Act for the death of a brakeman in a rear-end collision, negligence on the part of the engineer of the colliding train, which was running from 12 to 15 miles an hour, was not shown, although he was aware that a train was preceding him, where he did not know that it had stopped on the main track, and notwithstanding that he was keeping a careful lookout he received no signal to stop, nor did he, on account of the darkness and foginess of the night, see the rear lights of the train, which stood on a short curve, until too late to avert the collision, when, under the rules of the defendant, he had the right to expect a signal in time to stop his train in case the foremost train was stopped on the main track. *Hull v. Virginian R. Co.*, — W. Va. —, 88 S. E. 1060.

**—For Flagmen.**

Where a brakeman placed a red lantern between the rails of a track and with a white lantern beside him fell asleep outside the rails, it was the duty of those in charge of the engine of an approaching train to keep a proper lookout on the track, and their failure to see the decedent until within a short distance from him constitutes actionable negligence under the Federal Employers' Liability Act, where the blowing of the whistle suddenly awakened the brakeman and as he raised his head he was struck by the step of the engine and killed, and the disaster would probably not have occurred had a proper lookout been maintained. *Gray v. Southern R. Co.*, 167 N. C. 433, 83 S. E. 849, reversed 241 U. S. 333, 60 L. ed. —, 36 Sup. Ct. Rep. 558.

There cannot be a recovery under the Federal Employers' Liability Act for the

death of a brakeman who, after placing a red and a white lantern on a track at night, fell asleep beside it and was struck by a train, where the engineer, on observing the lights, sounded the customary signal when half a mile away and did everything in his power to stop the train as soon as he saw the brakeman's danger. *Southern R. Co. v. Gray*, 241 U. S. 333, 60 L. ed. —, 36 Sup. Ct. Rep. 558, reversing 167 N. C. 433, 83 S. E. 849.

**—For Switchmen.**

The duty which rests primarily on a switchman to keep out of the way of an engine, was held in an action founded on the Federal Employers' Liability Act, not to absolve the engine crew from all obligation to keep a lookout for him, since they were under a concurrent or secondary duty independently of statute or rule, to keep such a lookout as was reasonably necessary in order to avoid injury to employees who might neglect to protect themselves. *Southern R. Co. v. Smith*, 123 C. C. A. 488, 205 Fed. 360.

Where it appeared that a switchman while walking at night on a track in a yard, was struck and killed by a slowly moving engine when the little noise it made was drowned by a passing train on another track, and what light was given by its headlight was dimmed by a row of electric lights, and the proof showed that the deceased was not seen by the engineer, who might have given effective warning and stopped his engine within ten feet, such evidence tended to show negligence of the engineer in an action based on the Federal Employers' Liability Act. *Southern R. Co. v. Smith*, 123 C. C. A. 488, 205 Fed. 360.

**—For Man Piloting Engine Over Switches.**

It cannot be said as a matter of law, in an action under the Federal Employers' Liability Act, that an engineer exercised ordinary care for the protection of a person piloting an engine over switch tracks at night, where the former, although aware that the condition of the track required the pilot to walk between the rails in advance of the locomotive, made no effort to learn whether he was on the track at the time in question. *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914 C. 172.

**—Employee in Cinder Pit.**

It cannot be said as a matter of law, in an action predicated on the Federal Employers' Liability Act for the killing of a person while working in the manhole of a cinder pit, that those in charge of a locomotive were free from negligence where they backed it from the pit without ringing the bell or ascertaining whether any one was in danger. *Grybowski v. Erie R. Co.*, — N. J. —, 95 Atl. 764.

### —Employee Cleaning Cinders from Track.

Where an employee who, while shoveling cinders from a track at a point where he had worked for a year and a half, was struck and killed by a locomotive, it was held, in an action under the Federal Employers' Liability Act, that the defendant owed the decedent the duty of keeping a lookout for him and of warning him of the approach of the engine. *McCalley v. Chesapeake & O. R. Co.*, — Ky. —, 183 S. W. 234.

### —Men Cleaning Snow From Switches.

Where those running a train at high speed on a stormy night past a station, knew that section men would be at work cleaning snow and ice from switches, it cannot be said as a matter of law, in an action under the Federal Employers' Liability Act, that the trainmen were not charged with the duty of looking out for such employees and of giving them warning of the approach of the train. *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328.

### —Inspector Riding "Speeder."

Negligence on the part of those in charge of a backing engine is shown, in an action based on the Federal Employers' Liability Act for the death of an employee who was struck while riding a "speeder," by evidence that had due care been exercised the decedent might have been seen from the engine when 1,000 feet away and sufficient warning given him so that he could have escaped the danger. *Anest v. Columbia & P. S. R. Co.*, — Wash. —, 154 Pac. 1100.

### Warning Signals of Approach of Trains.

#### —In General.

The failure of the engineer of a rapidly moving train to sound the whistle was held negligence, in an action under the Federal Employers' Liability Act, if he actually saw an employee walking on the track for such a distance and for such a space of time that the giving of such warning would have informed him of his danger in time to escape being struck by the train. *Newkirk v. Pryor*, — Mo. App. —, 183 S. W. 682.

The evidence in an action founded on the Federal Employers' Liability Act, was held sufficient to justify a finding that an employee was on a track long enough to have enabled the engineer of a rapidly approaching train to have given him warning in time to escape from danger. *Newkirk v. Pryor*, — Mo. App. —, 183 S. W. 682.

#### —Trackwalkers.

Where a trackwalker walking between a main track and a side track with his back to an approaching train, was seen by the

fireman when the train was a long distance away, the failure of the latter to signal the engineer, who could not see the trackwalker at the time, to sound the whistle, was not, where the bell was ringing continuously, negligence which would render a carrier liable under the Federal Employers' Liability Act for the death of the trackwalker, who stepped in front of the engine when it was but ten feet from him. *New York, N. H. & H. R. Co. v. Pontillo*, 128 C. C. A. 573, 211 Fed. 331.

#### —Trackmen.

Where a trackman was struck and killed by a train as he with 30 or 40 others, were working on railroad tracks, his employer may be held guilty of negligence in an action under the Federal Employers' Liability Act, for failing to provide a watchman to warn the trackmen of the approach of trains where some of the workmen were in positions which prevented them looking out for their own safety. *Delaware, L. & W. R. Co. v. Caboni*, 139 C. C. A. 177, 223 Fed. 631.

Negligence on the part of the defendant in failing to give proper warning of the approach of a train which struck and killed a track hand, was not shown in an action predicated on the Federal Employers' Liability Act, where the whistle was sounded when the train was half a mile from the decedent. *Delaware L. & W. R. Co. v. Caboni*, 139 C. C. A. 177, 223 Fed. 631.

#### —Sectionmen.

It was held in an action under the Federal Employers' Liability Act, that crossing signals were not intended for the benefit of section men working at or near a crossing; and that the failure to give such signals was not negligence, where a section man was struck by a rapidly moving train on a day when fog and steam obscured its approach. *Land v. St. Louis & S. F. R. Co.*, 95 Kan. 441, 148 Pac. 612.

It was held in an action under the Federal Employers' Liability Act, that a railway company might rightfully assume that section men at work upon or along the track would at all times look out for the approach and passage of trains; and that ordinarily the company owed its section men no duty to give them warning of the approach of trains save when such employees are found in a place of danger and it becomes apparent that they will not or cannot protect themselves. *Land v. St. Louis & S. F. R. Co.*, 95 Kan. 441, 148 Pac. 612.

A failure of an approaching train to give warning signals, even in the absence of statute, was held evidence of negligence in an action under the Federal Employers' Liability Act for injuries sustained by a section man while attempting with his

crew to remove a hand-car from a track in the face of a rapidly approaching train. *Nelson v. Northern P. R. Co.*, 50 Mont. 516, 148 Pac. 388.

Where a section boss after leaving a track to let an approaching train pass, returned to the track when the train was almost upon him and was killed, there cannot be a recovery under the Federal Employers' Liability Act on the theory of the engineer's negligence in failing to ring the bell or sound the whistle, where, although the engineer saw the decedent leave the track, there was nothing to indicate that the latter intended to step back or to show that the engine might have been stopped in time to avert the injury. *Missouri, K. & T. R. Co. v. Gilbreath*, — Okla. —, 154 Pac. 539.

Under the Federal Employers' Liability Act, an employer is answerable for the death of a section man who, on a stormy night while cleaning snow and ice from the switches at a station, was struck and killed by a swiftly moving train which failed to give any warning signals, notwithstanding that those in charge did not in fact see the decedent, where, had they been looking, they could have seen him and observed that he was oblivious to his peril, in time to have given him warning of the danger. *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328.

— Men Repairing Pumping Plant.

It was held in an action under the Federal Employers' Liability Act, that an engineer cannot as a matter of law be absolved from all duty of giving warning of the approach of a train at high speed at a point where he knew that persons engaged in repairing a pumping plant might, while absorbed in their duties, be in a place of danger on or near the track. *Newkirk v. Pryor*, — Mo. App. —, 183 S. W. 682.

— Employee Crossing Bridge.

In an action under the Federal Employers' Liability Act it was held that ordinary care required the ringing of the bell or the blowing of the whistle before a switch engine, after a stop, crossed a bridge which was customarily used by employees as a foot path, where either the engineer or fireman had they been looking could have seen the plaintiff who was struck by the engine as he was crossing the bridge. *Molzoff v. Chicago, M. & St. P. R. Co.*, — Wis. —, 156 N. W. 467.

— Employee Cleaning Cinders From Track.

It was held, in an action founded on the Federal Employers' Liability Act for the death of an employee who was struck by a train while he was removing from a track ashes and cinders at a point where they were dumped from locomotives and where

he had worked for a year and a half, that the defendant owed him the duty of keeping a lookout for and of giving him warning of the approach of trains, and that it was not his duty to watch for their arrival and departure. *McCalley v. Chesapeake & O. R. Co.*, — Ky. —, 183 S. W. 234.

— Cinder Pit Employee.

In an action under the Federal Employers' Liability Act for the death of an employee who was struck and killed by an engine while in the manhole of a cinder pit, it cannot be said as a matter of law that those in charge of the engine were free from negligence where they backed it from the pit without ringing the bell or ascertaining whether any one was in danger. *Grybowski v. Erie R. Co.*, — N. J. L. —, 95 Atl. 764.

(e) Excessive Speed.

In General.

It was held in an action under the Federal Employers' Liability Act, not to have been negligence to run a passenger train towards a section man at a speed of 45 miles an hour at a time when its approach was obscured by fog and steam. *Land v. St. Louis & S. F. R. Co.*, 95 Kan. 441, 148 Pac. 612.

The running of a belated passenger train at a high rate of speed was held not negligence per se, in an action under the Federal Employers' Liability Act for injuries received by a section foreman while attempting with members of his crew to remove a hand-car from the track in order to prevent a collision. *Nelson v. Northern P. R. Co.*, 50 Mont. 516, 148 Pac. 388.

In Yard Limits.

A railway company is answerable under the Federal Employers' Liability Act, for the death of an engineer of an extra train who was killed in a collision with a switch engine which was run within yard limits through a curved cut at a dangerous rate of speed with knowledge of the proximity of the extra. *Chicago, R. I. & P. R. Co. v. Wright*, 239 U. S. 548, — L. ed. —, 36 Sup. Ct. Rep. 185, affirming 96 Neb. 87, 146 N. W. 1024, S. C. 94 Neb. 317, 143 N. W. 220.

Where an engineer, who, while on his way through a railway yard to take his engine to another station to draw a train moving in interstate commerce, when at a point where the smoke and steam from a roundhouse and locomotives was so dense that objects 2 feet distant could not be seen, was struck and killed by an engine running backwards at excessive speed, without lookout, warning or signal, a carrier was liable under the Federal Employers' Liability Act. *Huxoll v. Union P. R. Co.*, 99 Neb. 170, 155 N. W. 900.

### With Knowledge That Employee Had to Board Train.

A brakeman, who was injured in attempting to board a moving train after obtaining orders for it, may recover under the Federal Employers' Liability Act, where the engineer, with knowledge that it was the duty of the former to board the train, ran it at a speed of from 10 to 12 miles an hour. *Mattocks v. Chicago & A. R. Co.*, 187 Ill. App. 529.

### Hand-Cars.

Where a section foreman permitted a hand-car to run through a city at high speed close behind a passenger train, a carrier is answerable under the Federal Employers' Liability Act for injuries sustained by a member of the section crew when the car, which they were unable to stop in time, collided with the train as it stopped suddenly at a street crossing in order to avoid striking a pedestrian. *Houston, E. & W. T. R. Co. v. Samford*, — Tex. Civ. App. —, 181 S. W. 857.

### (f) Failure to Observe Signals.

#### Block Signals.

Where an employee was killed in a rear-end collision on a night when a blizzard was raging, the evidence, in an action founded on the Federal Employers' Liability Act was held to show negligence on the part of the engineer of the colliding train in failing to observe block signals and of the train dispatcher in ordering the preceding train to assist a stalled engine when he was aware of the dangerous proximity of the following train. *Hadley v. Union P. R. Co.*, 99 Neb. 349, 156 N. W. 765.

#### Cautionary Signals.

Evidence that a train, which struck and killed a track hand, approached at high speed, in violation of a cautionary signal, a curve where he was working, tends to show negligence of the defendant in an action based on the Federal Employers' Liability Act. *Cincinnati, N. O. & T. P. R. Co. v. Jones*, — Ky. —, 186 S. W. 897.

### (g) Starting or Stopping With Unnecessary Violence.

#### Sudden Stops.

##### — In General.

A finding of the negligence of a conductor is justified, in an action founded on the Federal Employers' Liability Act, from evidence that without a signal from a brakeman and without knowing whether the latter was ready or prepared for a stop of the train, the former gave a stop signal and that the stopping of the train

threw the brakeman from the end-sill of a car on which he was standing in order to uncouple it. *Thompson v. Minneapolis & St. L. R. Co.*, — Minn. —, 158 N. W. 42.

There may be a recovery under the Federal Employers' Liability Act for the death of a brakeman who was thrown from the top of a box car in switching, as the result of the sudden stopping of the train with unusual and unnecessary violence greater than the occasion required. *Ft. Worth & D. C. R. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279.

A finding that a brakeman was thrown from the top of a freight car as the result of the negligence of an engineer in stopping a train with unusual violence, was held not sustained by the weight of the evidence in an action under the Federal Employers' Liability Act. *Burnett v. Erie R. Co.*, 159 App. Div. 712, 144 N. Y. Supp. 969.

#### — Application of Emergency Brakes.

It was held, in an action founded on the Federal Employers' Liability Act, that it was not negligence for a flagman whose duty it was to protect the rear of his train, to apply the emergency brake when he believed that the train was about to back through a switch which he did not have time to unlock, where the sudden application of the brakes caused an injury to the engineer. *Louisville & N. R. Co. v. Stewart*, 156 Ky. 550, 161 S. W. 557, S. C. 163 Ky. 823, 174 S. W. 744, affirmed 241 U. S. 261, 60 L. ed. —, 36 Sup. Ct. Rep. 586.

It was held negligence, in an action under the Federal Employers' Liability Act, for a conductor to give an order to back his train onto a passing track that he knew was not long enough to hold the train without the rear end overrunning the switch, where, as the result of the application of the emergency brakes by the rear brakeman in order to prevent the derailment of the train, the engineer was injured. *Louisville & N. R. Co. v. Stewart*, 156 Ky. 550, 161 S. W. 557, S. C. 163 Ky. 823, 174 S. W. 744, affirmed 241 U. S. 261, 60 L. ed. —, 36 Sup. Ct. Rep. 586.

#### Jerks and Bumps.

Where an engineer began to slow down the speed of a freight train near a point where it was his duty to come to a full stop, but instead of stopping he suddenly increased speed with a jerk which threw a brakeman from a car and killed him, the conduct of the engineer was held negligence in an action founded on the Federal Employers' Liability Act. *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144.

There can be no recovery under the Federal Employers' Liability Act, for the



death of a brakeman who was thrown from a freight car as the result of the alleged negligent handling of a train, where there was no evidence that any unusual or unnecessary jerk or bump was given it at the time of the accident. *Chesapeake & O. R. Co. v. Walker*, 159 Ky. 237, 167 S. W. 128.

A finding that the defendant was guilty of negligence, in an action under the Federal Employers' Liability Act, is sustained by evidence that a switchman on a night when the cars were covered with icy sleet, was thrown from the roof of one of them when it was given an unusually violent jerk in switching. *Saar v. Atchison, T. & S. F. R. Co.*, — Kan., —, 155 Pac. 954.

A finding of the negligence of the defendant is sustained in an action under the Federal Employers' Liability Act, where the evidence is such that men might reasonably come to different conclusions as to whether a brakeman was thrown from a train as the result of a jerk negligently caused by the engineer. *Saar v. Atchison, T. & S. F. R. Co.*, — Kan., —, 155 Pac. 954.

A verdict for the plaintiff was sustained, in an action based on the Federal Employers' Liability Act for the death of a brakeman, where there was conflicting evidence as to whether it was caused by a violent and unusual jerk of a train. *Gulf, C. & S. F. R. Co. v. Beezley*, — Tex. Civ. App., —, 153 S. W. 651.

It cannot be said, in an action founded on the Federal Employers' Liability Act, that the cause of a brakeman's death was conjectural, where it is a fair inference from the evidence that an unexpected jerk caused by the negligent giving of a stop signal by the conductor, threw the decedent from a train. *Thompson v. Minneapolis & St. L. R. Co.*, — Minn., —, 158 N. W. 42.

#### **Making Coupling With Violence.**

Actual negligence is shown in an action founded on the Federal Employers' Liability Act, by evidence that an engineer with knowledge that his fireman was descending from the tender on the coal gate, made a coupling with unnecessary and unusual violence, which broke the fireman's hold on the gate and threw him to the floor of the cab. *Delano v. Roberts*, — Mo. App., —, 182 S. W. 771.

#### **(h) Kicking Cars.**

##### **In General.**

Where a switchman was killed in a collision between stationary cars and two cars he was riding which were kicked with unnecessary violence, and which he apparently tried to stop but failed because of a defective brake, the jury, in an action based on the Federal Employers' Liability Act,

are warranted in finding that the defendant was negligent and that there was a casual relation between such negligence and the employee's death. *Worthington v. Elmer*, 125 C. C. A. 50, 207 Fed. 306.

The negligent shunting of cars against stationary cars to the injury of an employee working about them is within the terms of the Federal Employers' Liability Act. *Young v. Lusk*, — Mo., —, 187 S. W. 849.

#### **Kicked Car Causing Trap Door of Coal Car to Open.**

A switchman may recover under the Federal Employers' Liability Act, for injuries sustained when a car of coal on which he was riding in a yard was struck by another car which caused a defective trap door in the bottom of the coal car to open and thus throwing the plaintiff and the coal beneath the car. *Chesapeake & O. R. Co. v. Cooper*, 168 Ky. 137, 181 S. W. 933.

#### **Injury to Employee Between Cars.**

Where a section hand voluntarily went between the ends of two box cars to urinate, his employer was not answerable under the Federal Employers' Liability Act for his death caused by a cut of cars being shunted against the stationary cars, if the brakeman on the moving cars could not have seen the decedent so as to stop the cars or give warning in time to avert the accident. *Louisville & N. R. Co. v. Johnson*, 161 Ky. 824, 171 S. W. 847.

Where it was customary or according to orders for section men to go between the ends of freight cars to urinate, and a foreman, who knew that a section hand was in such position, by the exercise of ordinary care should have known that a cut of cars was about to be kicked with violence against those between which the section man was standing, it was the foreman's duty to give warning of the danger, and failure to do so will render a carrier answerable for the death of the section hand. *Louisville & N. R. Co. v. Johnson*, 161 Ky. 824, 171 S. W. 847.

#### **(i) Running Switches.**

##### **At Crest of Grade on Time of Regular Train.**

Where employees of a railway company attempted to make a flying or running switch at the crest of a grade on a main track, with a loaded box car which they knew was out of repair, at a time when a passenger train was nearly due, the company is answerable under the Federal Employers' Liability Act, where the car escaped and killed the engineer of such train in an ensuing collision. *Jones v. Kansas City S. R. Co.*, 137 La. 178, 68

So. 401, reversed on other grounds, 241 U. S. 181, 60 L. ed. —, 36 Sup. Ct. Rep. 513.

It was held gross negligence, in an action founded on the Federal Employers' Liability Act for the death of the engineer of a passenger train in a collision with a runaway car, for the employees of a railway company to attempt to make a flying or running switch at the crest of a grade on a main line, with a loaded box car which they knew was out of repair, at a time when they were aware that a passenger train was nearly due. *Jones v. Kansas City S. R. Co.*, 137 La. 178, 68 So. 401, reversed on other grounds, 241 U. S. 181, 60 L. ed. —, 36 Sup. Ct. Rep. 513.

**(j) Stopping Train on Main Track at Meeting Point.**

**In General.**

It cannot be held negligence, in an action under the Federal Employers' Liability Act, to stop a train on a main track within four or five car lengths of a switch leading to the passing track, where a collision occurred with the train which should have taken the siding, by reason of its approaching the meeting point at a high rate of speed without being under control or giving the required signals. *Louisville & N. R. Co. v. Heinig*, 162 Ky. 14, 171 S. W. 853.

**(k) Failure of Crew of First Train at Meeting Point to Set Switch.**

**In General.**

The failure of the crew of a train which first arrived at a meeting point, to set a switch as was customarily done, so that the other train could take the passing track, was not actionable negligence under the Federal Employers' Liability Act, where the waiting train had just stopped when the other train approached at a high rate of speed, without being under control, and without giving the signals required by the rules of the carrier. *Louisville & N. R. Co. v. Heinig*, 162 Ky. 14, 171 S. W. 853.

**18. Miscellaneous.**

**(a) In General.**

**Injury to Health from Use of Paint Sprayer.**

In order to recover under the Federal Employers' Liability Act for the impairment of the health of an employee from the use of a paint sprayer or "gun," which discharged a poisonous and deleterious mist or spray, the plaintiff must show by a preponderance of evidence that the defendant was guilty of a want of ordinary care and caution in failing to

provide the former with a respirator for use while operating such appliance, and that such want of care was in whole or in part the direct cause of the plaintiff's injury. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

In order to recover under the Federal Employers' Liability Act for the impairment of the health of an employee from the use of a paint sprayer or "gun," the plaintiff must show by a preponderance of evidence that the defendant negligently caused or directed the use in such appliance, without providing the operator with a respirator, of materials that were poisonous or deleterious to the health of the operator when expelled from the gun in form of spray or mist. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

In order to recover under the Federal Employers' Liability Act for the impairment of the health of an employee from the use of a paint sprayer or "gun," the plaintiff must prove by a preponderance of evidence that the defendant negligently caused or directed the former to use in such apparatus, without providing him with a respirator, material that was poisonous or deleterious to the health of the operator when expelled in spray or mist, and that the plaintiff was employed in using such appliance in doing some act that had some real or substantial relation to interstate commerce. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

**(b) Gross Negligence.**

**In General.**

The question of the gross negligence of a section foreman has no place in an action based on the Federal Employers' Liability Act for injuries sustained by a section hand as the result of the defendant's negligence in failing to furnish a sufficient number of men to perform the work the former was engaged in at the time of his injury. *Cincinnati, N. O. & T. P. R. Co. v. Tucker*, 168 Ky. 149, 181 S. W. 940.

**(c) Use of Wooden Coal Cars.**

**Sticking Trap Doors.**

The use for hauling coal of wooden cars with wooden trap doors which damp coal or weather caused to swell so that it was difficult to open them, was held not to amount to negligence in an action under the Federal Employers' Liability Act for the death of an employee who fell through the trap door of such a car when he forced it open with an iron bar in order to unload the coal into a bin. *Bjornsen v. Northern P. R. Co.*, 84 Wash. 220, 146 Pac. 575.

**(d) Jumping From Train in Fright.**

See also *supra* VI, B, 1.

**Blowing Out of Crown Sheet.**

A cause of action under the Federal Employers' Liability Act is shown where a brakeman was injured by jumping from a locomotive in fright when the negligence of the engineer resulted in the blowing out of the crown sheet with a loud noise. *Vandalia R. Co. v. Stringer*, 182 Ind. 676, 106 N. E. 865, rehearing denied 182 Ind. 684, 107 N. E. 673.

**Belief in Imminence of Peril.**

Where a fireman on an interstate train was injured by jumping from a locomotive at a time when he believed that a derailment was inevitable as the result of the negligence of the defendant in permitting the rails to buckle and become out of line and also of its employees who were repairing the track, in neglecting to give sufficient warning so as to permit a timely stopping of the train, it was not essential in order to permit a recovery under the Federal Employers' Liability Act, that the engine should actually have left the rails, since the negligence of the defendant brought about the emergency which made it necessary for the fireman to jump. *Charleston & W. C. R. Co. v. Brown*, 13 Ga. App. 744, 79 S. E. 932.

**(e) Sportive Acts of Employees.**

**Scuffling Employees Pushing Coemployee From Car.**

An employee cannot recover under the Federal Employers' Liability Act for injuries received when he was pushed from a car by scuffling coemployees, since their act was not one committed while in the prosecution of their employer's business. *Reeve v. Northern P. R. Co.*, 82 Wash. 268, 144 Pac. 63, L. R. A. 1915 C. 37, 8 N. C. C. A. 167.

**(f) Electric Currents.**

**On Overhead Bridge.**

Where a railway employee was killed by a shock while at work on a bridge repairing an electric apparatus which permitted the electric transmission to be interrupted by circuit breakers, the jury in an action based on the Federal Employers' Liability Act, were justified in finding that the defendant was negligent in not turning off the current, where the decedent was not aware and had no reason to suppose, that the apparatus was charged with electricity. *Millette v. New York, W. & B. R. Co.*, 169 App. Div. 126, 154 N. Y. Supp. 792.

**Injury to Telephone Operator.**

A carrier was held liable in an action based on the Federal Employers' Liability Act, for injuries sustained by a telegraph and telephone operator from a heavy current of electricity while he was using a telephone in connection with the operation of an interstate train. *Atlantic C. L. R. Co. v. Newton*, 118 Va. 222, 87 S. E. 618.

**VIII. PROXIMATE CAUSE.**

Instructions as to proximate cause, see *infra* XIX, E, 18.

Proximate cause as jury question, see *infra* XIX, C, 3 (t).

**A. In General.**

**Causal Connection.**

There can be no recovery under the Federal Employers' Liability Act unless the injury or death of an employee was the proximate result of the negligence of the defendant. *Smith v. Illinois C. R. Co.*, 119 C. C. A. 33, 200 Fed. 553.

There must be a causal connection between the negligence averred in an action based on the Federal Employers' Liability Act and the injury received by an employee, in order that he may recover. *St. Louis & S. F. R. Co. v. Snowden*, — Okla. —, 149 Pac. 1083.

When two acts of negligence by different employees contribute to a train collision, one of such acts cannot be said as a matter of law, in an action under the Federal Employers' Liability Act, to have been the sole proximate cause thereof. *Hackney v. Missouri, K. & T. R. Co.*, 96 Kan. 30, 149 Pac. 421.

**Violation of Safety Statutes.**

The provision of the Federal Employers' Liability Act as to contributory negligence when a carrier's violation of any safety statute contributes to the injury or death of an employee, eliminates the element of proximate cause from a case where the concurrent negligence of the employee and the employer contribute to an accident as the result of the violation by the latter of the Federal Safety Appliance Act. *Spokane & I. E. R. Co. v. Campbell*, 133 C. C. A. 370, 217 Fed. 518, affirmed 241 U. S. 497, 60 L. ed. —, 36 Sup. Ct. Rep. 685.

**Failure to Give Notice of Changed Orders.**

Where an experienced captain of a barge belonging to an interstate railway company and used in interstate commerce, was ordered to make fast at a certain gangway of a wharf, and while paying out

a hawser to stop the boat, and standing on one foot looking forward, his leg was caught in a coil of the rope and injured, the fact that another employee on the wharf directed the captain of a tug which was towing the barge, to tie up at another gangway without notifying the plaintiff of the altered order, was not such negligence as would render the carrier answerable under the Federal Employers' Liability Act, since there was no causal connection between such failure and the captain's manipulation of the hawser. *Scarlett v. Delaware, L. & W. R. Co.*, 167 App. Div. 324, 153 N. Y. Supp. 51.

Where an engineer was ordered to meet a train at a station, and on arriving and examining the train register he found an entry indicating that such train had passed when instead it had gone back to another station, and on its return it collided with the plaintiff's train to his injury, the proximate cause was held, in an action under the Federal Employers' Liability Act, to have been the defendant's failure to establish proper rules and to give the plaintiff appropriate orders. *Bouchard v. Central Vt. R. Co.*, 87 Vt. 399, 89 Atl. 475, L. R. A. 1915 C. 83.

#### **Insufficient Number of Employees.**

The furnishing of an insufficient number of men to remove defective and rotten bents or piles from a bridge, was held, in an action based on the Federal Employers' Liability Act, not to have been the proximate cause of the injury of an employee who, while loosening a bent from the drift pin that held its top, was injured by its sudden fall which was due to the rotten condition of the bent, where it was perfectly safe for one man to remove the piles. *Marshall v. Chicago, R. I. & P. R. Co.*, — Minn. —, 155 N. W. 208.

#### **B. Negligence of Fellow Servants.**

##### **Failure of Flagman to Protect Rear of Train.**

Where a freight conductor was injured in a rear end collision when adjusting a new air hose, while his train stopped temporarily on a main track, the proximate cause of the accident was held in an action based on the Federal Employers' Liability Act, to have been the negligence of his flagman in failing to protect the rear of the train, instead of the conductor's failure to see that the flagman performed his duty. *Penn. R. Co. v. Goughnour*, 126 C. C. A. 39, 208 Fed. 961.

##### **Failure of Conductor to Throw Switch.**

Where a field man in a railway yard was struck and killed by a shunted car as the

result of the failure of the conductor of a switching crew to throw a switch as he should have done, it cannot be said as a matter of law, in an action under the Federal Employers' Liability Act, that the negligence of the conductor was not the proximate cause of the disaster. *Walsh v. Lake Shore & M. S. R. Co.*, 185 Mich. 177, 151 N. W. 754.

##### **Moving Cars While Inspector Between.**

Where a car inspector was injured at night by the movement of cars while he was connecting the air hose without having first displayed the signal required by the rules of his employer, the negligence of a switch crew in coupling onto such cars was held, in an action under the Federal Employers' Liability Act, to have been the proximate cause of the accident, when they knew or had reason to believe that the inspector was about or between the cars. *Texarkana & Ft. S. R. Co. v. Casey*, — Tex. Civ. App. —, 172 S. W. 729.

If, after hearing a conductor instruct a brakeman to inform the engineer not to move a freight train until a broken brake-beam on the caboose was repaired, an assistant roadmaster was negligent in going beneath the car which was in a portion of the train from which the engine had been detached, his negligence did not as a matter of law, make the negligence of the brakeman in failing to deliver the conductor's order, so remote as to relieve the carrier from liability under the Federal Employers' Liability Act, for the death of the roadmaster by the unexpected movement of the train. *Lynch v. Central Vt. R. Co.*, — Vt. —, 95 Atl. 683.

##### **Failure to Keep Lookout.**

###### **— For Switchmen.**

Where it appeared that a switchman while walking on a track in a yard at night, was struck and killed by a slowly moving engine when the little noise it made was drowned by a passing train on another track, and what light was given by its headlight was dimmed by a row of electric lights, and the proof showed that the engineer might have seen the switchman and given effective warning or stopped his engine within ten feet, the failure of the former to keep a proper lookout was held, in an action under the Federal Employers' Liability Act, to bear a casual relation to the accident. *Southern R. Co. v. Smith*, 123 C. C. A. 488, 205 Fed. 360.

###### **— For Switch Lights.**

The negligence of an engineer in failing to observe the signals on an open switch until too late to avoid a collision with a train standing on a siding, was held the proximate cause, in an act based on the Federal Employers' Liability Act, of

the death of the conductor of the side-tracked train, rather than the negligence of the latter in failing to perform his duty of seeing that the switch was closed instead of leaving that duty to a brakeman. *Louisville & N. R. Co. v. Wene*, 121 C. C. A. 245, 202 Fed. 887.

### C. Defective Appliances.

Instructions as to defective instrumentalities, see *infra* XIX, E, 7.

#### 1. In General.

(No decisions.)

#### 2. Engines and Cars.

##### Engine Leaking Steam So As to Obscure Signals.

Where it was found, in an action based on the Federal Employers' Liability Act, that the defendant was negligent in permitting an engine to be used with cylinders which leaked steam in such quantities as to obscure the signals of a preceding train, with which it collided, thereby killing a brakeman, such negligence, together with the failure of the defendant to give the crew of the first train notice that it was followed by a faster one, was the proximate cause of the disaster. *White v. Central Vt. R. Co.*, 87 Vt. 330, 89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916 B. 252, 9 N. C. C. A. 265.

##### Bursting Gauge Glass.

The failure of an engineer, on the breaking of the water gauge guard glass, to cut off the water and steam therefrom and to use the gauge cocks to ascertain the amount of water in the boiler of a locomotive, cannot be said, in an action under the Federal Employers' Liability Act, to have been the proximate cause of the injuries sustained by him from the bursting of the water glass, where, because of their liability to clog, the gauge cocks could not be relied on. *Seaboard A. L. R. Co. v. Horton*, 239 U. S. 595, — L. ed. —, 36 Sup. Ct. Rep. 180, affirming 169 N. C. 108, 85 S. E. 218, S. C. 157 N. C. 146, 72 S. E. 958.

##### Defective Brake-Step.

A defective brake-step on a freight car was held, in an action under the Federal Employers' Liability Act, to have been the cause of a switchman being thrown from such car and killed. *Crandall v. Chicago G. W. R. Co.*, 127 Minn. 498, 150 N. W. 165.

#### 3. Tools.

##### Using Wrench to Operate Jackscrew.

Where a shop employee was injured

while raising the end of a locomotive, by the sudden lowering of a jack screw, the fact that the jack was operated with a wrench instead of a lever, was held not sufficient, in an action founded on the Federal Employers' Liability Act, to show that the unexpected movement of the jack was caused by the negligent use of the wrench. *Winters v. Minneapolis & St. L. R. Co.*, 126 Minn. 260, 148 N. W. 106.

### D. Safe Place.

Instructions as to safe place, see *infra* XIX, E, 20.

#### 1. In General.

(No decisions.)

#### 2. Cars Not in Clear.

##### In General.

The negligence of a carrier in leaving cars on a side track, in violation of its rules, within striking distance of a train on a parallel track, was held, in an action predicated on the Federal Employers' Liability Act, to have been the proximate cause of the death of an engineer in a collision with such cars not due to his fault. *Wright v. Yazoo & M. V. R. Co.*, 197 Fed. 94, affirmed 125 C. C. A. 25, 207 Fed. 281, 235 U. S. 376, 59 L. ed. 277, 35 Sup. Ct. Rep. 130.

#### 3. Misplaced Switches.

##### Unlocked Switch.

The fact that a switch was left unlocked cannot, in an action under the Federal Employers' Liability Act, be held to have been the proximate cause of the derailment of a train and the death of the fireman, where the accident was due to the criminal act of a trespasser in turning the switch, since the latter's independent act rendered remote the negligence of the carrier in leaving the switch unlocked. *Bowers v. Southern R. Co.*, 10 Ga. App. 367, 73 S. E. 677.

##### Act of Trespasser.

There can be no recovery under the Federal Employers' Liability Act, for the death of a fireman from the derailment of his engine at a misplaced switch, where the independent criminal act of a trespasser in tampering with the switch intervened between the accident and the alleged negligence of the carrier, since the act of the former was the proximate cause of the accident. *Bowers v. Southern R. Co.*, 10 Ga. App. 376, 73 S. E. 677.

#### 4. Unguarded Machinery.

##### Gearing.

Where an employee's arm was crushed by the unguarded gearing of a gasoline engine used for pumping water for the locomotives of an interstate carrier, when he slipped on a greasy floor or his coat was caught in the fly wheel or shaft of the engine, the proximate cause was held, in an action based on the Federal Employers' Liability Act, to have been the failure to guard the gearing. *Knapp v. Great N. R. Co.*, 130 Minn., 405, 153 N. W. 848, affirmed, 240 U. S. 464, 36 Sup. Ct. Rep. 399.

#### 5. Structures and Obstructions Near Tracks.

##### Boxes on Platform.

Where a brakeman on an interstate passenger train was injured at night by falling from a car as the result of a step having been knocked away by one of a number of boxes negligently left by a carrier on a station platform in close proximity to the track, he may recover under the Federal Employers' Liability Act, notwithstanding that an unusual windstorm tipped over the box so that the step of the car struck it, since the proximate cause of the accident was the negligence of the carrier in leaving the boxes in a position where they might come into contact with passing trains. *Ferebee v. Norfolk & S. R. Co.*, 163 N. C. 351, 52 L. R. A. (N. S.) 1114, 79 S. E. 685, S. C. 167 N. C. 290, 83 S. E. 360, affirmed on other grounds, 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781.

##### E. Acts of Injured Employee. (No decisions.)

##### F. Movement of Trains.

###### 1. In General. (No decisions.)

###### 2. Excessive Speed.

##### In General.

Where a passenger train running in excess of schedule speed, was turned onto a side track by the criminal act of a trespasser who misplaced a switch, and after running thereon for one hundred feet the train was derailed at a safety switch and the fireman was killed, neither the excessive speed nor the situation of the safety switch can be regarded in an action based on the Federal Employers' Liability Act, as the proximate cause of his death, where the accident probably would have occurred had the train been

running at normal speed, since the proximate cause of the accident was the act of the trespasser. *Bowers v. Southern R. Co.*, 10 Ga. App. 367, 73 S. E. 677.

#### 3. Failure to Give Warning Signals.

##### For Hand-Car.

Where a hand-car was brought to a stop on the discovery of a rapidly approaching train, and some of the crew reached a place of safety while the foreman and others, when the train was from 200 to 300 feet away, attempted to remove the car from the track and would have succeeded had not one of the men fallen, it was held in an action under the Federal Employers' Liability Act, that the failure of the engineer to give a proper warning was not the proximate cause of injuries sustained by the foreman when the train threw the hand-car from the track. *Nelson v. Northern P. R. Co.*, 50 Mont. 516, 148 Pac. 388.

### IX. ASSUMED RISK.

Assumption of risk as jury question, see *infra* XIX, C, 3, (c).

Instructions as to assumed risk, see *infra* XIX, E, 2.

##### A. In General. (No decisions.)

##### B. Effect of Federal Act on Common-Law Rule.

##### In General.

The common-law doctrine of assumption of risk was not abolished by section four of the Federal Employers' Liability Act except where the violation by a carrier of some statute enacted for the safety of employees, caused or contributed to the injury or death of an employee. *Southern R. Co. v. Crockett*, 234 U. S. 725, 58 L. ed. 1564, 34 Sup. Ct. Rep. 897; *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, L. R. A. 1915 C. 1, Ann. Cas. 1915 B. 475, 8 N. C. C. A. 834, reversing 162 N. C. 424, 78 S. E. 494; *New York, N. H. & H. R. Co. v. Vizvari*, 126 C. C. A. 632, 210 Fed. 118, L. R. A. 1915 C. 9; *Southern R. Co. v. Peters*, — Ala. —, 69 So. 611; *Guana v. Southern P. Co.*, 15 Ariz. 413, 139 Pac. 782; *Kansas City S. R. Co. v. Livesay*, 118 Ark. 304, 177 S. W. 875; *Farley v. New York, N. H. & H. R. Co.*, 88 Conn. 409, 91 Atl. 651; *Charleston & W. C. R. Co. v. Sylvester*, 17 Ga. App. 85, 86 S. E. 275; *Bowers v. Southern R. Co.*, 10 Ga. App. 367, 73 S. E. 677; *Kendrick v. Chicago & E. I. R. Co.*, 188 Ill. App. 172; *Hall v. Vandalia R. Co.*, 169 Ill. App. 12; *Southern R.*

Co. v. Howerton, 182 Ind. 208, 232, 106 N. E. 369, 105 N. E. 1025, reversing — Ind. App. —, 101 N. E. 121, 103 N. E. 121; Barker v. Kansas City, M. & O. R. Co., 88 Kan. 767, 129 Pac. 1151, 43 L. R. A. (N. S.) 1121; Louisville & N. R. Co. v. Patrick, 167 Ky. 118, 180 S. W. 55; Chesapeake & O. R. Co. v. De Atley, 159 Ky. 687, 167 S. W. 933; Truesdale v. Chesapeake & O. R. Co., 159 Ky. 718, 169 S. W. 471; Glenn v. Cincinnati, N. O. & T. P. R. Co., 157 Ky. 453, 163 S. W. 461; Miller v. Michigan C. R. Co., 185 Mich. 432, 152 N. W. 235; Fish v. Chicago, R. I. & P. R. Co., 263 Mo. 106, 172 S. W. 340, 8 N. C. C. A. 538; Cross v. Chicago, B. & O. R. Co., — Mo. App. —, 177 S. W. 1127; Huxoll v. Union P. R. Co., — Neb. —, 155 N. W. 900; Nystrom v. Lake Shore & M. S. R. Co., 17 Oh. C. C. Rep. (N. S.) 507; Dayton & U. R. Co. v. Bunger, 19 Oh. C. C. Rep. (N. S.) 531, reversing 14 Oh. N. P. (N. S.) 487; St. Louis & S. F. R. Co. v. Snowden, — Okla. —, 149 Pac. 1083; Missouri, K. & T. R. Co. v. Scott, — Tex. Civ. App. —, 160 S. W. 432; Ft. Worth & D. C. R. Co. v. Copeland, — Tex. Civ. App. —, 164 S. W. 857; Freeman v. Powell, — Tex. Civ. App. —, 144 S. W. 1033; Southern R. Co. v. Jacobs, 116 Va. 189, 81 S. E. 99; Fogarty v. Northern P. R. Co., 74 Wash. 394, 135 Pac. 609, S. C. 85 Wash. 90, 147 Pac. 652.

The doctrine of assumption of risk is not wholly abolished by the Federal Employers' Liability Act. Hull v. Virginian R. Co., — W. Va. —, 88 S. E. 1060.

The common-law defense of assumption of risk is available in an action predicated on the Federal Employers' Liability Act, except where the violation by an employer of some statute enacted for the safety of employees contributes to or causes the injury or death of an employee. Baugham v. New York, P. & N. R. Co., 241 U. S. 237, 60 L. ed. —, 36 Sup. Ct. Rep. 592; Jacobs v. Southern R. Co., 241 U. S. 296; 60 L. ed. —, 36 Sup. Ct. Rep. 588, affirming 116 Va. 189, 81 S. E. 99; Louisville, H. & St. L. R. Co. v. Wright, — Ky. —, 185 S. W. 861.

An employee under the terms of the Federal Employers' Liability Act, assumes those risks of injury under the common law which were not expressly abrogated by the Act. Guana v. Southern P. Co., 15 Ariz. 413, 139 Pac. 782.

By abolishing the defense of assumed risk the Federal Safety Appliance Act did away with any other defense, although of a different name, that would be established by identically the same facts which go to constitute that of assumed risk. Southern P. Co. v. Allen, 48 Tex. Civ. App. 66, 106 S. W. 441.

The Federal Employers' Liability Act of 1906 by declaring that no contract of

employment should constitute a bar or defense to an action thereunder, abolished the defense of assumption of risk. Philadelphia, B. & W. R. Co. v. Tucker, 35 App. D. C. 123, L. R. A. 1915 C. 39, affirmed 220 U. S. 608, 55 L. ed. 607, 31 Sup. Ct. Rep. 725.

### C. Violation of Safety Statutes.

Instructions as to assuming risk of violation of safety statutes, see *infra* XIX, E, 2, (h).

#### 1. In General.

**What Statutes Within.**

**—Municipal Ordinance.**

A municipal ordinance is not a statute within the meaning of section 4 of the Federal Employers' Liability Act declaring that employees shall not assume the risk of injury from the master's violation of statutes enacted for the safety of employees. Mitchell v. Louisville & N. R. Co., 194 Ill. App. 77.

**When Risk Not Assumed.**

The fact that Congress has not enacted a statute pertaining to the safety of certain appliances does not render an employer answerable in an action under the Federal Employers' Liability Act, for the consequences of any defect therein, but leaves open to him the common-law defense of assumption of risk. Seaboard A. L. R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, L. R. A. 1915 C. 1, Ann. Cas. 1915 B. 475, 8 N. C. C. A. 834, reversing 162 N. C. 424, 78 S. E. 494.

Section 4 of the Federal Employers' Liability Act limits the abrogation of the assumed-risk doctrine to cases where the violation by a carrier of some express statutory duty is charged. Kirbo v. Southern R. Co., 16 Ga. App. 49, 84 S. E. 491.

It is only the risk of injury from the violation by an employer of some statute enacted for the safety of employees, which a railway employee does not assume under the Federal Employers' Liability Act. Hall v. Vandalia R. Co., 169 Ill. App. 12.

### 2. Federal Statutes.

#### (a) In General.

**When Risk of Injury from Violation of Not Assumed.**

Where the violation by a carrier of some Federal statute enacted for the safety of employees causes or contributes to the death or injury of an employee, by the terms of section 4 of the Federal Employers' Liability Act the defense of assumed risk is abolished. Charleston & W. C. R. Co. v. Sylvester, 17 Ga. App. 85, 86

S. E. 275; *Truesdell v. Chesapeake & O. R. Co.*, 159 Ky. 718, 169 S. W. 471; *Fish v. Chicago, R. I. & P. R. Co.*, 263 Mo. 106, 172 S. W. 340, 8 N. C. C. A. 538, Ann. Cas. 1916 B. 147.

Federal statutes only are within section 4 of the Federal Employers' Liability Act abolishing the defense of assumed risk where the violation by a carrier of any statute enacted for the safety of employees, causes or contributes to the injury or death of an employee. *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, L. R. A. 1915 C. 1, Ann. Cas. 1915 B. 475, 8 N. C. C. A. 834, reversing 162 N. C. 424, 78 S. E. 494; *Charleston & W. C. R. Co. v. Sylvester*, 17 Ga. App. 85, 86 S. E. 275; *Fish v. Chicago, R. I. & P. R. Co.*, 263 Mo. 106, 172 S. W. 340, 8 N. C. C. A. 538; *Truesdell v. Chesapeake & O. R. Co.*, 159 Ky. 718, 169 S. W. 471; *Oberlin v. Oregon-W. R. & N. Co.*, 71 Oreg. 177, 142 Pac. 554, *Lauer v. Northern P. R. Co.*, 83 Wash. 465, 145 Pac. 606; *Louisville, H. & St. L. R. Co. v. Wright*, — Ky. —, 185 S. W. 861.

### (b) Safety Appliance Act.

See generally Safety Appliance Act.

#### In General.

Assumed risk is not a defense to an action predicated on the Federal Employers' Liability Act for injuries sustained or for the death of an employee, as the result in whole or in part of a carrier's violation of the Federal Safety Appliance Act. *Southern R. Co. v. Crockett*, 234 U. S. 725, 58 L. ed. 1564, 34 Sup. Ct. Rep. 897; *Grand Trunk R. Co. v. Lindsay*, 120 C. C. A. 166, 201 Fed. 836, affirmed 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914 C. 168; *Birch v. American R. Co.*, 5 Porto Rico Fed. Rep. 273, reversed on other grounds 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603; *Columbia & P. S. R. Co. v. Sauter*, 139 C. C. A. 150, 223 Fed. 604; *Johnson v. Great N. R. Co.*, 102 C. C. A. 89, 178 Fed. 643; *St. Louis S. W. R. Co. v. Anderson*, 117 Ark. 41, 173 S. W. 834; *Farley v. New York, N. H. & H. R. R. Co.*, 88 Conn. 409, 91 Atl. 651; *Atlantic C. L. Co. v. Whitney*, 65 Fla. 72, 61 So. 179, 3 N. C. C. A. 812, S. C. 62 Fla. 124, 56 So. 937; *Thornboro v. Kansas City, M. & O. R. Co.*, 91 Kan. 684, 139 Pac. 410; *Louisville & N. R. Co. v. Patrick*, 167 Ky. 118, 180 S. W. 55; *Ahrens v. Chicago, M. & St. P. R. Co.*, 121 Minn. 335, 141 N. W. 297; *La Mere v. Railway Trans. Co.*, 125 Minn. 159, 145 N. W. 1068, Ann. Cas. 1915 C. 667, writ of error dismissed 239 U. S. 651, — L. ed. —, 36 Sup. Ct. Rep. 159; *Sears v. Atlantic C. L. R. Co.*, 169 N. C. 446, 86 S. E. 176; *Steele v. Atlantic C. L. R. Co.*, — S. C. —, 87 S. E. 639; *Bramlett v. Southern R. Co.*, 98 S. C. 319, 82 S. E. 501; *San*

*Antonio & A. P. R. Co. v. Wagner*, — Tex. Civ. App. —, 166 S. W. 24.

### (c) Hours of Labor Act.

See Generally Hours of Labor Act.

#### Violation.

A breach of the Hours of Labor Act does not deprive a carrier of the defense of assumption of risk in an action based on the Federal Employers' Liability Act, unless the breach contributed to the injury of the plaintiff. *Atchison, T. & S. F. R. Co. v. Swearingen*, 239 U. S. 339, — L. ed. —, 36 Sup. Ct. Rep. 121.

A railway employee does not, under section 4 of the Federal Employers' Liability Act, assume the risk of injury from the violation by a carrier of the Hours of Service Act. *Schweig v. Chicago, M. & St. P. R. Co.*, 132 C. C. A. 660, 216 Fed. 750, 7 N. C. C. A. 135, affirming 205 Fed. 96.

Since a railway employee assumed the risk of injury from working 54 out of 57 hours, there can be no recovery under the Federal Employers' Liability Act for his death, where as the result of his weary condition he fell from a moving switch engine, unless at the time of the accident he was engaged in the movement of a train in violation of the Hours of Service Act. *Schweig v. Chicago, M. & St. P. Ry. Co.*, 132 C. C. A. 660, 216 Fed. 750, 7 N. C. C. A. 135, affirming 205 Fed. 96.

### 3. State Statutes.

#### Effect.

A state statute abolishing the defense of assumption of risk in actions for injuries attributable to defective appliances furnished railway employees is not applicable to an action under the Federal Employers' Liability Act. *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, L. R. A. 1915 C. 1, Ann. Cas. 1915 B. 475, 8 N. C. C. A. 834, reversing 162 N. C. 424, 78 S. E. 494.

A state statute has no bearing on the issue of assumed risk in an action predicated on the Federal Employers' Liability Act, for injuries received by an employee while engaged in interstate commerce. *Knapp v. Great N. R. Co.*, 130 Minn. 405, 153 N. W. 848.

A state statute abolishing the defense of assumption of risk in actions for injury to or the death of railway employees, does not apply to a suit prosecuted under the Federal Employers' Liability Act. *Texas & P. R. Co. v. White*, — Tex. Civ. App. —, 177 S. W. 1185.

A state statute declaring that a railway employee's knowledge of the defective or unsafe condition of the ways or appliances



of an employer shall not be a defense to an action for injuries resulting therefrom, is not applicable to a suit based on the Federal Employers' Liability Act, since the latter law establishes a different rule. *Southern R. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99, affirmed on other grounds, 241 U. S. 229, 60 L. ed. —, 36 Sup. Ct. Rep. 588.

The violation by a carrier of a state statute relating to the guarding of cog wheels was held, in an action founded on the Federal Employers' Liability Act, not to relieve an injured employee of assumption of the risk of working about such unguarded wheels. *Lauer v. Northern P. R. Co.*, 83 Wash. 465, 145 Pac. 606.

An experienced blacksmith was held, in an action based on the Federal Employers' Liability Act, not to have assumed the risk of injury from using a power grindstone with a hole in the grinding face which made its use dangerous, although he was aware of the defect, where the defendant was guilty of a violation of a state law relative to the use of defective machinery. *Opsahl v. Northern P. R. Co.*, 78 Wash. 197, 138 Pac. 681, overruled 83 Wash. 465, 145 Pac. 606.

#### D. What Risks Assumed.

Instructions as to what risks assumed, see *infra* XIX, E, 2.

##### 1. In General.

#### Difference Between Assumed Risk and Contributory Negligence.

Where an engineer ran his engine at high speed at night at a point where he knew that another engine had been left or was likely to be left on a crossover track so as not to clear the main track, his conduct was held, in an action under the Federal Employers' Liability Act, to amount to contributory negligence and not an assumption of the risk. *Louisville & N. R. Co. v. Fleming*, — Ala. —, 69 So. 125.

The conduct of a brakeman of an interstate train in crossing a railway yard at night to procure a drinking cup for the engine crew, cannot be regarded as an assumption of risk but rather as contributory negligence in an action under the Federal Employers' Liability Act for injuries received by falling into a defective cinder pit. *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

Where a switchman was injured by attempting to kick into place the coupler of a switch engine in an emergency instead of using some other method, his conduct was held, in an action under the Federal Employers' Liability Act, to amount to contributory negligence rather than an assumption of the risk. *Trowbridge v. Kan-*

*sas City & W. B. R. Co.*, — Mo. App. —, 179 S. W. 777.

The fact that a switchman was injured while between moving cars in violation of his employer's rules does not show, in an action under the Federal Employers' Liability Act, an assumption of the risk, but rather negligence on the part of the former. *Oberlin v. Oregon, W. R. & N. Co.*, 71 Oreg. 177, 142 Pac. 554.

The failure of a brakeman to inspect a car before moving it, as required by the rules of his employee, is not, in an action founded on the Federal Employers' Liability Act, an assumption of the risk but amounts rather to contributory negligence. *Carter v. Kansas City S. R. Co.*, — Tex. Civ. App. —, 155 S. W. 638.

Where a train porter in obeying the command of a conductor, was injured by alighting at night from a train on the unfloored side of a trestle on which the train was standing, the manner in which he did so was held in an action under the Federal Employers' Liability Act, not a question of assumed risk but of contributory negligence. *Missouri, K. & T. R. Co. v. Bunkley*, — Tex. Civ. App. —, 153 S. W. 937.

Where, as the result of a carrier's negligence, a switchman was thrown from a flat car he was riding with his feet in the stirrup while bending over and holding with his hand to a cleat on the floor in the act of uncoupling the car or completing an intended kicking movement, his conduct presents a question of contributory negligence rather than of assumed risk. *Bolch v. Chicago, M. & St. P. R. Co.*, — Wash. —, 155 Pac. 422.

The distinction between assumption of risk and contributory negligence, within the meaning of the Federal Employers' Liability Act, lies in the different state of mind in which they are rooted, assumption of risk implying knowledge of danger and willingness to encounter it, while negligence is the result of inattention or oversight. *Cross v. Chicago, B. & Q. R. Co.*, — Mo. App. —, 186 S. W. 1130, S. C. 191 Mo. App. 202, 177 S. W. 1127.

#### What Law Determines Assumption of Risk.

What constitutes assumed risk in an action founded on the Federal Employers' Liability Act prosecuted in a state court, is to be determined by the common-law rules. *Hawkins v. St. Louis & S. F. R. Co.*, 189 Mo. App. 201, 174 S. W. 129.

In an action based on the Federal Employers' Liability Act a state court will apply its own rule that the negligence of an employer is never assumed, rather than that of the Federal courts to the contrary. *Hosheit v. Lusk*, 190 Mo. 431, 177 S. W.

712; *Cross v. Chicago, B. & Q. R. Co.*, — Mo. App. —, 177 S. W. 1127.

#### When Doctrine of Assumed Risk Not Involved.

The doctrine of assumed risk is not involved when the record shows that in answer to the objection that the instructions did not mention such defense, the court's statement that it understood that such doctrine was abolished by the Federal Employers' Liability Act was so clearly modified that it related to the common-law rules of contributory negligence and fellow servants. *Southern R. Co. v. Gadd*, 233 U. S. 572, 58 L. ed. 1099, 34 Sup. Ct. Rep. 969, affirming 125 C. C. A. 21, 207 Fed. 277.

#### Dangers Incident to Employment.

##### — In General.

The assumption of risk doctrine under the Federal Employers' Liability Act, applies only to such risks of his employment as a railway employee expressly or impliedly contracts to take upon himself because ordinarily incident to his employment as customarily carried on, or in a manner of which he has knowledge or of which he should have been aware. *Graber v. Duluth, S. S. & A. R. Co.*, 159 Wis. 414, 150 N. W. 489.

An employee of a railway company engaged in interstate commerce, assumes the risk of injury from the ordinary hazards of the business in which he engages, not arising out of the company's negligence or that of its officers or other employees. *Hull v. Virginian R. Co.*, — W. Va. —, 88 S. E. 1060.

##### — Rebound of Rail When Thrown to Ground.

A section man was held, in an action based on the Federal Employers' Liability Act, to have assumed the risk of injury from the rebound of a heavy rail when dropped to the ground by him and his co-employees without negligence, since it was a danger incident to his employment. *Truesdell v. Chesapeake & O. R. Co.*, 159 Ky. 718, 169 S. W. 471.

#### Violation of Unknown Rule.

An employee cannot be charged, in an action based on the Federal Employers' Liability Act, with assuming the risk of injury from violating a printed rule of his employer of which he never had notice. *Kansas City S. R. Co. v. Miller*, 117 Ark. 396, 175 S. W. 1164.

#### Knowledge of Conditions.

General knowledge on the part of an employee of a situation does not bar a re-

covery under the Federal Employers' Liability Act for an injury, on the ground of assumption of risk, unless he knew and appreciated the danger. *Brizendine v. Union P. R. Co.*, 96 Kan. 691, 153 Pac. 496.

An unknown risk of injury arising out of a carrier's negligence is not assumed by an employee so as to defeat a recovery under the Federal Employers' Liability Act. *Northern P. R. Co. v. Maerkl*, 117 C. C. A. 237, 198 Fed. 1.

An employee cannot be charged with assumed risk in an action founded on the Federal Employers' Liability Act, of a danger of which he was not aware. *Riley v. Minneapolis & St. L. R. Co.*, — Minn. —, 156 N. W. 272.

Where a switchman's death was attributable to his having been jarred from the narrow rim of the pilot of a road engine used for switching purposes instead of one with a footboard, his knowledge of the condition of the engine would not preclude a recovery under the Federal Employers' Liability Act, where other negligence of his employer, which was not assumed, contributed to the disaster. *Louisville & N. R. Co. v. Lankford*, 126 C. C. A. 247, 209 Fed. 321.

When an employee was thrown from a car he attempted to board after pushing it at the direction of his foreman in order to start the motor, it cannot be said as a matter of law in an action under the Federal Employers' Liability Act, that he assumed the risk of injury where he was inexperienced and not aware of the danger. *Chicago, R. I. & G. R. Co. v. Cosio*, — Tex. Civ. App. —, 182 S. W. 83.

#### Use of Paint Sprayer.

An employee cannot recover under the Federal Employers' Liability Act for the impairment of his health from the use of a paint sprayer or "gun" without a respirator, if the danger and risk of injury to his health was so open and obvious that an ordinarily prudent person would have observed and appreciated the same, since if it was he assumed the risk. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

#### Obedying Command.

Where a track hand was killed while attempting to obey the command of his foreman to remove a jack from the track in the face of a rapidly approaching train, he cannot be held as a matter of law, in an action under the Federal Employers' Liability Act, to have assumed the risk of obeying such order unless the danger was so obvious and apparent that a man of ordinary prudence would have refused to obey. *Cincinnati, N. O. & T. P. R. Co. v. Jones*, — Ky. —, 186 S. W. 897.

## 2. Negligence of Employer.

Instructions as to assumption of risk of employers' negligence, see *infra* XIX, E. 2, (d).

### When Risk of Assumed.

The defense of assumption of risk is not open in an action under the Federal Employers' Liability Act, where a carrier was guilty of negligence which contributed to the death of an employee. *Sandidge v. Atchison, T. & S. F. R. Co.*, 113 C. C. A. 653, 193 Fed. 867; *Hawkins v. St. Louis & S. F. R. Co.*, 189 Mo. App. 201, 174 S. W. 129; *Fish v. Chicago, R. I. & P. R. Co.*, 263 Mo. 106, 172 S. W. 340, 8 N. C. C. A. 538.

Under the Federal Employers' Liability Act an employee does not assume the risk of injury from the negligence of his employer. *Young v. Lusk*, — Mo. —, 187 S. W. 849.

The rule of the Federal courts that under the Federal Employers' Liability Act a servant assumes not only the risks usual and ordinarily connected with his employment, but also such dangers as arise from defects due to the master's negligence when the former knows both that such defects exist and that his safety is thereby endangered, will not be applied by a state court in an action under such act, but it will apply its own rule that such negligence of the employer is never assumed. *Hosheit v. Lusk*, 190 Mo. App. 431, 177 S. W. 712; *Cross v. Chicago, B. & Q. R. Co.*, — Mo. App. —, 177 S. W. 1127.

Under the law of Missouri an employee cannot be charged, in an action under the Federal Employers' Liability Act, with assumption of the risk of injury from the negligence of his employer in providing the former with an unsafe place in which to work, unless the employee without reasonable grounds for believing that he could escape such danger by ordinary care, negligently disregarded the imminence of the danger and thereby directly contributed to his injury. *Fish v. Chicago, R. I. & P. R. Co.*, 263 Mo. 106, 172 S. W. 340, 8 N. C. C. A. 538, *Ann. Cas.* 1916 B. 147.

### Failure to Warn.

A failure to warn an employee of a danger is the negligence of the master which the former does not assume under the terms of the Federal Employers' Liability Act. *Young v. Lusk*, — Mo. —, 187 S. W. 849.

## 3. Negligence of Fellow Servants.

Instructions as to assuming risk of negligence of fellow servants, see *infra* XIX, E. 2, (c).

### Not an Assumed Risk.

Under the Federal Employers' Liability Act an injured employee does not assume the risk of injury from the negligence of a fellow servant. *Phila., B. & W. R. Co. v. McConnell*, 142 C. C. A. 555, 228 Fed. 263; *Erie R. Co. v. Jacobus*, 137 C. C. A. 151, 221 Fed. 335; *Penn. R. Co. v. Goughnour*, 126 C. C. A. 39, 208 Fed. 961; *Louisville & N. R. Co. v. Fleming*, — Ala. —, 69 So. 125; *Byram v. Illinois C. R. Co.*, — Ia. —, 154 N. W. 1006; *Hackney v. Missouri, K. & T. R. Co.*, 96 Kan. 30, 149 Pac. 421; *Caverhill v. Boston & M. R. Co.*, 77 N. H. 330, 91 Atl. 917; *Grybowski v. Erie R. Co.*, — N. J. —, 95 Atl. 764; *St. Louis & S. F. R. Co. v. Brown*, — Okla. —, 144 Pac. 1075; *Carter v. Kansas City S. R. Co.*, — Tex. Civ. App. —, 155 S. W. 638; *Easter v. Virginian R. Co.*, — W. Va. —, 86 S. E. 37; *Graber v. Duluth, S. S. & A. R. Co.*, 159 Wis. 414, 150 N. W. 489; *Sweet v. Chicago & N. W. R. Co.*, 157 Wis. 400, 147 N. W. 1054; *Thompson v. Minneapolis & St. L. R. Co.*, — Minn. —, 158 N. W. 42; *Elliott v. Illinois C. R. Co.*, — Miss. —, 71 So. 741; *Koukouris v. Union P. R. Co.*, — Mo. App. —, 186 S. W. 545.

### Negligence of Particular Employees.

#### — Failure of Flagman to Protect Train.

Under the Federal Employers' Liability Act a conductor does not assume the risk of injury from the failure of his flagman to protect the rear of a freight train while stopped temporarily on a main track. *Penn. R. Co. v. Goughnour*, 126 C. C. A. 39, 208 Fed. 961.

#### — Conductor Running Engine.

A freight brakeman was held, in an action based on the Federal Employers' Liability Act, not to have assumed the risk of injury from the negligence of his conductor in running a locomotive, where the latter was directed by the former to fire the engine while the regular crew were in the caboose of a train eating dinner. *Martin v. Atchison, T. & S. F. R. Co.*, 93 Kan. 681, 145 Pac. 649.

#### — Employees Moving Trains.

A signal repairman who, as he stepped from the track on which he was working to avoid an approaching train, was struck and killed by a train which came from the opposite direction on another track was held, in an action under the Federal Employers' Liability Act, not to have assumed the risk of injury from the negligence of those in charge of the train that killed him. *Glunt v. Penn. R. Co.*, 249 Pa. 522, 95 Atl. 109.

#### — Freight Handler.

A truckman in the employ of an interstate carrier does not assume the risk of

injury from the negligence of a coemployee where, while transferring interstate freight from a warehouse to a car, he was crushed between the side of the house and a loaded truck as the result of the other's negligent management of his truck, since such risk was not one ordinarily incident to his employment. *Illinois C. R. Co. v. Porter*, 125 C. C. A. 55, 207 Fed. 311.

#### Particular Acts of Employees.

##### —Running Train at Excessive Speed.

A brakeman does not assume the risk of injury from the negligence of an engineer in running his train at an excessive rate of speed with knowledge that it was the duty of the former to board it. *Mattocks v. Chicago & A. R. Co.*, 187 Ill. App. 529.

A brakeman who went ahead of his train, at the direction of his engineer, to obtain orders, cannot be held, in an action under the Federal Employers' Liability Act, to have assumed the risk of injury from attempting to board the engine of the train when moving 12 miles an hour, since he had the right to assume that the engineer would exercise reasonable care for his safety, and he did not assume the risk of injury attributable to the running of the train at an unusually high and dangerous rate of speed, unless the speed and the consequent danger were so obvious that an ordinarily careful person would have observed the one and appreciated the other. *Chesapeake & O. R. Co. v. De Atley*, 241 U. S. 310, 60 L. ed. —, 36 Sup. Ct. Rep. 564, reversing 159 Ky. 687, 167 S. W. 933.

A brakeman who was injured while boarding the engine of a moving train in the course of his duties cannot be said, in an action based on the Federal Employers' Liability Act, to have assumed the extraordinary risk of injury from the negligence of the engineer in running the train at an excessive speed with knowledge that it was the duty of the brakeman to board it. *Chesapeake & O. R. Co. v. De Atley*, 159 Ky. 687, 167 S. W. 938, reversed on other grounds 241 U. S. 310, 60 L. ed. —, 36 Sup. Ct. Rep. 933.

##### —Negligence of Towerman.

An engineer who negligently ran his train over a switch at a rate of speed prohibited by the rules of an interstate carrier was held, in an action based on the Federal Employers' Liability Act, not to have assumed the extraordinary risk of injury from the negligence of a towerman of which the former had no knowledge, in improperly setting the switch. *Penn. Co. v. Wasson*, 21 Oh. C. C. R. (N. S.) 481.

##### —Failure to Inspect Cars.

A brakeman does not, under the Federal Employers' Liability Act, assume the risk

of injury from the negligence of his fellow servants in failing to inspect a car as their duty required them to do. *Carter v. Kansas City S. R. Co.*, — Tex. Civ. App. —, 155 S. W. 638.

##### —Improper Loading of Car.

A brakeman who was injured by the improper loading of piles on a flat car was held, in an action founded on the Federal Employers' Liability Act, not to have assumed the risk of injury, where the conductor negligently inspected the car before it was taken into the train. *Michigan C. R. Co. v. Schaffer*, 136 C. C. A. 413, 220 Fed. 809.

##### —Inclusion of High Car in Train.

A switchman does not assume the risk of injury from the negligence of his coemployees in failing to exclude a high box car from a cut of cars he was ordered to move on a dark night in a railway yard, or of their failure to give warning of the danger, where he was knocked from the top of such car by a low overhead bridge and injured. *Portland Term. Co. v. Jarvis*, — C. C. A. —, 227 Fed. 8.

##### —Coemployee Giving Push-Car Sudden Shove With Foot.

In an action under the Federal Employers' Liability Act it cannot be held that a section foreman, by standing on a slowly moving push-car which was being propelled in front of a hand-car, assumed, as an incident of his employment, the risk of injury from the negligence of a fellow servant on the hand-car in giving the push-car a sudden kick or shove with his foot so as to throw the plaintiff to the ground, since it was not an obvious risk nor one that could have been reasonably anticipated. *Arizona E. R. Co. v. Bryan*, — Ariz. —, 157 Pac. 376.

#### Particular Risks.

##### —Remaining on Runaway Car.

A freight conductor, who went to the assistance of a brakeman after the latter had lost control of a car on a grade, did not, by remaining on the car after he was aware that it was beyond their control, assume the risk of injury, unless the danger was so obvious that an ordinarily prudent person would have left the car, where the conductor was killed by the derailment of the car after it had been diverted to a branch line by orders negligently given by the train dispatcher; it appearing that the car might have been brought under control within a short distance without endangering any other trains had it remained on the main line. *Sandidge v. Atchison, T. & S. F. R. Co.*, 113 C. C. A. 653, 193 Fed. 867.

— **Mismanagement of Cars.**

A finding that an inexperienced car inspector assumed the risk of injury from the mismanagement of cars by a coemployee was not justified, in an action based on the Federal Employers' Liability Act, under conflicting evidence as to whether he went to the top of a freight car by direction of the person detailed to instruct him in his duties, without being warned of the danger from a sudden movement of the car in switching. *Boston & M. R. Co. v. Benson*, 124 C. C. A. 68, 205 Fed. 876.

Where a switchman was caught and injured by the sudden movement of the rear cars of a train down a slight incline in the track, as he was reaching over the couplers of two cars and turning the angle cock, the accident being due to the negligence of the engineer in leaving the control lever in a position which permitted the releasing of the brakes when the angle cock was turned, it cannot be held, in an action based on the Federal Employers' Liability Act, that the switchman assumed the risk of injury from the engineer's negligence. *Union P. R. Co. v. Fuller*, 122 C. C. A. 359, 204 Fed. 45.

**4. Defective Appliances.**

(a) **In General.**

(No decisions.)

(b) **Engines and Cars.**

**Engines.**

— **In General.**

A railway employee can not, in an action under the Federal Employers' Liability Act, be held to have assumed the risk of injury from unknown defects in the engines, machinery or appliances of an interstate railway company. *Central Vt. R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, Ann. Cas. 1916 B, 252, affirming 87 Vt. 330, 89 Atl. 618.

An engineer cannot, in an action based on the Federal Employers' Liability Act, be held to have assumed the risk of injury from defects in a locomotive just from the repair shop, which he was inspecting preparatory to making a trial run, where he was not aware of the defect, and it was not his duty to make repairs. *Lloyd v. Southern R. Co.*, 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489, affirmed on other grounds 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210.

— **Defective Step.**

Where a brakeman was injured by slipping from a defective step attached to the rear of the pilot beam of an engine, and it did not appear that the defect was

plainly observable, or that he was aware of its condition, and reasonable men might differ as to the conclusions to be drawn from the evidence, it cannot be held, in an action based on the Federal Employers' Liability Act, that he knew of and appreciated the danger so as to assume the risk. *Norfolk & W. R. Co. v. Thompson*, 161 Ky. 814, 171 S. W. 451.

— **Towing Dead Engine.**

An engineer who was injured by the negligent movement of a disabled engine which he had orders to tow to another station, may recover under the Federal Employers' Liability Act, notwithstanding the general rule that he assumed the risk of injury from the defective condition of such engine. *Pfeiffer v. Oregon-W. R. & N. Co.*, 74 Oreg. 307, 144 Pac. 762, 7 N. C. C. A. 685, writ of error dismissed 239 U. S. 658, — L. ed. —, 36 Sup. Ct. Rep. 222.

— **Defective Gauge Glasses.**

The danger from the explosion of a water gauge glass of a locomotive which normally should withstand the pressure to which it is subjected, but which might explode at some near or remote time, cannot be said as a matter of law, in an action based on the Federal Employers' Liability Act, to have been so imminent as to import the assumption of the risk to an engineer notwithstanding his employer's promise to replace the broken guard glass. *Seaboard A. L. R. Co. v. Horton*, 239 U. S. 595, — L. ed. —, 36 Sup. Ct. Rep. 180, affirming 169 N. C. 108, 85 S. E. 218, S. C. 157 N. C. 146, 72 S. E. 968.

An engineer cannot be said as a matter of law, in an action under the Federal Employers' Liability Act, to have assumed the risk of injury from the absence of a guard glass from the front of a water gauge glass which exploded, where he had reported the absence of the guard glass to the defendant and had been assured that a new one would be furnished. *Seaboard A. L. R. Co. v. Horton*, 239 U. S. 595, — L. ed. —, 36 Sup. Ct. Rep. 180, affirming 169 N. C. 108, 85 S. E. 218, S. C. 157 N. C. 146, 72 S. E. 958.

An engineer cannot be charged, in an action under the Federal Employers' Liability Act, with assuming the risk of injury from the bursting of a tubular glass lubricator indicator on a high-pressure boiler, where, although he knew that there were certain dangers incident to the use of such glasses, it did not appear that he knew or had any ground to believe that his employer was wanting in proper care for the former's safety, or that because of such want of care that the danger to him was increased. *Chicago & N. W. R. Co. v. Bower*, 241 U. S. 470, 60 L. ed. —, 36 Sup. Ct. Rep. 624, affirming 96 Neb. 419, 148 N. W. 145.

An experienced engineer cannot, in an action based on the Federal Employers' Liability Act, be held to have assumed the risk of injury from the explosion of a lubricator glass and the shattering of its metallic shield, where he had used similar devices for many years without injury, or knowing of other persons being injured in such manner. *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419, 148 N. W. 145, affirmed 241 U. S. 470, 60 L. ed. —, 36 Sup. Ct. Rep. 624.

Assumption of risk is a full defense to an action under the Federal Employers' Liability Act for injuries received by an engineer from the bursting of an unprotected water gauge glass, notwithstanding that such defense had been abolished by a state statute in actions for injuries sustained by railway employees from defective appliances. *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, L. R. A. 1915 C. 1, Ann. Cas. 1915 B 475, 8 N. C. C. A. 834, reversing 162 N. C. 424, 78 S. E. 494.

An engineer who operated a locomotive with knowledge of the absence of a shield to prevent injury from the explosion of a water gauge glass, and who continued to operate the engine without giving notice of the defect to his employer, assumed the risk of injury therefrom. *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, L. R. A. 1915 C. 1, Ann. Cas. 1915 B 475, 8 N. C. C. A. 834, reversing 162 N. C. 424, 78 S. E. 494.

#### —Obstruction on Tender.

A fireman was held, in an action based on the Federal Employers' Liability Act, to have assumed the risk of injury from slipping at night while filling the tank of an engine with water, on a round bolt lying upon the rear of the tender near the man-hole, where it was usual and customary in the absence of a tool box, to carry necessary equipments in such place, and at the time there was in the same place a piece of rubber hose, an iron bar, two lumps of coal and a covering of cinders two inches deep. *Kansas City S. R. Co. v. Livesay*, 118 Ark. 304, 177 S. W. 875.

#### Cars.

##### —Defective Door of Freight Car.

A brakeman who was injured as the result of a defect in the door of a refrigerator car, cannot be held, in an action based on the Federal Employers' Liability Act, to have assumed the risk of injury, where the defect was attributable to the negligence of the defendant, unless the former was aware of the defect or would have known of it had he exercised ordinary care. *Carter v. Kansas City S. R. Co.*, — Tex. Civ. App. —, 155 S. W. 638.

##### —Defective Brakes.

A switchman cannot be held in an action under the Federal Employers' Liability Act, to have assumed the risk of injury from trying to stop a kicked car with a brake which proved defective. *Worthington v. Elmer*, 125 C. C. A. 50, 207 Fed. 306.

##### —Effect of Violating Rule.

Where a brakeman was struck and injured by a defective door while moving a refrigerator car, the fact that at the time he was making a flying switch in violation of a carrier's rules, he cannot be held, in an action based on the Federal Employers' Liability Act, to have assumed the risk, since the accident did not necessarily result from the violation of the rule. *Carter v. Kansas City S. R. Co.*, — Tex. Civ. App. —, 155 S. W. 638.

#### (c) Tools.

##### Failure to Provide.

##### —“Deadman” for Pole Raising.

A telegraph lineman cannot be held, in an action based on the Federal Employers' Liability Act, to have assumed the risk of injury from the failure of his master to furnish a “deadman” for use in raising poles, where the former was assured by his foreman, when he requested him to provide such implement, that it was not necessary for the decedent's safety. *Coal & Coke R. Co. v. Deal*, — C. C. A. —, 231 Fed. 604, affirming 215 Fed. 285.

##### —Ice Hooks.

An employee who was injured while removing ice from a box with his hands to place in the water coolers of an interstate passenger train, was held, in an action based on the Federal Employers' Liability Act, to have assumed the risk of injury from the failure of his employer to provide ice hooks. *Freeman v. Powell*, — Tex. Civ. App. —, 144 S. W. 1033, affirmed 105 Tex. 317, 148 S. W. 290.

##### Defective Tools.

##### —Spike Maul.

If a section hand knew of the defective condition of the mauls which he and his companions used for driving spikes, and of the danger from spraws or slivers of steel flying therefrom, and with such knowledge he continued to work with or in dangerous proximity to a defective maul without obtaining from his employer or foreman an assurance that the defect would be remedied or the danger removed, he will be held in an action under the Federal Employers' Liability Act, to have assumed the risk of injury. *Louisville & N. R. Co. v. Patrick*, — Ky. —, 180 S. W. 55.

**5. Safe Place.**

**(a) In General.**

**Failure to Provide not Assumed.**

Under the Federal Employers' Liability Act an employee does not assume the risk of injury from the failure of a carrier to provide him with a reasonably safe place in which to work. *Chesapeake & O. R. Co. v. Shaw*, 158 Ky. 537, 182 S. W. 653; *Fish. v. Chicago, R. I. & P. R. Co.*, 263 Mo. 106, 172 S. W. 340, 8 N. C. C. A. 538, Ann. Cas. 1916 B. 147.

**Assurance of Safety.**

In an action under the Federal Employers' Liability Act, an employee cannot be charged with assumption of risk, where he was injured while working in a tunnel by falling rock, when he was assured by his superior that the place was safe. *Louisville & N. R. Co. v. Thomas*, — Ky. —, 185 S. W. 840.

**Cinder Pile Beside Track.**

An employee who, with knowledge of a custom of depositing cinders between the tracks in a yard and of their presence there, attempted to mount a moving locomotive with a vessel of water in his hands, was held, in an action based on the Federal Employers' Liability Act, to have assumed the risk of stumbling on a pile of cinders, although he had forgotten their existence and did not notice them. *Jacobs v. Southern R. Co.*, 241 U. S. 229, 60 L. ed. —, 36 Sup. Ct. Rep. 588, affirming 116 Va. 189, 81 S. E. 99.

**(b) Tracks Close Together.**

**In General.**

A railway employee who was thoroughly familiar with the fact that the switch tracks in a railway yard were placed too close together, assumed the risk of injury therefrom, notwithstanding the provisions of section 4 of the Federal Employers' Liability Act, which relates only to the violation of safety statutes. *Central Vt. R. Co. v. Bethune*, 124 C. C. A. 528, 206 Fed. 868.

Section 4 of the Federal Employers' Liability Act does not preclude the defense that an employee assumed the risk of injury from the construction of tracks too close together in a railway yard. *Kirbo v. Southern R. Co.* 16 Ga. App. 49, 84 S. E. 491.

A switchman was held, in an action under the Federal Employers' Liability Act, to have assumed the risk of injury from the construction of the tracks too close together in a railway yard in which he was employed, where he was fully aware of the conditions. *Kirbo v. Southern R. Co.*, — Ga. App. —, 89 S. E. 179, S. C. 16 Ga. App. 49, 84 S. E. 491.

**(c) Absence of Block or Other Fixed Signals.**

**In General.**

An engineer of long experience who knew and appreciated the danger arising from the failure of a carrier to adopt and use a block signal system, was held, in an action under the Federal Employers' Liability Act, to have assumed the risk of injury from such omission, as it was a risk ordinarily incident to his employment. *Louisville & N. R. Co. v. Heinig*, 162 Ky. 14, 171 S. W. 853.

In an action under the Federal Employers' Liability Act, the court should have held, as a matter of law, that an experienced engineer assumed the risk of injury from the failure of a carrier to equip its road with the block signal system, where he knew and appreciated the danger growing out of the failure to do so. *Louisville & N. R. Co. v. Heinig*, 162 Ky. 14, 171 S. W. 853.

Where a fireman had been running over the same track for more than two years at a point where a switch light was obscured by a curve in the track as well as by a deep cut, and a trespasser misplaced the switch so as to cause the derailment of a train and the death of the fireman, it was held, in an action founded on the Federal Employers' Liability Act, that the decedent assumed the risk of injury from the failure of his employer to provide a "distance signal" at the place of the accident. *Bowers v. Southern R. Co.*, 10 Ga. App. 367, 73 S. E. 677.

**(d) Obstructions Near to or Above Tracks.**

**Cars Not in Clear.**

The risk of injury from cars on a side track not clearing a main track was held in an action under the Federal Employers' Liability Act, not to have been assumed by an engineer, where the cars were not visible from his side of the engine and he was assured by his fireman that the track was clear. *Yazoo & M. V. R. Co. v. Wright*, 235 U. S. 376, 59 L. ed. 277, 35 Sup. Ct. Rep. 130, affirming 125 C. C. A. 25, 207 Fed. 281 S. C. 197 Fed. 94.

The fact that a fireman knew that yardmen sometimes negligently left cars so as not to clear a lead track does not warrant a finding, in an action founded on the Federal Employers' Liability Act, that the fireman assumed the risk of injury from coming into contact with the marker of a caboose of another train, which at night had just been left standing so as not to clear the lead track, especially where a fixed signal indicated that there was no danger. *Chesapeake & O. R. Co. v. Meadows*, — Va. —, 89 S. E. 244.

It cannot be held, as a matter of law, that a fireman assumed the risk of injury from being struck at night by the marker of a caboose of another train which was left on an adjoining track so that it did not clear a lead track, merely because he was familiar with the conditions in a railway yard and was aware that employees sometimes were negligent in such particular. *Chesapeake & O. R. Co. v. Meadows*, — Va. —, 89 S. E. 244.

#### Low Bridge.

Where a brakeman sitting on the side of the roof of a freight car with his feet hanging off, was knocked therefrom by a low overhead bridge, he cannot be held in an action founded on the Federal Employers' Liability Act, to have assumed the risk of injury, where the telltale at that point was of insufficient width to give warning of the proximity of the bridge to a person in his position, and it did not appear that his attention had ever been called to its width, or that however often he had passed under the bridge or however long he had worked as a flagman in its vicinity, that he had ever passed under it when on top of a freight car. *Boston & M. R. Co. v. Brown*, 134 C. C. A. 383, 218 Fed. 625.

#### Switch Stands.

A brakeman cannot be held, in an action based on the Federal Employers' Liability Act, to have by his contract of employment assumed the risk of injury from the negligent location of a switchstand in dangerous proximity to a track or of the failure to place a warning light thereon at night. *Vickery v. New London N. R. Co.*, 87 Conn. 634, 89 Atl. 277.

It cannot be said as a matter of law, in an action founded on the Federal Employers' Liability Act, that a switchman assumed the risk of injury from an unlighted switchstand which was so close to a track that when its handle was turned in one position it endangered the safety of a person on the side of a box car, where a fair inference from the testimony was that although the plaintiff knew of the danger, at the time of the accident he was attempting to avoid the switchstand by swinging around from the side to the end of a car. *McDonald v. Railway Transfer Co.*, 121 Minn. 273, 141 N. W. 177.

#### Stand Pipe.

A contract of employment by which a brakeman assumed to take care of himself with respect to existing and known dangers, cannot, in an action based on the Federal Employers' Liability Act, charge him with assuming the risk of injury from being struck on a dark night by a water standpipe which without his knowledge, was placed too close to a track a year

after the contract was made. *Fish v. Chicago, R. I. & P. R. Co.*, 263 Mo. 106, 172 S. W. 340, 8 N. C. C. A. 538, Ann. Cas. 1916 B. 147.

#### Posts in Tunnel.

It cannot be said as a matter of law, in an action based on the Federal Employers' Liability Act, that because an engineer had made many previous trips through a tunnel he assumed the risk of injury from his head striking one of a number of posts, which were but 6 inches from the side of a locomotive cab, as he leaned from the window in the discharge of a necessary duty. *St. Louis, I. M. & S. R. Co. v. Conley*, 110 C. C. A. 97, 187 Fed. 949.

#### Posts in Roundhouse.

A hostler was held, in an action based on the Federal Employers' Liability Act, not to have assumed, as a matter of law, the risk of injury from coming into contact with a post set near a track in a roundhouse, as he was riding at night from the house on an engine of unusual width, where, by reason of the absence of lights, he was unable to discover his danger or the character of the engine. *Guana v. Southern P. Co.*, 15 Ariz. 413, 139 Pac. 782.

#### (e) Obstructed View of Switch Signals.

##### In General.

Where a fireman who had run over the same track for more than two years, was killed by the derailment of his engine at a misplaced switch, it was held in an action founded on the Federal Employers' Liability Act, that he assumed the risk of injury from the obscuring of the switch lights by a curve in the track and a deep cut through which it passed before reaching the switch. *Bowers v. Southern R. Co.*, 10 Ga. App. 367, 73 S. E. 677.

Where a curve in a track and other obstructions obstructed the view of a passing track from an approaching train at a point selected for a meeting place for two trains, it was held in an action under the Federal Employers' Liability Act, even though it was an improper meeting point, that an engineer who was familiar with the surroundings assumed the risk, when he so negligently operated his train as to cause a collision in which he was killed. *Louisville & N. R. Co. v. Heinig*, 162 Ky. 14, 171 S. W. 853.

#### (f) Defective Premises.

##### Narrow Doorways.

A conductor of a switching crew who had worked for six years about a freight house and who was thoroughly familiar with its construction, was held as a matter



of law, in an action based on the Federal Employers' Liability Act, to have assumed the risk of injury while placing a car in the house, from being caught between a narrow doorway and the side of a refrigerator car with its doors opened back so as not to leave sufficient clearance for a man's body, where the narrowness of the doorway necessitated the opening of the doors of such cars before they were placed in the freight house. *Miller v. Michigan C. R. Co.*, 185 Mich. 432, 152 N. W. 235.

**Insufficient Lights.**  
— In Yards.

Where a carrier maintained an electric plant to supply lights for a switch yard so as to enable its employees to move about at night in greater safety near and between dangerous tracks, and a switchman was injured as the result of the alleged failure of the lights to burn, he cannot, under section 4 of the Federal Employers' Liability Act, be held to have assumed the risk of injury from the failure of the carrier to properly maintain its lighting system. *Kirbo v. Southern R. Co.*, 16 Ga. App. 49, 84 S. E. 491. But see *S. C.* — Ga. App. —, 89 S. E. 179.

A switchman was held, in an action under the Federal Employers' Liability Act, to have assumed the risk of injury from the construction of the tracks too closely together in a railway yard, where, on a dark night, he continued to work about such tracks for 40 minutes after the electric lights provided by the defendant had been extinguished. *Kirbo v. Southern R. Co.*, — Ga. App. —, 89 S. E. 179, S. C. 16 Ga. App. 49, 84 S. E. 491.

— Round Houses.

The knowledge of a night assistant foreman of the insufficiency of the lights in a roundhouse, cannot charge him, in an action based on the Federal Employers' Liability Act, with having assumed the risk of falling over a small jackscrew negligently left, in violation of the rules of a carrier and without his knowledge, by the day shift of workmen, on the floor between two engines. *Hawkins v. St. Louis & S. F. R. Co.*, 189 Mo. App. 201, 174 S. W. 129.

The fact that a night assistant roundhouse foreman was aware that the floor between the engine stalls was insufficiently lighted, does not, as a matter of law, in an action under the Federal Employers' Liability Act, show that he assumed the risk of injury from falling over a small jackscrew negligently left on the floor by the day shift of workmen, where the plaintiff was not charged with the duty of inspecting the floor for obstructions. *Hawkins v. St. Louis & I. M. R. Co.*, 189 Mo. App. 201, 174 S. W. 129.

A night assistant roundhouse foreman cannot be held, in an action under the Federal Employers' Liability Act, to have assumed the risk of injury from falling over a small jackscrew negligently left without his knowledge by a member of the day shift on the floor between two stalls in violation of a rule of the employer, by reason of the fact that the foreman went about the insufficiently lighted house at night without a lantern, since he did not assume a risk of which he was not aware unless it was an obvious one. *Hawkins v. St. Louis & S. F. R. Co.*, 189 Mo. App. 201, 174 S. W. 129.

**Icy Path.**

Where a pump repairman in the employ of an interstate carrier, was injured at night while on his way to procure necessary repairs for a pump, by falling on ice thinly covered with snow, formed over a path from water negligently permitted to overflow from a tank, it was held, in an action based on the Federal Employers' Liability Act, that he did not assume the risk of injury, where he had no knowledge of the condition of the path and could not have discovered it by the exercise of ordinary care, and the carrier had had ample time in which to make it safe. *Renn v. Seaboard A. L. R.*, 170 N. C. 128, 86 S. E. 964, affirmed on other grounds 241 U. S. 290, 60 L. ed. —, 36 Sup. Ct. Rep. 567.

**Obstructed Floor.**

A night assistant roundhouse foreman cannot be held, in an action under the Federal Employers' Liability Act, to have assumed the risk of injury from falling over a small jackscrew the presence of which was unknown to him, which was negligently left between two stalls in violation of a rule of the employer by a member of the day shift of workmen. *Hawkins v. St. Louis & S. F. R. Co.*, 189 Mo. App. 201, 174 S. W. 129.

Where a roundhouse employee was injured by stepping from a ladder onto a piece of scrap hose that was negligently permitted to remain on the floor for several days, he cannot be charged, in an action based on the Federal Employers' Liability Act, with assumption of the risk, although, while he knew that the hose had been there several days before, it did not appear that he actually knew of its presence there on the day of the accident. *Cross v. Chicago, B. & Q. R. Co.*, — Mo. App. —, 186 S. W. 1130, S. C. 191 Mo. App. 202, 177 S. W. 1127.

**Pits.**

An engineer employed in interstate commerce, who was killed in the night by falling into a deep pit in a roundhouse in which his engine was stored, cannot, in an

action under the Federal Employers' Liability Act, be held to have assumed the risk of injury, where his duties did not ordinarily take him into the roundhouse, and it did not appear that he was aware of the existence of the pit. *Padgett v. Seaboard A. L. R.* 99 S. C. 364, 83 S. E. 633, affirmed 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481.

A brakeman cannot be held in an action based on the Federal Employers' Liability Act, to have assumed the risk of injury from the unsafe and improper construction of a cinder pit in a yard, into which he fell at night and was injured, where his duties did not concern the pit, which he could rightfully assume was a safe and proper appliance. *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

## 6. Movement of Trains and Cars.

### (a) In General.

#### Negligent Operation.

The risk of injury from the negligent operation of a train is not assumed under the Federal Employers' Liability Act by a person riding on a railway tricycle provided by the carrier, from his work of installing an automatic signal system on an interstate railway line. *Grow v. Oregon S. L. R. Co.*, — Utah —, 150 Pac. 970, S. C. 44 Utah 160, 138 Pac. 398.

### (b) Excessive Speed.

Where an engineer was passing through a cloud of smoke and steam in a railway yard on the way to his engine, he was held in an action under the Federal Employers' Liability Act, not to have assumed the risk of injury from the negligent movement of an engine backwards at high speed without lookout, warning or signal. *Huxoll v. Union P. R. Co.*, 99 Neb. 170, 155 N. W. 900.

A freight conductor who had control of the speed of his train, and who was injured by the derailment of cars that were being moved on a spur track at a dangerous rate of speed, without having the air-brakes connected, was held, in an action under the Federal Employers' Liability Act, to have assumed the risk of injury. *Casey v. Illinois C. R. Co.*, — Minn. —, 158 N. W. 812.

It cannot be said, as a matter of law, in an action based on the Federal Employers' Liability Act, that a speed of 12 miles an hour of an oncoming train was obviously dangerous to a brakeman who was injured while boarding the engine. *Chesapeake & O. R. Co. v. De Atley*, 241 U. S. 310, 60 L. ed. —, 36 Sup. Ct. Rep. 564, reversing 159 Ky. 687, 167 S. W. 933.

### (c) Lookout and Warning Signals.

#### In General.

It cannot be held in an action based on the Federal Employers' Liability Act, that an experienced employee while inspecting a track on a "speeder" assumed the risk of injury from the negligent operation of a jacking locomotive without proper lookout or signals. *Anest v. Columbia & P. S. R. Co.*, 89 Wash. 509, 154 Pac. 1100.

### (d) Passing Trains.

#### In General.

It was held in an action under the Federal Employers' Liability Act, that a track-walker employed to walk over, watch, and repair tracks on which there was a constant passing of trains, necessarily assumed the risk of injury of being struck by trains properly operated. *Connelley v. Penn. R. Co.*, 142 C. C. A. 614, 228 Fed. 322, affirming 221 Fed. 508, S. C. 119 C. C. A. 392, 201 Fed. 54, 47 L. R. A. (N. S.) 867.

A trackwalker who was struck and killed by a train in a railway yard, was held, in an action based on the Federal Employers' Liability Act, to have assumed the risk of injury, where trains were constantly moving, and at the time of the accident he was enveloped in a cloud of steam, to which a coworker called his attention, which warning was disregarded, and the defendant had stationed a brakeman on such train as lookout and to apply the emergency brake if necessary, but the steam prevented the decedent from being seen. *Connelly v. Penn. R. Co.*, 142 C. C. A. 614, 228 Fed. 322, affirming 221 Fed. 508, S. C. 119 C. C. A. 392, 201 Fed. 54, 47 L. R. A. (N. S.) 867.

A railway employee who was engaged on a stormy day in removing snow from a right of way at a point where there were four lines of main track, was held in an action under the Federal Employers' Liability Act, not to have assumed the risk of injury from passing trains, where he was struck by a fast train as he was attempting to avoid a local train on another track, and there was conflicting testimony as to whether he was warned of the approach of the train which struck him. *McGovern v. Philadelphia & R. Ry. Co.*, 235 U. S. 389, 59 L. ed. 283, 35 Sup. Ct. Rep. 127, 8 N. C. A. 67, reversing 209 Fed. 975.

### (e) Failure to Observe Signals.

#### Block Signals.

A brakeman was held, in an action under the Federal Employers' Liability Act, not to have assumed the risk of injury from the negligence of the engineer of a closely following train in running past a block signal on a night when a severe bliz-

zard was raging, where the jury found that the engineer did not have an understanding with the decedent that the former should rely on signals displayed by the latter rather than on the block signals. *Hadley v. Union P. R. Co.*, 99 Neb. 349, 156 N. W. 765.

**(f) Violent and Unusual Movements.**

Instructions as to assumption of risk of violent and unusual movement of cars, see *infra* XIX, E, 2, (g).

**Starting with Violence.**

Where the sudden movement of a locomotive threw the fireman from the step as he was entering the cab after making an inspection at the direction of the engineer, it was held, in an action under the Federal Employers' Liability Act, that he did not assume the risk of injury from the unusual movement of the engine caused by the engineer when he was aware, or should have known that the fireman was in a position of danger. *Southern R. Co. v. Gadd*, 125 C. C. A. 21, 207 Fed. 277, affirmed 233 U. S. 572, 58 L. ed. 1099, 34 Sup. Ct. Rep. 696.

**Unexpected Stoppage of Train.**

Where a brakeman came down the end ladder of a freight car and, instead of swinging around to the side of the car and standing in the stirrup and using the pin-lifter, he stood on the end sill in order to uncouple the cars, he cannot be charged, as a matter of law, in an action founded on the Federal Employers' Liability Act, with having assumed the risk of the negligence of his conductor in giving an unexpected stop signal. *Thompson v. Minneapolis & St. L. R. Co.*, — Minn. —, 158 N. W. 42.

**Stopping with Unnecessary Violence.**

Under the Federal Employers' Liability Act a switchman does not assume the risk of injury from the negligence of an engineer in stopping a train suddenly with unnecessary violence. *Devine v. Chicago, R. I. & P. R. Co.*, 266 Ill. 248, 107 N. E. 595, Ann. Cas. 1916 B. 481, affirming 185 Ill. App. 488, affirmed 239 U. S. 52, — L. ed. —, 36 Sup. Ct. Rep. 27.

**Jerks and Bumps.**

A brakeman cannot, in an action founded on the Federal Employers' Liability Act, be charged with having assumed the risk of injury from the jerking and bumping of a train when caused by the negligence of the engineer. *La Mere v. Railway Transfer Co.*, 125 Minn. 159, 145 N. W. 1068, Ann. Cas. 1915 C. 607, writ of error dismissed 239 U. S. 651, — L. ed. —, 36 Sup. Ct. Rep. 159.

**(g) Shunted or Kicked Cars.**

**Cars Kicked Against Others.**

In an action under the Federal Employers' Liability Act for injuries sustained by a switchman while working between two freight cars in a railway yard, he was held to have assumed the risk of injury from such cars being struck by other cars when run over a "hump" in the yard, where such movement of cars was of almost daily occurrence. *Boldt v. Penn. R. Co.*, 134 C. C. A. 175, 218 Fed. 367.

A brakeman who was injured while engaged in coupling the air hose between cars near the head of a freight train, cannot, in an action based on the Federal Employers' Liability Act, be held to have assumed the risk of injury from the kicking by a switching crew, of cars against the rear end of the train in a violent and unusual manner. *Chesapeake & O. R. Co. v. Proffitt*, 134 C. C. A. 37, 218 Fed. 23, affirmed 241 U. S. 462, 60 L. ed. —, 36 Sup. Ct. Rep. 620.

In an action under the Federal Employers' Liability Act, a car inspector cannot be held to have assumed the risk of injury from cars being shunted against those on which he was working without having displayed the signals required by the rules of his employer, where it was customary not to move cars such as the inspector was working on even though no signal was displayed, without first giving notice or warning to the inspectors. *Texarkana & Ft. S. R. Co. v. Casey*, — Tex. Civ. App. —, 172 S. W. 729.

A switchman who was injured by a cut of cars being shunted against the one on which he was adjusting a coupler, was held, in an action based on the Federal Employers' Liability Act, to have assumed the risk of injury, where the shunted cars were moved in the ordinary and customary manner. *Ft. Worth & D. C. R. Co. v. Copeland*, — Tex. Civ. App. —, 164 S. W. 857.

The evidence, in an action based on the Federal Employers' Liability Act for the death of a switchman, was held not to show that he assumed the risk of injury from being thrown from the top of a box car when another car was kicked against it with unusual violence. *Kenney v. Seaboard A. L. R. Co.*, 165 N. C. 99, 80 S. E. 1078, affirmed on other grounds 240 U. S. 489, 60 L. ed. —, 36 Sup. Ct. Rep. 458.

An employee who attempted to replace a knuckle in a coupler, which could be done in a minute's time, cannot in an action under the Federal Employers' Liability Act, be charged with having assumed the risk of injury from the car being struck by other cars moving by gravity, where it did not appear that he saw or heard the movement of the cars or knew that they

had been left with brakes unset. *Illinois C. R. Co. v. Stewart*, 138 C. C. A. 444, 223 Fed. 30.

#### Going in Front of Shunted Cars.

An employee, was held, in an action under the Federal Employers' Liability Act, to have assumed the risk of injury from being struck as in the daytime he stepped in front of moving cars in order to cross a dangerous and defective roadbed, when he must have seen and realized the imminent peril to which he exposed himself. *Charleston & W. C. R. Co. v. Sylvester*, 17 Ga. App. 85, 86 S. E. 275.

#### Track Repairer.

A track walker who was struck and killed at night by cars which were negligently kicked down a track on which he was working repairing a switch, was held, in an action under the Federal Employers' Liability Act, not to have assumed the risk of injury where he had never before been called on to do such work. *Colasurdo v. Central R. of New Jersey*, 180 Fed. 832, affirmed 113 C. C. A. 379, 192 Fed. 901, writ of error dismissed 226 U. S. 617, 57 L. ed. 383, 33 Sup. Ct. Rep. 111.

#### Failure to Give Warning.

An experienced freight conductor was held in an action under the Federal Employers' Liability Act, to have assumed the risk of injury from the shunting of cars in an extensive railway yard without warning, where he was familiar with a rule of the defendant dispensing with warning in such cases. *Swartwood v. Lehigh V. R. Co.*, 169 App. Div. 759, 155 N. Y. Supp. 778.

#### (h) Violation of Rules and Orders.

##### Speed of Train.

There cannot be a recovery under the Federal Employers' Liability Act for the death of an engineer who was killed by the derailment of his engine, which, in violation of express orders to reduce to speed of 10 miles an hour, he ran at the rate of 45 mile an hour over a bad piece of track, since he assumed the risk of injury from the violation of his orders. *Kendrick v. Chicago & E. I. R. Co.*, 188 Ill. App. 172.

##### Riding on Engine.

Where a head brakeman was injured while riding on the engine of an interstate passenger train, the fact that a rule of the carrier prohibited persons riding on engines, except employees in the discharge of their duties, without an order from the superintendent, he cannot be charged in an action based on the Federal Employers' Liability Act, with assumption of the risk of injury, where it was customary for the head brakemen to ride on engines in the

discharge of their duties, and on the day of his injury the plaintiff was expressly directed by his conductor to do so. *Pelton v. Illinois C. R. Co.*, 171 Ia. 91, 150 N. W. 236, writ of error dismissed 239 U. S. 655, 60 L. ed. —, 36 Sup. Ct. Rep. 166.

#### (i) Stepping from Train Standing on Bridge At Night.

It cannot be said as a matter of law, in an action based on the Federal Employers' Liability Act, that a train porter assumed the risk of injury, where, on being directed by his conductor at night to take an oil can to the engineer when the train stopped at a water tank, he was injured by stepping off a car on the unfloored side of a trestle of the existence of which he was unaware. *Missouri, K. & T. R. Co. v. Bunkley*, — Tex. Civ. App. —, 153 S. W. 937.

#### (j) Boarding Moving Train.

##### Inexperienced Employee.

Where a minor boarded an engine under a permit, in order to be instructed in firing, and, when the engineer suggested that he would learn quicker on a heavier train, he voluntarily left such engine and was injured while attempting to board that of a heavier train at a point it passed under "slow" orders, it was held, in an action founded on the Federal Employers' Liability Act, that in the absence of evidence of negligence on the part of those in charge of the engines, the plaintiff assumed the risk of injury. *Cincinnati, N. O. & T. P. R. Co. v. Wheeler*, 160 Ky. 215, 169 S. W. 690.

#### 7. Insufficient Number of Employees.

##### In General.

A member of a crew engaged in removing defective and rotten bents or piles from a bridge was held, in an action under the Federal Employers' Liability Act, to have assumed the risk of injury from doing the work with an insufficient number of men. *Marshall v. Chicago, R. I. & P. R. Co.*, — Minn. —, 155 N. W. 208.

Where a section hand was injured while he and three coemployees, at the direction of their foreman, were moving on round spike maul handles, a switch tie weighing from 800 to 1000 pounds, it cannot be said in an action based on the Federal Employers' Liability Act, that the plaintiff assumed the risk of injury from the negligence of the foreman in requiring the work to be performed by an insufficient number of men, where the plaintiff had no experience in handling ties of that character. *Missouri, K. & T. R. Co. v. Scott*, — Ter. Civ. App. —, 160 S. W. 432.

A member of a section gang who, while assisting, at the direction of his foreman, in removing a heavy motor car from a track in the face of a rapidly approaching passenger train at a time when immediate action was necessary, was held, in an action based on the Federal Employers' Liability Act, not to have assumed the risk of injury from attempting to remove the car with an insufficient number of men. *Missouri, K. & T. R. Co. v. Freeman*, — Tex. Civ. App. —, 168 S. W. 69.

A section foreman who was injured when the additional weight of a heavy hand-car was thrown on him by the giving out of a coemployee while they were removing the car from the track in the face of an approaching train, was held in an action under the Federal Employers' Liability Act to have assumed the risk of injury where he was aware of the weight of the car. *Texas & P. R. Co. v. White*, — Tex. Civ. App. —, 177 S. W. 1185.

An experienced brakeman was held, in an action under the Federal Employers' Liability Act, to have assumed the risk of injury from the failure of a carrier to furnish a sufficient number of men to handle a heavy box which the brakeman undertook to move alone under the impression that he was physically capable of doing so. *St. Louis & S. F. R. Co. v. Snowden*, — Okl. —, 149 Pac. 1083.

#### 8. Unguarded Machinery.

##### Circular Saw.

Under the Federal Employers' Liability Act of 1906, a car shop employee of an interstate carrier did not assume the risk of injury from an unguarded circular saw. *Malloy v. Northern P. R. Co.*, 151 Fed. 1019.

##### Pump Engine Gearing.

A railway employee who was familiar with a gasoline engine used for pumping water for the engines of an interstate carrier, can not, in an action based on the Federal Employers' Liability Act, be held to have assumed the risk of injury from catching his arm in the unguarded gearing of the engine when he slipped on a greasy floor or his coat was caught in the fly wheel or shaft of the engine. *Knapp v. Great N. R. Co.*, 130 Minn. 405, 153 N. W. 848, affirmed 240 U. S. 464, — L. ed. —, 36 Sup. Ct. Rep. 399.

#### 9. Charged Electric Wires.

##### On Overhead Bridge.

An experienced engineer who was familiar with and who had been warned of the danger, was held in an action under the Federal Employers' Liability Act, to have assumed the risk of injury from a heavily

charged electric trolley wire where it passed under an overhead bridge above the track into the proximity of which he came and was killed when he was on the tender of his engine inspecting the water supply. *Farley v. New York, N. H. & H. R. Co.*, 88 Conn. 409, 91 Atl. 651.

Where a railway employee received a fatal shock of electricity while working on a bridge repairing electrical apparatus which permitted the electric transmission to be broken or interrupted by circuit breakers, the jury in an action founded on the Federal Employers' Liability Act, were justified in finding that the decedent did not assume the risk of injury, where he was not aware and had no reason to suppose, that the apparatus was charged with electricity. *Millette v. New York W. & B. R. Co.*, 169 App. Div. 126, 154 N. Y. Supp. 792.

#### 10. Improper Method of Doing Work.

##### When Due to Master's Negligence.

Even though an employee knows of and assumes the risks of an inherently dangerous method of doing work, he does not, under the Federal Employers' Liability Act, assume the increased risk attributable not to the method but to the negligence of the employer in pursuing it. *Chesapeake & O. R. Co. v. Proffitt*, 241 U. S. 462, 60 L. ed. —, 36 Sup. Ct. Rep. 620; affirming 134 C. C. A. 37, 218 Fed. 23.

##### Removing Earth With Plow From Cars on Curve.

Where, while standing on the inside of a curve in order to relay signals to an engineer as earth and stone were removed from flat cars with a plow, a brakeman was injured when the cable used for drawing the plow, slipped from the cars because of the curve in the track, it was held in an action under the Federal Employers' Liability Act, that it could not be said as a matter of law that he assumed the risk of injury where he had no control over the work and did not know that it was being improperly done without proper or necessary appliances. *Louisville & N. R. Co. v. Henry* 167 Ky. 151, 180 S. W. 74.

##### Falling from Standpipe.

A pumpman who after repairing a slight defect in a valve of a water column, was injured by slipping from the wet spout as he was descending, was held, in an action under the Federal Employers' Liability Act, to have assumed the risk of injury. *Davis v. Chesapeake & O. R. Co.*, 166 Ky. 490, 179 S. W. 422.

##### Removing Rotten Bents from Bridge.

Where a member of a crew who, while removing defective and rotten bents or

piles from a bridge by sawing them off close to the ground, then working them loose from the drift bolts that held them at the top and letting them fall to the ground, was injured by the sudden fall of a bent which was rotten at the top, he cannot recover under the Federal Employers' Liability Act, where he knew that the bents were rotten and unsafe for use, although he did not know that the one which caused his injury was rotten, since under the circumstances he assumed the risk of injury. *Marshall v. Chicago, R. I. & P. R. Co.*, — Minn. —, 155 N. W. 208.

#### **Failure to Protect from Flying Chips.**

Where a helper, who was holding with an iron bar a journal box attached to a locomotive driving wheel as a machinist was chipping the box with a chisel, at the direction of the latter dropped the bar when the box was being turned over, and, as he stooped to pick up the bar, the machinist began chipping and a piece of metal flew into the helper's eye and destroyed it, it can not be said as a matter of law in an action under the Federal Employers' Liability Act, that the helper assumed the risk of injury, where it was a general practice to use a board, box, broom or piece of canvas to catch the chips from such work. *Siegesmund v. Chicago, M. & St. P. R. Co.*, 144 C. C. A. 238, 229 Fed. 956.

### **11. Objects Falling from Passing Trains.**

#### **Coal.**

A track hand cannot be charged, in an action based on the Federal Employers' Liability Act, with having assumed the risk of injury from a lump of coal falling from the tender of a rapidly moving train, where he did not know that it was improperly loaded and had no opportunity to observe and appreciate the danger therefrom, notwithstanding that on former occasions similar accidents had occurred. *Cincinnati, N. O. & T. P. R. Co. v. Claybourn*, — Ky. —, 183 S. W. 903.

#### **Acting in Emergency.**

A track hand cannot, as a matter of law, be charged with contributory negligence in an action under the Federal Employers' Liability Act, where, on the sudden approach at high speed of a train in violation of a cautionary signal, he attempted at the order of his foreman to remove a jack from the track and on his inability to do so, instead of remaining where he was, there being but little space between the track and the side of a bluff, he attempted to cross the track in front of the train and was killed, if he acted in the emergency as a person of ordinary caution would have done. *Cincinnati, N. O. & T. P. R. Co. v. Jones*, — Ky. —, 186 S. W. 897.

Where a track hand, on the sudden approach of a train at high speed in violation of a cautionary signal, attempted, at the order of his foreman, to remove a jack from the track and on his inability to do so, instead of remaining where he was, there being but little space between the track and a bluff, he attempted to cross the track in front of the train and was killed, he cannot, in an action under the Federal Employers' Liability Act, be held, as a matter of law, to have assumed the risk of injury because he failed to choose the safest course open to him, if he acted in the emergency as an ordinarily careful person would have done. *Cincinnati, N. O. & T. P. R. Co. v. Jones*, — Ky. —, 186 S. W. 897.

### **X. CONTRIBUTORY NEGLIGENCE.**

Instructions as to contributory negligence, see *infra* XIX, E, 5.

When contributory negligence jury question, see *infra* XIX, C, 3, (f).

#### **A. In General.**

#### **Distinction Between Contributory Negligence and Assumed Risk.**

The distinction between contributory negligence and assumption of risk within the meaning of the Federal Employers' Liability Act lies in the different states of mind in which they are rooted, negligence being the result of inattention or oversight, while assumption of risk implies knowledge of danger and willingness to encounter it. *Cross v. Chicago, B. & Q. R. Co.*, — Mo. App. —, 186 S. W. 1130, S. C. 191 Mo. App. 202, 177 S. W. 1127.

#### **What Law Determines Contributory Negligence.**

Effect of state laws on question of contributory negligence, see *Infra* XVI, D, 3, (d).

What constitutes contributory negligence in an action based on the Federal Employers' Liability Act, is to be determined in a state court by the common-law rules. *Hawkins v. St. Louis & S. F. R. Co.* 189 Mo. App. 201, 174 S. W. 129.

The rule as to what amounts to contributory negligence was not altered by the Federal Employers' Liability Act, the effect of the act being merely to change the rule as to the issue of damages so that an affirmative finding of such negligence tends only to reduce the amount of the plaintiff's recovery. *Raines v. Southern R. Co.*, 169 N. C. 189, 85 S. E. 294.

#### **When Contributory Negligence Not in Issue.**

Neither the pleadings nor the evidence present the question of contributory neg-

ligence where an engineer, with knowledge of a fireman's position, started an engine as the latter was descending from the tender on the coal gate, and made a coupling with such unusual and unnecessary violence as to break the fireman's hold and to throw him to the floor of the cab. *Delano v. Roberts*, — Mo. App. —, 182 S. W. 771.

#### Submission of Question to Jury.

The defendant was not prejudiced by the submission to the jury of the question of the plaintiff's contributory negligence in an action for injuries received in consequence of defective coupling apparatus, since more favorable to the defendant than it was entitled, as contributory negligence, as a defense in such a case, is abolished by the Federal Employers' Liability Act. *Clark v. Erie R. Co.*, 230 Fed. 478.

### B Effect of Federal Act on Common-Law Rule.

#### 1. In General.

(No decisions.)

#### 2. As Complete Defense.

#### In General.

Contributory negligence as a complete defense to an action for injuries or the death of a person while employed in interstate commerce, was abolished by the Federal Employers' Liability Act. *Seaboard A. L. R. v. Tilghman*, 237 U. S. 499, 59 L. ed. 1069, 35 Sup. Ct. Rep. 653, reversing 167 N. C. 163, 83 S. E. 315, 1090; *Portland Term. Co. v. Jarvis*, — C. C. A. —, 227 Fed. 8; *Chicago G. W. R. Co. v. McCormack*, 118 C. C. A. 527, 200 Fed. 375, 47 L. R. A. (N. S.) 18; *Sandidge v. Atchison, T. & S. F. R. Co.*, 113 C. C. A. 653, 193 Fed. 867; *Southern R. Co. v. Peters*, — Ala. —, 69 So. 611; *St. Louis, I. M. & S. R. Co. v. Rodgers*, 118 Ark. 263, 176 S. E. 696; *Neil v. Idaho & N. W. R. R.*, 22 Idaho 74, 125 Pac. 331; *Mattocks v. Chicago & A. R. Co.*, 187 Ill. App. 529; *Hall v. Vandalia R. Co.*, 169 Ill. App. 12; *Pitts., C. & St. L. R. Co. v. Farmers' T. & S. Co.*, — Ind. —, 108 N. E. 108; *Kenyon v. Illinois C. R. Co.*, — Ia. —, 155 N. W. 810; *Byram v. Illinois C. R. Co.*, — Ia. —, 154 N. W. 1006; *Duggan v. Missouri P. R. Co.*, 96 Kan. 249, 150 Pac. 557; *Hackney v. Missouri, K. & T. R. Co.*, 96 Kan. 30, 149 Pac. 421; *Cole v. Atchison, T. & S. F. R. Co.*, 92 Kan. 132, 139 Pac. 1177; *Louisville & N. R. Co. v. Winkler*, 162 Ky. 843, 173 S. W. 151, 9 N. C. C. A. 146; *Cincinnati, N. O. & T. P. R. Co. v. Eastham*, 160 Ky. 458, 169 S. W. 886, L. R. A. 1915 C. 27; *Jones v. Kansas City S. R. Co.*, 177 La. 178, 68 So. 401; *Bombolis v. Minneapolis & St. L. R. Co.*, 128 Minn. 112, 150 N. W. 385; *La Mere v. Railway Transfer Co.*, 125 Minn. 159, 145 N. W.

1068, Ann. Cas. 1915 C. 667; *Wiles v. Great N. R. Co.*, 125 Minn. 348, 147 N. W. 427, 5 N. C. C. A. 60; *McDonald v. Railway Transfer Co.*, 121 Minn. 273, 141 N. W. 177; *Fish v. Chicago, R. I. & P. R. Co.*, 263 Mo. 106, 172 S. W. 340, 8 N. C. C. A. 538; *Cross v. Chicago, B. & Q. R. Co.*, — Mo. App. —, 177 S. W. 1127; *Hawkins v. St. Louis & S. F. R. Co.*, 189 Mo. App. 201, 174 S. W. 129; *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328; *Huxoll v. Union P. R. Co.*, 99 Neb. 170, 155 N. W. 900; *Gee v. Lehigh V. R. Co.*, 163 App. Div. 274, 148 N. Y. Supp. 882; *Saunders v. Southern R. Co.*, 167 N. C. 375, 83 S. E. 573; *Lloyd v. Southern R. Co.*, 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489, affirmed 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210; *Kenney v. Seaboard A. L. R. Co.*, 165 N. C. 99, 80 S. E. 1078; *Chadwick v. Oregon-W. R. & N. Co.*, 74 Ore. 19, 144 Pac. 1165; *Carter v. Kansas City S. R. Co.*, — Tex. Civ. App. —, 155 S. W. 638; *Missouri, K. & T. R. Co. v. Bunkley*, — Tex. Civ. App. —, 153 S. W. 937; *Southern R. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99; *White v. Cent. of Vt. R. Co.*, 87 Vt. 330, 89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865; *Fogarty v. Northern P. R. Co.*, 74 Wash. 397, 133 Pac. 609, S. C. 85 Wash. 90, 147 Pac. 652; *Easter v. Virginian R. Co.*, — W. Va. —, 86 S. E. 37.

Contributory negligence is a partial and not a complete defense to an action founded on the Federal Employers' Liability Act. *Arizona E. R. Co. v. Bryan*, — Ariz. —, 157 Pac. 376; *Louisville & N. R. Co. v. Holloway*, 163 Ky. 125, 173 S. W. 343.

Contributory negligence is not a bar to an action under the Federal Employers' Liability Act, where the negligence of an employer is also a proximate cause of an employee's injury. *Koukouris v. Union P. R. Co.*, — Mo. App. —, 186 S. W. 545.

No degree of negligence on the part of a railway employee, however gross or proximate, can, as a matter of law, bar a recovery under the Federal Employers' Liability Act. *Penn. R. Co. v. Cole*, 131 C. C. A. 244, 214 Fed. 948.

The fact that an employee participated in the act which caused his injury does not preclude a recovery under the Federal Employers' Liability Act. *Illinois C. R. Co. v. Skaggs*, 240 U. S. 66, 60 L. ed. —, 36 Sup. Ct. Rep. 249, affirming 125 Minn. 532, 147 N. W. 1135, S. C. 124 Minn. 503, 145 N. W. 381.

The fact that the negligence of an injured employee equals or exceeds that of his employer does not preclude a recovery of any damages in an action under the Federal Employers' Liability Act. *Louisville & N. R. Co. v. Wene*, 121 C. C. A. 245, 202 Fed. 887.

The contributory negligence of an em-

ployee as a complete defense to an action under the Federal Employers' Liability Act against two defendants, is eliminated from the case by evidence that both defendants were in fact common carriers, one owning and the other operating a railway. *Copper R. & N. W. R. Co. v. Heney*, 128 C. C. A. 131, 211 Fed. 459.

The fact that an engineer, at the time he was killed in a collision with another engine which was negligently left on a crossover track so as not to clear the main track, may have acted imprudently, negligently or contrary to the rules of his employer in running an engine at night at high speed against the current of traffic, does not necessarily bar a recovery under the Federal Employers' Liability Act. *Louisville & N. R. Co. v. Fleming*, — Ala. —, 69 So. 125.

The contributory negligence of an employee engaged in interstate commerce, in walking on a railway track, will not bar a recovery under the Federal Employers' Liability Act where he was struck and killed by a negligently operated train. *Newkirk v. Pryor*, — Mo. App. —, 183 S. W. 682.

In an action under the Federal Employers' Liability Act for injuries received by a fireman in a collision caused by the negligence of the crew of another train in leaving a switch open, the former's contributory negligence in failing to warn the engineer of the open switch, the danger light of which he saw, will not defeat a recovery. *Hackney v. Missouri, K. & T. R. Co.*, 96 Kan. 30, 149 Pac. 421.

The contributory negligence of an injured employee will not bar recovery under the Federal Employers' Liability Act where an employer was negligent in the slightest degree. *Anest v. Columbia & P. S. R. Co.*, 89 Wash. 609, 154 Pac. 1100.

Evidence of contributory negligence is not admissible for the purpose of defeating an action based on the Federal Employers' Act. *Jones v. Kansas City S. R. Co.*, 137 La. 178, 68 So. 401, reversed on other grounds 241 U. S. 181, 60 L. ed. —, 36 Sup. Ct. Rep. 513.

### 3. Comparative Negligence.

#### In General.

The common-law doctrine of contributory negligence was expressly abrogated by the Federal Employers' Liability Act, and the rule of comparative negligence substituted. *Penn. R. Co. v. Cole*, 131 C. C. A. 244, 214 Fed. 948.

Where a brakeman on the sudden stopping of his train on a dark night as the result of the pulling out of a drawbar, failed to protect the rear of the train as

required by the rules of a carrier, and was killed in a rear-end collision with a closely following train which was run without negligence, and of the proximity of which the decedent was aware, there is no justification, in an action based on the Federal Employers' Liability Act, for a comparison of negligence or apportioning of effects. *Great N. R. Co. v. Wiles*, 240 U. S. 444, — L. ed. —, 36 Sup. Ct. Rep. 406, reversing 125 Minn. 348, 147 N. W. 427, 5 N. C. C. A. 60.

Under the rule of comparative negligence established by the Federal Employers' Liability Act, the jury is entitled to consider all the circumstances which characterize the negligence of either party, and which tend to fix the quantity and quality of that negligence in its relation to the sum total of the negligence of both parties, since all circumstances of aggravation or mitigation must be taken into consideration. *New York C. & St. L. R. Co. v. Niebel*, 131 C. C. A. 248, 214 Fed. 952.

### C. Reduction of Damages for Contributory Negligence.

Instructions as to reduction of damages for contributory negligence, see *infra* XIX, E, 5, (h).

Province of jury to diminish damages for contributory negligence, see *infra* XIX, C, 3, (h).

#### 1. In General.

#### Diminution of Damages.

The effect of the contributory negligence of an employee is merely to diminish the amount of his recovery in an action founded on the Federal Employers' Liability Act. *Portland Term. Co. v. Jarvis*, 141 C. C. A. 562, 227 Fed. 8, *Southern R. Co. v. Peters*, — Ala. —, 69 So. 611; *St. Louis, I. M. & S. R. Co. v. Rodgers*, 118 Ark. 263, 176 S. W. 696; *Charleston & W. C. R. Co. v. Sylvester*, 17 Ga. App. 85, 86 S. E. 275; *Neil v. Idaho & N. W. R. R.*, 22 Idaho. 74, 125 Pac. 331; *Mattocks v. Chicago & A. R. Co.*, 187 Ill. App. 529; *Hackney v. Missouri, K. & T. R. Co.*, 96 Kan. 30, 149 Pac. 421; *Duggan v. Missouri P. R. Co.*, 96 Kan. 249, 150 Pac. 557; *Cole v. Atchison, T. & S. F. R. Co.*, 92 Kan. 132, 139 Pac. 1177; *Louisville & N. R. Co. v. Winkler*, 162 Ky. 843, 173 S. W. 151, 9 N. C. C. A. 146; *Bombolis v. Minneapolis & St. L. R. Co.*, 128 Minn. 112, 150 N. W. 385; *La Mere v. Railway Transfer Co.*, 125 Minn. 159, 145 N. W. 1068, *Ann. Cas.* 1915 C. 667, writ of error dismissed 239 U. S. 651, 60 L. ed. —, 36 Sup. Ct. Rep. 159; *Wiles v. Great N. R. Co.*, 125 Minn. 348, 147 N. W. 427, 5 N. C. C. A. 60; *McDonald v. Railway Transfer Co.*, 121 Minn. 273, 141 N. W. 177; *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328; *Gee*



v. Lehigh V. R. Co., 163 App. Div. 274, 148 N. Y. Supp. 882; Lloyd v. Southern R. Co., 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489, affirmed on other grounds 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210, Kenney v. Seaboard A. L. R. Co., 165 N. C. 99, 80 S. E. 1078; Horton v. Seaboard A. L. R. Co., 157 N. C. 146, 72 S. E. 958, S. C. 169 N. C. 108, 85 S. E. 218, affirmed 239 U. S. 595, — L. ed. —, 36 Sup. Ct. Rep. 180; Chadwick v. Oregon, W. R. & N. Co., 74 Oreg. 19, 144 Pac. 1165; Carter v. Kansas City S. R. Co., — Tex. Civ. App. —, 155 S. W. 638; Missouri, K. & T. R. Co. v. Bunkley, — Tex. Civ. App. —, 153 S. W. 937; Southern R. Co. v. Jacobs, 116 Va. 189, 81 S. E. 99; Easter v. Virginian R. Co., — W. Va. —, 86 S. E. 37.

Contributory negligence which would defeat an action under the state laws, merely reduces the amount of the recovery in an action based on the Federal Employers' Liability Act. Cincinnati, N. O. & T. P. R. Co. v. Eastham, 160 Ky. 458, 169 S. W. 886, L. R. A. 1915 C. 27.

It is only such negligence on the part of an injured employee as is "causal" which will reduce the amount of his recovery under the Federal Employers' Liability Act. Illinois C. R. Co. v. Porter, 125 C. C. A. 55, 207 Fed. 311.

The contributory negligence of an employee in walking on a railway track will not bar a recovery under the Federal Employers' Liability Act, but merely diminishes the damages, where he was struck and killed by a negligently operated train. Newkirk v. Pryor, — Mo. App. —, 183 S. W. 682.

## 2. Method of Reduction.

### In General.

Where the negligence resulting in injury to a railway employee was attributable partly to him and partly to his employer, he cannot recover full damages under the Federal Employers' Liability Act, but only a diminished amount bearing the same relation to the full damages as the negligence of the carrier bears to the negligence attributable to both; the purpose of the Act being to exclude from the recovery a proportional part of the damages corresponding to the employee's contribution to the total negligence. Seaboard A. L. R. Co. v. Tilghman, 237 U. S. 499, 59 L. ed. 1069, 35 Sup. Ct. Rep. 653, reversing 167 N. C. 163, 83 S. E. 315, 1090.

The contributory negligence of an injured employee reduces his damages in the proportion the negligence attributable to him compares to the combined negligence of himself and the defendant. White v. Central Vermont R. Co., 87 Vt.

330, 89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916 B. 252, 9 N. C. C. A. 265.

The damages in an action under the Federal Employers' Liability Act, should be diminished for the plaintiff's contributory negligence in proportion to the amount of fault attributable to him, only when the causal negligence is partly attributable to him and partly to his employer. Southern R. Co. v. Peters, — Ala. —, 69 So. 611.

The damages, in an action under the Federal Employers' Liability Act, should be diminished for the contributory negligence of the plaintiff in proportion to the amount of negligence attributable to him, so that he will recover only such proportionate part of his full damages as bears the same relation to the full amount as the negligence attributable to the defendant bears to the entire negligence of both. Cincinnati, N. O. & T. P. R. Co. v. Goode, 163 Ky. 60, 173 S. W. 329.

The effect of an employee's contributory negligence is to preclude a full recovery under the Federal Employers' Liability Act, and he is entitled only to such a proportionate amount as bears the same relation to the full amount as the negligence attributable to the defendant bears to the entire negligence of both of them. Louisville & N. R. Co. v. Holloway, 163 Ky. 125, 173 S. W. 343.

Where, in an action under the Federal Employers' Liability Act, the causal negligence is partly attributable to the decedent and partly to his employer, there can be a recovery of but a proportionate amount of the plaintiff's damages, bearing the same relation to the full amount as the negligence attributable to the employer bears to the negligence attributable to both. Louisville & N. R. Co. v. Heinig, 162 Ky. 14, 171 S. W. 853.

Where the negligence causing injury to a railway employee is partly attributable to him and partly to his employer, the former can not recover full damages in an action under the Federal Employers' Liability Act, but only a proportionate amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both. Cross v. Chicago, B. & Q. R. Co., — Mo. App. —, 177 S. W. 1127.

The contributory negligence of a deceased employee diminishes the damages recoverable under the Federal Employers' Liability Act in proportion to the amount of negligence attributable to him. Birch v. American R. Co., 5 Porto Rico Fed. Rep. 273, reversed on other grounds 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603.

The Federal Employers' Liability Act requires the jury, in diminishing damages for the contributory negligence of the plaintiff, to determine the full amount of damages caused by the joint negligence of himself and the defendant, and also to determine the amount of damage caused by the contributory negligence of the plaintiff and to deduct from the whole amount of negligence, the amount found as contributory negligence, and the remainder constitutes the amount the plaintiff is entitled to recover if anything. *Arizona E. R. Co. v. Bryan*, — Ariz. —, 157 Pac. 376.

In estimating damages in an action under the Federal Employers' Liability Act, if the jury find that the plaintiff's injury was caused in part by his own and in part by the defendant's negligence, they must subtract from the total damages they may find for the plaintiff such sum as they believe from the evidence was proportionate to the amount of negligence attributable to the plaintiff in causing his injury; that is to say, if the negligence of both parties was an equally efficient cause in producing the injury, the plaintiff can be allowed but one-half the damages suffered by him, while if the plaintiff's negligence was one-fourth and the defendant's three-fourths of the total producing negligence, the plaintiff should be allowed the damages suffered by him, less one-fourth attributable to him, while if the plaintiff's negligence was three-fourths and the defendant's one-fourth of the total negligence, the plaintiff may recover the damages suffered by him less the three-fourths attributable to him, and so on for any other proportionate negligence. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

#### **D. Effect of Violation of Safety Statutes.**

##### **1. In General.**

(No decisions.)

##### **2. What Statutes Within Act.**

###### **(a) In General.**

#### **Federal Laws.**

Federal statutes only are within Section 3 of the Federal Employers' Liability Act, abolishing the defense of contributory negligence where the violation by a carrier of "any statute enacted for the safety of employees contributes to the injury or death of such employee." *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, L. R. A. 1915 C. 1, Ann. Cas. 1915 B. 475, 8 N. C. C. A. 834, reversing 162 N. C. 424, 78 S. E. 494; *Oberlin v. Oregon-W. R. & N. Co.*, 71 Oreg. 177, 142 Pac. 554; *Lauer v. Northern P. R. Co.*, 83 Wash. 465, 145 Pac. 606.

#### **(b) Boiler Inspection Act.**

##### **Explosion of Defective Water Gauge Glass.**

Where a locomotive fireman was injured by the explosion of a defective water gauge glass which he was repairing, there was such a violation of the Federal Boiler Inspection Act, as under Section 3 of the Federal Employers' Liability Act, to preclude charging him with contributory negligence for failing to cut off the steam and water from the glass to drain it before attempting to make repairs. (*Per Shelby, C. J. dissenting.*) *Atchison, T. & S. F. R. Co. v. Hines*, 127 C. C. A. 632, 211 Fed. 264.

#### **(c) Hours of Labor Act.**

##### **Breach.**

A breach of the Hours of Service Act does not deprive a carrier of the defense of contributory negligence in an action under the Federal Employers' Liability Act, unless such breach contributed to the plaintiff's injury. *Atchison, T. & S. F. R. Co. v. Swearingen*, 239 U. S. 339, — L. ed. —, 36 Sup. Ct. Rep. 121.

#### **(d) Safety Appliance Act.**

Using defective safety appliances as contributory negligence, see Safety Appliance Act, VII, H, 2.

##### **In General.**

Under the provisions of the Federal Employers' Liability Act, contributory negligence is not a defense to nor does it tend to diminish the damages in an action for injuries received by an employee as the result in whole or in part of a carrier's violation of the Federal Safety Appliance Act. *Lucas v. Peoria & E. R. Co.*, 171 Ill. App. 1; *Thornboro v. Kansas City, M. & O. R. Co.*, 91 Kan. 684, 139 Pac. 410; *Ahrens v. Chicago, M. & St. P. R. Co.*, 121 Minn. 335, 141 N. W. 297; *La Mere v. Railway Trans. Co.*, 125 Minn. 159, 145 N. W. 1068, Ann. Cas. 1915 C. 667; *Burho v. Minneapolis & St. L. R. Co.*, 121 Minn. 326, 141 N. W. 300; *Montgomery v. Carolina & N. W. R. Co.*, 169 N. C. 249, 85 S. E. 139, S. C. 163 N. C. 597, 80 S. E. 83; *Montgomery v. Carolina & N. W. R. Co.*, 163 N. C. 597, 80 S. E. 83, S. C. 169 N. C. 249, 85 S. E. 139; *Steele v. Atlantic C. L. R. Co.*, — S. C. —, 87 S. E. 639; *San Antonio & A. P. R. Co. v. Wagner*, — Tex. Civ. App. —, 166 S. W. 24; *Birch v. American R. Co.*, 5 Porto Rico Fed. Rep. 273, reversed on other grounds 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603.

A carrier's violation of the Safety Appliance Act need not be the sole efficient cause of an employee's injury to bring an

action within the clause of the Federal Employers' Liability Act declaring that contributory negligence shall not be a defense where such violation of the Safety Appliance Act causes or contributes to the injury or death of an employee. *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. ed. —, 36 Sup. Ct. Rep. 683, affirming 133 C. C. A. 370, 217 Fed. 518.

Under the provisions of the Federal Employers' Liability Act declaring that an employee shall not be held guilty of contributory negligence when a violation by a carrier of any safety statute contributes to his injury or death, no act on the part of an employee, however negligent and irrespective of the extent it in fact contributes to his injury, can be urged as contributory negligence, where a carrier's failure to comply with the Safety Appliance Act contributed to such injury. *Fletcher v. South Dakota C. R. Co.*, — S. D. —, 155 N. W. 3.

Under the provisions of the Federal Employers' Liability Act declaring that contributory negligence shall not be a defense where the violation by a carrier of some safety statute causes or contributes to the injury or death of an employee, the negligent acts which are precluded as a defense are those which in fact merely contribute to and which are not the sole cause of the result. *Fletcher v. South Dakota C. R. Co.*, — S. D. —, 155 N. W. 3.

### **E. What Amounts to Contributory Negligence.**

#### **1. In General.**

#### **Alighting at Night on Bridge.**

Where a train porter in obeying the commands of a conductor, was injured by alighting from a train at night on the unfloored side of a trestle on which the train was standing, the manner in which he did so was a question of contributory negligence rather than of assumed risk, in an action based on the Federal Employers' Liability Act. *Missouri K. & T. R. Co. v. Bunkley*, — Tex. Civ. App. —, 153 S. W. 937.

#### **Brakeman Firing Engine by Conductor's Orders.**

A freight brakeman was held, in an action founded on the Federal Employers' Liability Act, not to have been guilty of contributory negligence in obeying an order from his conductor to fire an engine while the latter was running it during the absence of the regular crew in the caboose of a freight train eating dinner. *Martin v. Atchison, T. & S. F. R. Co.*, 93 Kan. 681, 145 Pac. 849.

#### **Electric Shocks.**

Where a railway employee was killed by a shock while at work on a bridge repairing an electric apparatus which permitted the electric transmission to be interrupted by circuit breakers, the jury in an action based on the Federal Employers' Liability Act, were justified in finding that the decedent was not guilty of contributory negligence, where he was not aware and had no reason to suppose, that the apparatus was charged with electricity. *Millette v. New York, W. & B. R. Co.*, 169 App. Div. 126, 154 N. Y. Supp. 792.

#### **Failure to Avoid Train After Due Warning.**

A finding that the negligence of a track hand contributed to his death is sustained, in an action under the Federal Employers' Liability Act, by evidence that he had sufficient time to avoid the train which struck him, after its whistle was sounded, when half a mile away. *Delaware, L. & W. R. Co. v. Caboni*, 139 C. C. A. 177, 223 Fed. 631.

#### **Kicking Couplers into Line.**

Where a switchman was injured by attempting, in an emergency, to kick into place the coupler of a switch engine, instead of taking some other precaution for his safety, his conduct was held, in an action under the Federal Employers' Liability Act, to amount to contributory negligence rather than an assumption of the risk. *Trowbridge v. Kansas City & W. B. R. Co.*, — Mo. App. —, 179 S. W. 777.

The contributory negligence of a switchman was not so conclusively shown as to bar as a matter of law, an action under the Federal Employers' Liability Act for injuries sustained when, on observing that his signal to stop a switch engine was not going to be obeyed, he attempted to kick the coupler of the engine into position so as to meet that of the car to which a coupling was to be made. *Trowbridge v. Kansas City & W. B. R. Co.*, — Mo. App. —, 179 S. W. 777.

#### **Removing Hand-Car from Track.**

For a section foreman and his crew to attempt to remove a hand-car from a track in order to avert a collision with a rapidly approaching passenger train, was held in an action under the Federal Employers' Liability Act, not negligence as a matter of law. *Nelson v. Northern P. R. Co.*, 50 Mont. 516, 148 Pac. 388.

#### **Posts in Tunnel.**

An engineer is not chargeable with contributory negligence, in an action based on the Federal Employers' Liability Act, where his head came in contact with a

post set in a tunnel with a clearance of but six inches between it and the side of a locomotive cab, while he was looking from the cab window operating the injector in an emergency, and it appeared that the posts could have been set further away from the track without additional expense to the defendant. *St. Louis, I. M. & S. R. Co. v. Conley*, 110 C. C. A. 97, 187 Fed. 949.

### Standing Close to Track.

An inexperienced section hand between fifteen and sixteen years of age, who was struck and killed by a train he attempted to flag, cannot be charged with contributory negligence in an action founded on the Federal Employers' Liability Act, because he stood too close to the track, if the accident did not result from his failure to exercise that degree of care which one of his age and knowledge should have exercised for his own safety under similar circumstances. *Raines v. Southern R. Co.*, 169 N. C. 189, 85 S. E. 294.

## 2. Failure to Inspect.

### In General.

The failure of a brakeman to inspect a car before moving it, as the rules of his employer required, amounts, in an action founded on the Federal Employers' Liability Act, to contributory negligence rather than an assumption of the risk. *Carter v. Kansas City S. R. Co.*, — Tex. Civ. App. —, 155 S. W. 638.

The fact that a freight conductor did not inspect a car which, with a defective drawbar, was placed in the train by a brakeman, was not sufficient in an action under the Federal Employers' Liability Act, to charge the former, who sustained an injury by reason of such defect, with contributory negligence, where it was the duty of the brakeman to inspect the car, and at the time it was placed in the train, the conductor was engaged elsewhere in the discharge of his duties. *Louisville & N. R. Co. v. Winkler*, 162 Ky. 843, 173 S. W. 151, 9 N. C. C. A. 146.

### Loaded Flat Cars.

A brakeman, in an action predicated on the Federal Employers' Liability Act, was held not negligent in failing to inspect a flat car, the improper loading of which with piles resulted in his injury, where the rules of the defendant as well as custom, cast upon the conductor the duty of inspecting such cars before they were placed in his train, although another rule required all members of the train crew to examine the cars before they were moved. *Michigan C. R. Co. v. Schaffer*, 136 C. C. A. 413, 220 Fed. 809.

## 3. Violation of Rules.

### In General.

Where, in an action under the Federal Employers' Liability Act for the death of a freight conductor in a rear end collision, the defendant's instructions were based on a supposed violation by the former of rules requiring him to see that his flagman protected the rear of his train, such rules should not be construed so as to require impossibilities of the conductor, but so as to permit the performance by him of his other duties without being chargeable with negligence or contributory negligence in case of his injury by the negligence of the defendant. *Culp v. Virginian R. Co.*, — W. Va. —, 87 S. E. 187.

The fact that a switchman was injured while between moving cars in violation of the rules of his employer, shows negligence rather than an assumption of the risk of injury, in an action based on the Federal Employers' Liability Act. *Oberlin v. Oregon, W. R. & N. Co.*, 71 Oreg. 177, 142 Pac. 554.

A freight conductor cannot be charged with negligence, in an action under the Federal Employers' Liability Act for injuries caused by the giving away of the steps of a caboose, by reason of the fact that a rule of his employer required him to keep his caboose clean, and all tools and appliances in their proper places and in good order. *Cincinnati, N. O. & T. P. R. Co. v. Goldston*, 163 Ky. 42, 173 S. W. 161.

A brakeman who while riding on an engine was injured in a collision caused by the engineer passing a meeting point, was held guilty of contributory negligence in an action based on the Federal Employers' Liability Act, where, in violation of the carrier's rules, he carried at the request of the conductor, the meeting order to the engineer who misread it. *Duggan v. Missouri P. R. Co.*, 96 Kan. 249, 150 Pac. 557.

Where a head brakeman was injured while riding on the engine of an interstate passenger train, the fact that a rule of the carrier prohibited persons riding on engines, except employees in the discharge of their duties, without an order from the superintendent, does not, in an action based on the Federal Employers' Liability Act, charge such employee with contributory negligence, where it was customary for the head brakemen to ride on engines in the discharge of their duties, and on the occasion in question the plaintiff was expressly directed by his conductor to do so. *Pelton v. Illinois C. R. Co.*, 171 Ia. 91, 150 N. W. 236, writ of error dismissed 239 U. S. 655, 60 L. ed. —, 36 Sup. Ct. Rep. 166.

### Failure of Flagman to Signal Train.

Where a train was stopped for ten minutes by the snow on a stormy night, before

a switch could be opened so as to permit it to take a siding, the failure of the engineer to give the necessary signals, as required by a carrier's rules, for the flagman to protect the rear of the train from another which they both knew was following closely, does not, in an action founded on the Federal Employers' Liability Act for the death of the flagman in an ensuing rear end collision, excuse his contributory negligence in disregarding another rule of the carrier which required the decedent to protect the rear of his train without waiting for signals from the engineer. *New York C. & St. L. R. Co. v. Niebel*, 131 C. C. A. 248, 214 Fed. 952.

In an action under the Federal Employers' Liability Act it was held negligence for a brakeman, on signal from the engineer, to fail to protect the rear of his train with the proper signals as required by the master's rules, where he knew that another train was closely following on a night when a severe blizzard was raging. *Hadley v. Union P. R. Co.*, 99 Neb. 349, 156 N. W. 765.

#### **Failure of Fireman to Observe Engineer's Disregard of Signals.**

Where a fireman called the attention of his engineer to a signal which required the train to be brought under control, and then on the failure of the latter to observe the requirements of such signal, did nothing until too late to avert an accident, the former was held negligent in an action under the Federal Employers' Liability Act, where the rules of the defendant placed upon him the affirmative duty of co-operating with his engineer in observing and obeying signals, and the fact that, from the failure of the engineer to slacken speed, the fireman supposed that the signal had been changed to clear, will not excuse the latter's inaction. *Penn. Co. v. Sheeley*, 137 C. C. A. 471, 221 Fed. 901.

#### **Failure to Display Signals While Repairing Cars.**

The failure of a car inspector while replacing a broken knuckle in a coupler, to display a flag on the car as required by his employer's rules, was not contributory negligence which would affect the amount of the recovery under the Federal Employers' Liability Act, where he was killed by other cars moving by gravity down a slight incline in the track and striking the car on which he was working, since a compliance with such rule would not have averted the accident. *Illinois C. R. Co. v. Stewart*, 138 C. C. A. 444, 223 Fed. 30.

A car repairer cannot, in an action based on the Federal Employers' Liability Act, be held guilty of contributory negligence for violating a rule requiring the display of designated signals on cars undergoing repairs, where such a uniform and habit-

ual disregard of the rule was shown as to amount to its abrogation. *St. Louis, I. M. & S. R. Co. v. Sharp*, 115 Ark. 308, 171 S. W. 95, writ of error dismissed 238 U. S. 697, 50 L. ed. 1504, 35 Sup. Ct. Rep. 939.

It cannot be said as a matter of law, in an action based on the Federal Employers' Liability Act, that it was contributory negligence for a car inspector to go between cars on a sidetrack without first displaying the signal required by the rules of his employer where it was customary not to display such signals and he was injured by a switching crew moving such cars without first giving the customary warning, at a time when they knew or had reasons to believe that he was between the cars. *Texarkana & Ft. S. R. Co. v. Casey*, — Tex. Civ. App. —, 172 S. W. 729.

#### **Going Between Cars Without Notifying Crew.**

The violation by a switchman of a rule prohibiting employees from going between or under cars in a train until a member of the crew was notified and took precautions to prevent a movement of the train, bears only on the question of contributory negligence in an action predicated on the Federal Employers' Liability Act. *Boldt v. Penn. R. Co.*, 134 C. C. A. 175, 218 Fed. 367.

### **4. Knowledge of Danger or Defects.**

#### **In General.**

Where an engineer at night ran an engine at high speed at a point where he knew that another engine had been left so as not to clear the main track, his conduct was held, in an action under the Federal Employers' Liability Act, to amount to contributory negligence rather than an assumption of the risk. *Louisville & N. R. Co. v. Fleming*, — Ala. —, 69 So. 125.

Where a brakeman was killed by striking a timber above a sidetrack while he was on the roof of a box car, it was held in an action under the Federal Employers' Liability Act, that he might rightfully assume that such obstruction did not exist when he had no knowledge of it, and that it was not negligence for him to perform his work on the track unless the danger was apparent. *Bruckshaw v. Chicago, R. I. & P. R. Co.*, — Ia. —, 155 N. W. 273.

#### **Absence of Guard Glass from Water Gauge.**

An engineer who was injured by the explosion of a water gauge glass cannot be charged as a matter of law with contributory negligence, in an action under the Federal Employers' Liability Act, because he used an engine which had a broken guard glass in front of the water glass, where the defect had been reported

to the defendant and a promise made to remedy it. *Seaboard A. L. R. v. Horton*, 239 U. S. 595, — L. ed. —, 36 Sup. Ct. Rep. 180, affirming 169 N. C. 108, 85 S. E. 218, S. C. 157, N. C. 146, 72 S. E. 958.

#### Location of Standpipe.

A notice to trainmen of the location of a water standpipe near a track at a station, and warning them that it would not clear a man hanging too far outside a car, was not sufficient to charge a brakeman with contributory negligence in an action under the Federal Employers' Liability Act, where on a dark night he was struck and killed by the standpipe, which was but 22 inches from the side of a box car, as he leaned out from the side ladder thereof in the customary manner giving a signal to an engineer. *Fish v. Chicago, R. I. & P. R. Co.*, 263 Mo. 106, 172 S. W. 340, 8 N. C. A. 538, Ann. Cas. 1916 B. 147.

#### Obstruction on Roundhouse Floor.

A roundhouse hostler was guilty of contributory negligence within the meaning of the Federal Employers' Liability Act, where, with knowledge that an old piece of hose had been lying on the floor of the roundhouse for several days, he placed a ladder beside it in order to clean a locomotive, and when he descended stepped on the hose and sprained his ankle. *Cross v. Chicago, B. & Q. R. Co.*, — Mo. App. —, 177 S. W. 1127, S. C. second appeal — Mo. App. —, 186 S. W. 1130.

Where a roundhouse employee was injured by stepping from a ladder onto a piece of scrap hose that had been negligently permitted to remain on the floor for several days, his conduct in stepping from the ladder without looking where he stepped will be regarded, in an action under the Federal Employers' Liability Act, as contributory negligence, since a positive act on his part coupled with a neglect or omission to observe care for his own safety. *Cross v. Chicago, R. I. & P. R. Co.*, — Mo. App. —, 186 S. W. 1130, S. C. 191 Mo. 202, 177 S. W. 1127.

#### 5. Improper Method of Doing Work.

##### Improper Way of Riding Car.

Where, as the result of a carrier's negligence, a switchman was thrown from a flat car as he was riding with his feet in the stirrup and holding with one hand to a cleat on the floor, in the act of uncoupling the car or completing an intended kicking movement, his conduct presents a question of contributory negligence rather than of assumed risk. *Bolch v. Chicago, M. & St. P. R. Co.*, — Wash. —, 155 Pac. 422.

##### Poling Cars.

A switchman who was killed while "pol-

ing" a freight car cannot, as a matter of law, be charged with contributory negligence in an action based on the Federal Employers' Liability Act, because he rode on the engine instead of standing on the ground while holding a piece of timber between the car and engine in order to perform such operation, or because he selected for that purpose a timber but 34 inches in length. *Sweet v. Chicago & N. W. R. Co.*, 157 Wis. 400, 147 N. W. 1054.

The fact that a switchman did not instruct his foreman as to the proper method of "poling" a freight car, which both were engaged in doing when the former was killed, was not affirmative proof of the contributory negligence of the decedent, in an action under the Federal Employers' Liability Act. *Sweet v. Chicago & N. W. R. Co.*, 157 Wis. 400, 147 N. W. 1054.

#### 6. Failure to Observe Danger.

##### Failure of Inspector on "Speeder" to Watch for Trains.

An employee inspecting a track on a "speeder," who was struck and killed by a backing engine which approached from his rear, was held guilty of contributory negligence in an action founded on the Federal Employers' Liability Act, where he did not exercise sufficient care to watch for irregular trains and engines. *Anest v. Columbia & P. S. R. Co.*, 89 Wash. 609, 154 Pac. 1100.

#### F. Necessity of Showing Freedom from Contributory Negligence.

##### In General.

An injured employee need not show his freedom from fault in order to recover under the Federal Employers' Liability Act. *Calhoun v. Central of G. R. Co.*, 10 Ga. App. 656, 73 S. E. 1077.

The plaintiff need not show himself free from fault in order to recover under the Federal Employers' Liability Act, as he may recover for the negligence of the defendant, since his own negligence merely reduces the amount of his recovery. *Charleston & W. C. R. Co. v. Brown*, 13 Ga. App. 744, 79 S. E. 932.

#### XI. FELLOW-SERVANT DOCTRINE.

Liability for negligence of fellow servants, see in general supra VII, F, 12.

#### Effect of Federal Act on Common-Law Rule.

The common-law rule exempting employers from liability for injuries to em-

ployees arising from the negligence of fellow servants was abolished by the Federal Employers' Liability Act. *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, L. R. A. 1915 C. 1, Ann. Cas. 1915 B. 475, 8 N. C. C. A. 834, reversing 162 N. C. 424, 78 S. E. 494; *Law v. Illinois C. R. Co.*, 126 C. C. A. 27, 208 Fed. 869, L. R. A. 1915 C. 17; *Devine v. Chicago, R. I. & P. R. Co.*, 266 Ill. 248, 107 N. E. 595, affirming 185 Ill. App. 488, affirmed 239 U. S. 52, 60 L. ed. —, 36 Sup. Ct. Rep. 27; *Southern R. Co. v. Howerton*, 182 Ind. 208, 232, 106 N. E. 369, 105 N. E. 1025, reversing — Ind. App. —, 101 N. E. 121, 103 N. E. 121; *Carter v. Kansas City S. R. Co.*, — Tex. Civ. App. —, 155 S. W. 638.

## XII. LAST CLEAR CHANCE DOCTRINE.

### Effect of Federal Act On.

The last clear chance doctrine was not abrogated by the Federal Employers' Liability Act. *Gray v. Southern R. Co.*, 167 N. C. 433, 83 S. E. 849, reversed on other grounds 241 U. S. 333, 60 L. ed. —, 36 Sup. Ct. Rep. 558.

## XIII. WHO ENTITLED TO BENEFIT OF ACT.

When evidence sufficient to take question of dependency to jury, see *infra* XIX, C, 2, (c).

Where dependency question for jury, see *infra* XIX, C, 3, (k).

### A. In General.

#### For Whose Benefit Act Intended.

The liability created by the Federal Employers' Liability Act is exclusively for the benefit of the employees of a carrier and the persons described in the act. *Robinson v. Baltimore & O. R. Co.*, 237 U. S. 84, 59 L. ed. 849, 35 Sup. Ct. Rep. 491, affirming 40 App. D. C. 169, L. R. A. 1915 D. 510.

A recovery can be had under the Federal Employers' Liability Act only in the mode and by and for the persons or class of persons in whose favor the law creates a right of action. *Seaboard A. L. R. Co. v. Kenney*, 240 U. S. 489, 60 L. ed. —, 36 Sup. Ct. Rep. 458, affirming 167 N. C. 14, 82 S. E. 968.

#### Prior to Amendment of 1910.

Prior to the amendment of 1910 two distinct rights of action were created by the Federal Employers' Liability Act, one on behalf of the injured employee himself when his injuries were not either imme-

diately or subsequently fatal, and on his death another cause of action vested in his personal representative for the pecuniary loss sustained by the beneficiaries described in the Federal Law. *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. ed. 1160, 35 Sup. Ct. Rep. 704, 9 N. C. C. A. 754, affirming 115 Ark. 483, 171 S. W. 1185; *Garrett v. Louisville & N. R. Co.*, 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32, affirming 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769; *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 193, Ann. Cas. 1914 C. 176, reversing 189 Fed. 495.

### B. Employees of Carriers Other than Defendant.

#### Relation of Master and Servant Necessary.

Where an employee of one railway company was injured by the negligence of another company while he was moving cars engaged in interstate commerce over the tracks of another company, he cannot recover under the Federal Employers' Liability Act, from the negligent carrier for his injuries, since the relation of master and servant did not exist between them. *Wagner v. Chicago & A. R. Co.*, 265 Ill. 245, 106 N. E. 809, affirming 180 Ill. App. 196, affirmed 239 U. S. 452, — L. ed. —, 36 Sup. Ct. Rep. 135, Ann. Cas. 1916 A. 778.

A carrier whose negligence caused an injury to an employee of another carrier is not answerable therefor under the Federal Employers' Liability Act, since the relation of master and servant did not exist between the injured employee and the negligent carrier. *Kentucky & T. R. Co. v. Minton*, 167 Ky. 516, 180 S. W. 831.

An employee of a private corporation who, while at work on the latter's premises, was injured through the negligent movement by the employees of a railway company of a car engaged in interstate commerce, cannot recover against the latter company under the Federal Employers' Liability Act, since the relation of master and servant did not exist between the injured person and the railway company. *Ft. Worth, B. R. Co. v. Perryman*, — Tex. Civ. App. —, 158 S. W. 1181.

### C. In Case of Death of Employee.

#### 1. In General.

#### Nature of Action.

A new and independent cause of action for the death of an employee was created by the Federal Employers' Liability Act for the benefit of the dependent relatives named in the act. *Fogarty v. Northern P. R. Co.*, 85 Wash. 90, 147 Pac. 652, L. R. A. 1916 C. 803, S. C. 74 Wash. 397, 133 Pac. 609, L. R. A. 1916 C. 800.

Where recovery is sought in one count of a complaint for the benefit of the estate of a decedent and in another for the benefit of his widow and next of kin, the recovery in an action based on the Federal Employers' Liability Act, on both elements, must be for such beneficiaries. *St. Louis, I. M. & S. R. Co. v. Sharp*, 115 Ark. 308, 171 S. W. 95, writ of error dismissed 238 U. S. 697, 59 L. ed. 1504, 35 Sup. Ct. Rep. 939.

The Federal Employers' Liability Act as amended, creates a right of action for the benefit of the widow and next of kin of a deceased employee which is independent of the right of action given the injured person for his conscious pain and suffering. *Kansas City S. R. Co. v. Leslie*, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915 B. 834, reversed on other grounds 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844.

#### Effect of Fact That Death Not Instantaneous.

The fact that an employee survived an accident for several hours does not extinguish the liability of his employer created by the Federal Employers' Liability Act, for the benefit of the persons named in the statute. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 193, Ann. Cas. 1914 C. 176, reversing 189 Fed. 495.

### 2. Recovery for Benefit of Estate.

#### In General.

The proceeds of a recovery under the Federal Employers' Liability Act, by the personal representative of a deceased railway employee, are for the benefit of the persons mentioned in the act, and not for the estate of the deceased. *American R. Co. v. Birch*, 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603, reversing 5 Porto Rico Fed. Rep. 273.

A new cause of action was created by the Federal Employers' Liability Act in favor of certain specified beneficiaries, instead of the estate of the decedent. *McCullough v. Chicago, R. I. & P. R. Co.*, 160 Ia. 524, 142 N. W. 67, 47 L. R. A. (N. S.) 23.

The Federal Employers' Liability Act does not permit a recovery merely to compensate the estate of a decedent for his death and the consequent destruction of his earning power, but provides that only those naturally or actually dependent on him shall take the benefit of the recovery under the act. *Illinois C. R. Co. v. Doherty*, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31.

The recovery by a personal representative under the Federal Employers' Liability Act is for the benefit of the beneficiaries designated in the act instead of the

estate of the decedent. *Melzner v. Northern P. R. Co.*, 46 Mont. 277, 127 Pac. 1002.

The amount recovered by a personal representative under the Federal Employers' Liability Act is not for the benefit of the decedent's estate. *Fogarty v. Northern P. R. Co.*, 85 Wash. 90, 147 Pac. 652, L. R. A. 1916 C. 800, S. C. 74 Wash. 397, 133 Pac. 609, L. R. A. 1916 C. 800.

### 3. Recovery by Personal Representative.

#### In General.

Where an employee dies from his injuries a new and distinct cause of action arises under the Federal Employers' Liability Act, in favor of his personal representative for the benefit of the beneficiaries mentioned in the statute. *American R. Co. v. Didricksen*, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224, reversing 5 Porto Rico Fed. Rep. 401, S. C. 5 id. 427.

The right of the personal representative of a deceased railway employee to recover for the benefits of those enumerated in the Federal Employers' Liability Act, is independent of the right vested in the injured employee. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 193, Ann. Cas. 1914 C. 176, reversing 189 Fed. 495.

The right of the personal representative of a deceased railway employee to recover under the Federal Employers' Liability Act for the benefit of the persons enumerated in the statute, is not limited to cases where death was instantaneous. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 193, Ann. Cas. 1914 C. 176, reversing 189 Fed. 495.

### 4. Necessity for Existence of Beneficiaries.

#### In General.

An action will not lie under the Federal Employers' Liability Act where the decedent did not leave surviving any beneficiary of one of the classes enumerated in the act. *Illinois C. R. Co. v. Doherty*, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31.

Where there is no living representative of any of the three classes of beneficiaries designated in the Federal Employers' Liability Act, no cause of action arises thereunder. *McCullough v. Chicago, R. I. & P. R. Co.*, 160 Ia. 524, 142 N. W. 67, 47 L. R. A. (N. S.) 23.

An administrator cannot recover under the Federal Employers' Liability Act for the death of an employee who left no surviving dependent next of kin. *Cincinnati, N. O. & T. P. R. Co. v. Wilson*, 157 Ky. 460, 163 S. W. 493, 51 L. R. A. (N. S.) 308.

Proof of the existence of some surviving



beneficiary of one of the classes enumerated in the act is essential to a recovery under the Federal Employers' Liability Act. *Illinois C. R. Co. v. Doherty*, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31.

The existence of some of the beneficiaries designated in the Federal Employers' Liability Act must be proven in an action by a personal representative for the death of an employee. *Melzner v. Northern P. R. Co.*, 46 Mont. 277, 127 Pac. 1002.

When a deceased employee does not leave surviving either a widow, children, parents or other dependent next of kin, there can be no recovery for his death, under the Federal Employers' Liability Act, by a personal representative. *Long v. Lusk*, — Ark. —, 186 S. W. 601.

## 5. Who Are Beneficiaries.

### (a) In General.

#### Pecuniary Loss Essential.

The Federal Employers' Liability Act expressly limits the right to recover thereunder to cases in which only the beneficiaries designated in the statute sustain pecuniary loss by the death of a railway employee. *Illinois C. R. Co. v. Doherty*, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31.

In order to make one a beneficiary under the Federal Employers' Liability Act, he or she must have sustained some pecuniary loss on account of the death of an employee, flowing from the deprivation of the financial benefit which the beneficiary might have reasonably expected to receive had death not occurred. *Illinois C. R. Co. v. Doherty*, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31.

A surviving child cannot recover under the Federal Employers' Liability Act for the death of a father, where there is neither allegation nor proof that the former was dependent upon or had any reasonable grounds for expecting any pecuniary benefit from the continuance of the decedent's life. *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806, reversing — *Tex. Civ. App.* —, 147 S. W. 1188.

### (b) Widow.

#### Exclusive Right of Widow.

See *Infra* XIII, C, 5, (d).

The widow of a childless railway employee is entitled to the whole of the amount recovered under the Federal Employers' Liability Act, to the exclusion of his surviving parents. *Taylor v. Taylor*, 232 U. S. 363, 58 L. ed. 638, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436, reversing 204 N. Y. 135, 97 N. E. 502, *Ann. Cas.* 1913

D. 276, 144 App. Div. 634, 129 N. Y. Supp. 378.

A mother is not entitled to share in a recovery under the Federal Employers' Liability Act, where a railway employee left a surviving widow. *Goen v. Baltimore & O. S. W. R. Co.*, 179 Ill. App. 566.

#### Effect of Husband and Wife Living Apart.

There may be a recovery under the Federal Employers' Liability Act for the benefit of the widow of an employee, although they were living apart at the time of his death. *Dunbar v. Charleston & W. C. R. Co.*, 186 Fed. 175.

#### Effect of Abandonment.

There may be a recovery under the Federal Employers' Liability Act for the benefit of an abandoned wife and child of a deceased employee, since his legal duty to furnish assistance to them, together with his clearly proven ability to provide such assistance, constituted a reasonable expectation of such assistance or support even though it had not been voluntarily given. *Fogarty v. Northern P. R. Co.*, 85 Wash. 90, 147 Pac. 652, L. R. A. 1916 C. 803, S. C. 74 Wash. 397, 133 Pac. 609, L. R. A. 1916 C. 800.

### (c) Children.

#### Minor Children.

A son 16 years of age, not physically strong, who was without means of his own, with an uncompleted education, and who lived with his divorced mother, is entitled to share with his father's widow in a recovery under the Federal Employers' Liability Act for such parent's death, although the latter did not contribute to his son's support, since the father's legal duty to support his son was alone sufficient to constitute some ground for a reasonable expectation of pecuniary benefit of which he was deprived by his parent's death. *McGarvey v. McGarvey*, 163 Ky. 242, 173 S. W. 765.

#### Adult Children.

An adult son is not entitled to compensation under the Federal Employers' Liability Act for the death of his father, unless he was actually and necessarily dependent upon the decedent for support. *Birch v. American R. Co.*, 5 Porto Rico Fed. Rep. 273, reversed on other grounds 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603.

A married woman who resides with and who is maintained by her husband, cannot recover under the Federal Employers' Liability Act for the death of her father, where there is neither allegation nor proof that she was in any manner dependent upon the latter, or that she had any reason-

able expectation of any pecuniary benefit from a continuation of his life. *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806, reversing — *Tex. Civ. App.* —, 147 S. W. 1188.

#### (d) Parents.

##### Recovery for Parent's Benefit Where Decedent Leaves Widow or Children.

See *Supra* XIII, C, 5, (d).

A personal representative cannot recover under the Federal Employers' Liability Act for the benefit of the parents of a deceased railway employee without allegation and proof that the latter did not leave a surviving widow or children. *Moffett v. Baltimore & O. R. Co.*, 135 C. C. A. 607, 220 Fed. 39.

There can be no recovery under the Federal Employers' Liability Act for the benefit of a surviving dependent parent of a son who left a widow and children. *St. Louis, S. F. & T. R. Co. v. Geer*, — *Tex. Civ. App.* —, 149 S. W. 1178.

##### Adopting Parents.

Adopting parents may, to the exclusion of the natural parents, recover under the Federal Employers' Liability Act for the death of an adopted son. *Ransom v. New York, C. & St. L. R. Co.*, — *Ohio*, —, 112 N. E. 586.

##### Father of Illegitimate Son.

No provision of the common law or of the laws of North Carolina makes the father of an illegitimate son his next of kin, within the meaning of the Federal Employers' Liability Act, to the exclusion of the lawful children of the deceased mother of the illegitimate. *Seaboard A. L. R. Co. v. Kenney*, 240 U. S. 489, 60 L. ed. —, 36 Sup. Ct. Rep. 458, affirming 167 N. C. 14, 82 S. E. 968.

##### Parent Who Abandoned Wife and Children.

A father who abandoned his wife and family and who did not support them for many years is not a dependent who is entitled to share in the amount recovered under the Federal Employers' Liability Act for the death of an unmarried son. *Malone's Estate*, 24 Pa. Dist. Ct. Rep. 246.

##### Necessity of Dependency.

A personal representative of an adult son cannot recover under the Federal Employers' Liability Act for the benefit of a surviving parent, where the decedent did not contribute to the latter's support. *Carolina, C. & O. R. Co. v. Shewalter*, 128 Tenn. 363, 161 S. E. 1136, Ann. Cas. 1915

C. 605, affirmed without opinion 239 U. S. 630, — L. ed. —, 36 Sup. Ct. Rep. 166.

##### When Dependency of Parent Established.

There may be a recovery under the Federal Employers' Liability Act, for the benefit of a parent on proof of a reasonable expectation on his part of pecuniary benefit from the continuance of the life of a deceased railway employee, without showing that the parent was wholly dependent on the decedent. *Moffett v. Baltimore & O. R. Co.*, 135 C. C. A. 607, 220 Fed. 39.

Evidence that the parents of a deceased railway employee, who were old, owned a large farm which the son lived on and managed prior to entering the employ of the defendant, and that he had promised to return and help harvest the growing crops, together with proof of the value of such services, prima facie establishes such a reasonable expectation of pecuniary benefit as to permit a recovery under the Federal Employers' Liability Act for the benefit of the parents. *Garrett v. Louisville & N. R. Co.*, 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769, affirmed on other grounds 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32.

Evidence that the decedent was an unmarried man of good health, habits and character, that he had helped his father and was disposed to give him financial aid, that his parent was growing old, and, that although not actually dependent on his son at the time of the latter's death, the father could not tell how soon he might be, is sufficient to permit a recovery under the Federal Employers' Liability Act for the latter's benefit. *Dooley v. Seaboard A. L. R. Co.*, 163 N. C. 454, 79 S. E. 970.

A married woman living with a husband who was able and willing to support her, may recover under the Federal Employers' Liability Act for the death of an unmarried childless son who lived with and who habitually gave the larger portion of his earnings to his mother. *Moffett v. Baltimore & O. R. Co.*, 135 C. C. A. 607, 220 Fed. 39.

Evidence that a son lived with his mother, to whom he gave the greater portion of his earnings, is a sufficient showing of a pecuniary benefit to sustain a recovery in her behalf under the Federal Employers' Liability Act. *Moffett v. Baltimore & O. R. Co.*, 135 C. C. A. 607, 220 Fed. 39.

Evidence that a minor about 16 years old, in good health, and sober and industrious for one of his age, earned \$1.10 per day as a section hand, and that he contributed regularly to the support of his father, tends to show that in mind and disposition he was imbued with a proper con-

ception of his filial duty, and establishes such reasonable expectation on the part of the parent if his son had survived, of benefit or pecuniary aid or other advantage by gift or inheritance, sufficient to take the question of dependency to the jury in an action under the Federal Employers' Liability Act. *Raines v. Southern R. Co.*, 169 N. C. 189, 85 S. E. 294.

The pecuniary loss of surviving parents for the death of a son 21 years old is sufficiently shown, in an action under the Federal Employers' Liability Act, by evidence that he was in robust health, of good habits, industrious, and frugal, and that in addition to assisting his parents in working their small farm, he gave them small sums of money as their needs demanded. *Louisville & N. R. Co. v. Thomas*, — Ky. —, 185 S. W. 840.

Even though an unmarried son made no contributions to the support of his father, declarations on the former's part of a purpose to do so are sufficient, in an action founded on the Federal Employers' Liability Act for his death, to authorize a finding of damages in the parent's favor. *Pittsburgh, C. C. & St. L. R. Co. v. Collard*, — Ky. —, 185 S. W. 1108.

#### Contributions to One Parent Only.

In an action under the Federal Employers' Liability Act for the benefit of surviving parents who lived together, the recovery is not limited to the pecuniary loss sustained by the father, because all pecuniary assistance by the decedent had been rendered him, since such contributions inured to the benefit of both parents. *Louisville & N. R. Co. v. Thomas*, — Ky. —, 185 S. W. 840.

#### Failure to Contribute as Defense.

The fact that a son did not contribute to the support of his mother may be shown in defense of an action under the Federal Employers' Liability Act for her sole benefit. *Irvin v. Southern R. Co.*, 164 N. C. 5, 80 S. E. 78.

#### Loss of Care and Society.

Parents cannot, under the Federal Employers' Liability Act, recover for the deprivation of the society of their son, and of such care and consideration as he might have given or had for them during his life. *American R. Co. v. Didricksen*, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224, reversing 5 Porto Rico Fed. Rep. 401, S. C. 5 id. 427.

#### (e) Brothers and Sisters.

##### Adult Brothers and Sisters.

There cannot be a recovery under the Federal Employers' Liability Act for the death of an unmarried railway employee,

where his earnings were scarcely sufficient for his own support, and his surviving next of kin were an adult brother and sister with whom the decedent lived. *Collins v. Penn. R. Co.*, 163 App. Div. 452, 148 N. Y. Supp. 777.

On the death of an unmarried railway employee there can be no recovery under the Federal Employers' Liability Act for the benefit of an adult brother who was his sole surviving relative, where, although such survivor had been ill for some time and unable to work, it did not appear that the decedent ever contributed anything to his support or maintenance, or at any time gave him anything, or rendered him any services of value, and the testimony did not warrant an inference that the decedent, had he survived, would ever have done anything for such brother. *Jones v. Charleston & W. C. R. Co.*, 98 S. C. 197, 82 S. E. 415.

There can be no recovery under the Federal Employers' Liability Act for the benefit of a deceased employee's adult married sister, who was in comfortable circumstances, with whom the decedent boarded for two years prior to his death, and to whom he made monthly contributions of approximately the value of his board, since she was not dependent within the meaning of such act. *Southern R. Co. v. Vessell*, 162 Ala. 440, 68 So. 336.

A sister of a deceased railway employee to whose support he had contributed during his lifetime by gifts of money, payment of board and otherwise, was a dependent within the meaning of the Federal Employers' Liability Act, although she possessed property of her own and occupied a position which in part supported her. *Richelieu v. Union P. R. Co.*, 97 Neb. 360, 149 N. W. 772.

There may be a recovery under the Federal Employers' Liability Act for the benefit of a sister and niece of a deceased unmarried employee who left no surviving parents, where he contributed five or six dollars a month to their support, and supplied them as well with provisions, dresses, furniture, etc., his monthly contributions being in excess of his board. *Bruckshaw v. Chicago, R. I. & P. R. Co.*, — Ia. —, 155 N. W. 273.

#### Recovery for Death of Illegitimate Brother.

An action will lie under the Federal Employers' Liability Act for the benefit of dependent children born in lawful wedlock, for the death of the illegitimate unmarried, childless son of their mother, since deceased. *Kenney v. Seaboard A. L. R. Co.*, 167 N. C. 14, 82 S. E. 968, affirmed 240 U. S. 489, 60 L. ed. —, 36 Sup. Ct. Rep. 458.

There may be a recovery under the Federal Employers' Liability Act for the bene-

fit of the brothers and sisters of an illegitimate son of their deceased mother, when they are recognized by the local law as the next of kin of the deceased employee. *Seaboard A. L. R. Co. v. Kenney*, 240 U. S. 489, 60 L. ed. —, 36 Sup. Ct. Rep. 458, affirming 167 N. C. 14, 82 S. E. 968.

#### (f) Next of Kin.

##### What Law Determines Kinship.

The next of kin for whose benefit an action may be maintained under the Federal Employers' Liability Act, are to be determined according to the law of the state in which action is brought. *Kenney v. Seaboard A. L. R. Co.*, 167 N. C. 14, 82 S. E. 968, affirmed 240 U. S. 489, 60 L. ed. —, 36 Sup. Ct. Rep. 458.

##### Necessity of Dependency.

It is only when an action is prosecuted under the Federal Employers' Liability Act for the benefit of the next of kin other than the widow, children or parents of a deceased employee, that the dependency of the beneficiaries need be shown in order to permit a recovery. *Dooley v. Seaboard A. L. R. Co.*, 163 N. C. 454, 79 S. E. 970.

That those for whose benefit a personal representative prosecutes an action under the Federal Employers' Liability Act were dependent on a deceased railway employee need be shown only where recovery is sought for the benefit of "the next of kin dependent on such decedent." *Moffett v. Baltimore & O. R. Co.*, 135 C. C. A. 607, 220 Fed. 39.

There can be no recovery under the Federal Employers' Liability Act for the benefit of the next of kin of a deceased employee unless they were dependent upon the decedent at the time of his death for a substantial, if not an entire support. *Southern R. Co. v. Vessell*, 162 Ala. 440, 68 So. 336.

##### Illegitimate Son as Next of Kin to Father's Wife.

A son who was begotten after the divorce of his parents, is not such kin to his father's second wife and children as will permit a recovery for their benefit under the Federal Employers' Liability Act for the death of such son, although he had contributed to their support after his father's death. *Cincinnati, N. O. & T. P. R. Co. v. Wilson*, 157 Ky. 460, 163 S. W. 493, 51 L. R. A. (N. S.) 308.

#### (g) Aliens.

##### Recovery for Benefit.

An action may be maintained under the Federal Employers' Liability Act for the benefit of a nonresident alien. *Bombolis*

*v. Minneapolis & St. L. R. Co.*, 128 Minn. 112, 150 N. W. 385; *McGovern v. Philadelphia & R. R. Co.*, 235 U. S. 389, 59 L. ed. 283, 35 Sup. Ct. Rep. 127, 8 N. C. C. A. 67, reversing 209 Fed. 975.

Where an unmarried railway employee, without surviving parents or children, sent five or six dollars a month to his widowed sister, who resided in a foreign country, she was a dependent for whose benefit an action could be maintained under the Federal Employers' Liability Act. *Bitondo v. New York C. & H. R. R. Co.* 163 App. Div. 823, 149 N. Y. Supp. 339.

#### XIV. SURVIVAL OF EMPLOYER'S RIGHT OF ACTION.

##### A. In General.

(No decisions.)

##### B. Prior to Amendment.

Applicability of state laws pertaining to survival, see *infra* XVI, D, 3, (n).

##### In General.

The right of action given an injured employee by the Federal Employers' Liability Act, as originally enacted, for his conscious pain and suffering did not survive his death and pass to his personal representative. *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. ed. 1160, 35 Sup. Ct. Rep. 704, 9 N. C. C. A. 754, affirming 115 Ark. 483, 171 S. W. 1185; *Garrett v. Louisville & N. R. Co.*, 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32, affirming 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769; *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914 C. 176, reversing 189 Fed. 495; *American R. Co. v. Didricksen*, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224, reversing 5 Porto Rico Fed. Rep. 401, S. C. 5 id. 427; *Walsh v. New York, N. H. & H. R. Co.*, 173 Fed. 494, affirmed on other grounds 223 U. S. 1, 56 L. ed. 327, 32 Sup. Ct. Rep. 169, 38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875; *Cain v. Southern R. Co.* 199 Fed. 211; *Fulgham v. Midland V. R. Co.*, 167 Fed. 660, reversed on other grounds 104 C. C. A. 151, 181 Fed. 91.

Prior to the amendatory act of 1910 an employee's right of action under the Federal Employers' Liability Act did not survive his death and pass to his personal representative. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 35 Sup. Ct. Rep. 193, Ann. Cas. 1914 C. 176, reversing 189 Fed. 495.

The second Federal Employers' Liability Act as originally passed did not provide for the survival of the cause of action arising to a decedent in his lifetime be-

cause of the injury which resulted in his death. *McCullough v. Chicago, R. I. & P. R. Co.*, 160 Ia. 524, 124 N. W. 67, 47 L. R. A. (N. S.) 23.

Prior to the amendment of 1910 the only action given by the Federal Employers' Liability Act to the personal representative of a deceased railway employee was for the benefit of his next of kin. *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703, reversing 98 Ark. 240, 136 S. W. 874.

### C. Subsequent to Amendment.

#### 1. Instantaneous Death.

##### In General.

Where an employee is instantly killed, no right to recover for his pain and suffering passes to his personal representative for which a recovery may be had under the Federal Employers' Liability Act. *Carolina, C. & O. R. Co. v. Shewalter*, 128 Tenn. 363, 161 S. W. 1136, Ann. Cas. 1915 C. 605, L. R. A. 1916 C. 964, affirmed without opinion 239 U. S. 630, — L. ed. —, 36 Sup. Ct. Rep. 166.

A personal representative cannot recover under the Federal Employers' Liability Act for the suffering of a railway employee where his death was instantaneous. *Moffett v. Baltimore & O. R. Co.* 135 C. C. A. 607, 220 Fed. 39.

There cannot be a recovery under the Federal Employers' Liability Act for the instantaneous death of an employee, of the damage sustained by his estate. *Farley v. New York, N. H. & H. R. Co.*, 87 Conn. 328, 87 Atl. 990.

#### 2. Conscious Pain and Suffering.

##### When Action Survives.

Where an employee lived for more than thirty minutes after an injury and the evidence, although conflicting, tended to show that he was conscious of pain and suffering during a part of that time, his personal representative may recover therefor under the Federal Employers' Liability Act as amended. *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. ed. 1160, 35 Sup. Ct. Rep. 704, 9 N. C. C. A. 754, affirming 115 Ark. 483, 171 S. W. 1185, L. R. A. 1916 C. 187.

Where an employee lived an appreciable length of time after receiving an injury, although unconscious, his cause of action survived his death under Section 9 of the Federal Employers' Liability Act. *Capital Trust Co. v. Great N. R. Co.*, 127 Minn. 144, 149 N. W. 14, S. C. 128 Minn. 537, 150 N. W. 1102.

##### Recovery for Suffering and Death in Same Action.

Since the amendment of 1910 the per-

sonal representative of a deceased employee may recover under the Federal Employers' Liability Act in the same action for the conscious pain and suffering of the decedent previous to his death and for the pecuniary loss sustained from his death by the surviving beneficiaries. *Kansas City S. R. Co. v. Leslie*, 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844, reversing 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915 B. 834; *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. ed. 1160, 35 Sup. Ct. Rep. 704, 9 N. C. C. A. 754, affirming 115 Ark. 483, 171 S. W. 1185; *Northern P. R. Co. v. Maerkl*, 117 C. C. A. 237, 198 Fed. 1; *St. Louis & S. F. R. Co. v. Conarty*, 106 Ark. 421, 155 S. W. 93, reversed on other grounds 238 U. S. 243, 59 L. ed. 1290, 35 Sup. Ct. Rep. 785; *Midland V. R. Co. v. Le Moyne*, 104 Ark. 327, 148 S. W. 654; *Rich v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379, 148 S. W. 1011; *Calhoun v. Great N. R. Co.*, — Wis. —, 156 N. W. 198.

Since the amendment of 1910 there can be but one recovery under the Federal Employers' Liability Act by the personal representative of a deceased employee for the loss and suffering of the latter prior to his death, as well as for the pecuniary loss sustained by his next of kin. *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703, reversing 98 Ark. 240, 135 S. W. 874; *St. Louis & S. F. R. Co. v. Conarty*, 106 Ark. 421, 155 S. W. 93, reversed on other grounds 238 U. S. 243, 59 L. ed. 1290, 35 Sup. Ct. Rep. 785.

A recovery under the Federal Employers' Liability Act by a personal representative for the pain and suffering of a deceased employee, as well as for the pecuniary loss of his surviving parents, is not double, since each cause of action constitutes a separate item of damages. *Calhoun v. Great N. R. Co.*, — Wis. —, 156 N. W. 198.

In an action under the Federal Employers' Liability Act for wrongful death, there may be a recovery for the pain and suffering of the decedent prior to his death, for loss of time, and medical and other expenses which he might have recovered had he lived. *Brooks v. Yazoo & M. V. R. Co.*, — Miss. —, 72 So. 227.

#### 3. Election.

##### Between Causes of Action.

A personal representative of a deceased employee need not elect whether he will recover for the latter's loss and suffering previously to his death, or for the pecuniary injury sustained by the beneficiaries designated in the Federal Employers' Liability Act, since under the amendment of 1910, he may recover for both in the same

action. *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. ed. 1160, 35 Sup. Ct. Rep. 704, 9 N. C. C. A. 754, affirming 115 Ark. 483, 171 S. W. 1185, L. R. A. 1916 C. 817.

The plaintiff cannot be required to elect, in an action based on the Federal Employers' Liability Act for the death of an employee, between the cause of action for the pain and suffering of the decedent and the pecuniary loss sustained by the widow and next of kin. *St. Louis, I. M. & S. R. Co. v. Rodgers*, 118 Ark. 263, 176 S. W. 696.

## XV. ADMINISTRATION OF DECEDENT'S ESTATE.

### A. General.

(No decisions.)

### B. Sole Asset Cause of Action Under Federal Act.

#### Appointment of Administrator.

Administration may be granted on the estate of a decedent although the only asset is a cause of action under the Federal Employers' Liability Act. *Gulf, C. & S. F. R. Co. v. Beezley*, — Tex. Civ. App. —, 153 S. W. 651.

An inchoate right of action under the Federal Employers' Liability Act is sufficient to permit the appointment of an administrator in the absence of any other assets. *Eastern R. Co. v. Ellis*, — Tex. Civ. App. —, 153 S. W. 701.

### C. Cause of Action Arising in Foreign State.

#### When Administrator Appointed.

An administrator of the estate of a non-resident decedent may be appointed by the courts of the state of the defendant's domicile, where the only asset within the jurisdiction of the appointing court is a right of action under the Federal Employers' Liability Act. *Howard v. Nashville, C. & St. L. R. Co.*, 133 Tenn. 19, 179 S. W. 380.

An administrator may be appointed on the estate of an employee by the court of his domicile where he was killed in another state, although the sole asset was a right of action under the Federal Employers' Liability Act. *Rivera v. Atchison, T. & S. F. R. Co.*, — Tex. Civ. App. —, 149 S. W. 223, 3 N. C. C. A. 788.

### D. Collateral Attack.

#### In General.

The jurisdiction of a probate court to appoint an administrator cannot be attacked in an action brought by him under

the Federal Employers' Liability Act. *Gulf, C. & S. F. R. Co. v. Beezley*, — Tex. Civ. App. —, 153 S. W. 651.

### E. Compensation of Personal Representative.

#### From Recovery.

Where the defendant paid to the attorneys of record of an administrator the amount recovered in an action under the Federal Employers' Liability Act, which they paid to the sole beneficiary of the deceased employee, they will not be required to return the money to the administrator in order that he may deduct his commissions and return the remainder to the beneficiary, since the former was not entitled to commissions in such a case. *Allen v. Napier*, 144 Ga. 38, 85 S. E. 1013.

## XVI. ACTIONS.

As to state law governing distribution of proceeds of recovery, see *infra* XVII, 1, 2.

### A. In General.

#### Law of Case.

The decision of an appellate court is the law of the case in an action based on the Federal Employers' Liability Act, on the second trial. *Cincinnati, N. O. & T. P. R. Co. v. Goode*, — Ky. —, 183 S. W. 264, S. C. 153 Ky. 247, 154 S. W. 941, 163 Ky. 60, 173 S. W. 329.

### B. Transitory Nature.

#### In General.

The cause of action conferred by the Federal Employers' Liability Act is transitory. *Rivera v. Atchison, T. & S. F. R. Co.*, — Tex. Civ. App. —, 149 S. W. 223, 3 N. C. C. A. 788.

An action may be maintained under the Federal Employers' Liability Act in the courts of one state by a personal representative for the death of an employee who was killed in another state of which he was a resident. *Waring v. Baltimore & O. R. Co.*, 15 Ohio C. C. R. (N. S.) 33, 23 Ohio Cir. 194.

A widow may, under the Federal Employers' Liability Act of 1906, recover in the courts of Texas as the personal representative of her deceased childless husband, where his death occurred in the territory of New Mexico. *Gutierrez v. El Paso & N. E. R. Co.*, 102 Tex. 378, 117 S. W. 426 (reversing — Tex. Civ. App. —, 111 S. W. 159), affirmed on other grounds 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21.

**C. Limitations.**

Burden of showing that action is not barred, see *infra* XVIII, C, 1.

Instructions as to time for bringing action, see *infra* XIX, E, 1.

Necessity that pleadings show action not barred, see *infra* XVI, J, 1, (b).

**1. In General.****Showing Institution of Action in Time.**

An employee cannot recover under the Federal Employers' Liability Act unless he shows that his injuries were sustained within two years from the day his action was begun. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225; *American R. Co. v. Coronas*, 144 C. C. A. 599, 230 Fed. 545.

**2. Accrual of Cause of Action.****In General.**

A cause of action accrues under the Federal Employers' Liability Act immediately on the death of a railway employee, and not on the subsequent appointment of his personal representative. *Bixler v. Penn. R. Co.*, 201 Fed. 553.

An action for wrongful death under the Federal Employers' Liability Act accrues when death occurs, and not when the injury was received. *Lindsay v. Chicago, R. I. & P. R. Co.*, — Okla. —, 155 Pac. 1173.

A cause of action under the Federal Employers' Liability Act for wrongful death does not accrue so that the two years' limitation prescribed by section 6 attaches, until the appointment of an administrator for the estate of the decedent. *American R. Co. v. Coronas*, 144 C. C. A. 599, 230 Fed. 545.

**3. Time as Condition.****In General.**

The requirement of the Federal Employers' Liability Act that actions thereunder shall be brought within two years is a condition upon the right to sue under the act. *Vaught v. Virginian & S. W. R. Co.*, 132 Tenn. 679, 179 S. W. 314.

Since the Federal Employers' Liability Act of 1906 created a new liability where none existed before, the requirement that actions thereunder should be brought within one year from the time the cause accrued was a condition essential to the maintenance of the suit. *Morrison v. Baltimore & O. R. Co.*, 40 App. D. C. 391, Ann. Cas. 1914 C. 1026.

The bringing of an action within the two years prescribed by section 6 of the

Federal Employers' Liability Act is a condition to the exercise of the right given by the statute, and if not complied with the parties stand as if the act had not been enacted, since such limitation relates to the right and not merely to the remedy. *American R. Co. v. Coronas*, 144 C. C. A. 599, 230 Fed. 545.

**4. Time for Bringing Action.****In General.**

Section 6 of the Federal Employers' Liability Act, providing that no action shall be maintained thereunder unless begun within two years from the day the cause of action accrued, is a statute of limitations. *Burnett v. Atlantic C. L. R. Co.*, 163 N. C. 186, 79 S. E. 414, reversed 239 U. S. 199, 60 L. ed. —, 36 Sup. Ct. Rep. 75.

An action under the Federal Employers' Liability Act is barred under section 6 of the act, unless brought within two years from the time the cause of action accrued. *Shannon v. Boston & M. R. Co.*, 77 N. H. 349, 92 Atl. 167.

**5. Excusing Failure to Bring Action in Time.****Conduct of Defendant.**

The failure of an employee to bring an action under the Federal Employers' Liability Act of 1906, within one year after his cause of action accrued, was not excused by the conduct of his employer in making false promises of employment if suit was not begun, where such matter was not pleaded by amendment until several years after the promise was made. *Morrison v. Baltimore & O. R. Co.*, 40 App. D. C. 391, Ann. Cas. 1914 C. 1026.

**6. State Law Saving Rights.****Effect.**

Since the period of prescription defined by the Federal Employers' Liability Act affects the remedy, it cannot be affected by a state statute providing that when an action is commenced within the period of limitation and judgment is rendered against the plaintiff on any ground which is not conclusive of his right of action, he may bring a new suit within one year. *Vaught v. Virginian & S. W. R. Co.*, 132 Tenn. 679, 179 S. W. 314.

**D. What Law Controls.****1. Federal.****In General.**

Rights and obligations under the Federal Employers' Liability Act are governed by that act and the applicable principles of the common law as interpreted and ap-

plied by the Federal Courts. *Southern R. Co. v. Gray*, 241 U. S. 333, 60 L. ed. —, 36 Sup. Ct. Rep. 558, reversing 167 N. C. 433, 83 S. E. 849.

An action to recover for injuries sustained by a railway employee while working within a territory of the United States is governed by the Federal Employers' Liability Act. *Cound v. Atchison, T. & S. F. R. Co.*, 173 Fed. 527.

An action for injuries sustained by a railway employee while engaged in interstate commerce, arises under an act of Congress, being based of necessity on the Federal Employers' Liability Act. *Clark v. Southern P. Co.*, 175 Fed. 122.

The Federal Employers' Liability Act controls an action for injuries received while an employer and employee were engaged in interstate commerce. *Staley v. Illinois C. R. Co.*, 268 Ill. 356, 109 N. E. 342, L. R. A. 1916 A. 450, reversing 186 Ill. App. 593; *Jones v. Charleston & W. C. R. Co.*, 98 S. C. 197, 82 S. E. 415.

An action for injuries sustained by a railway employee is properly brought under the Federal Employers' Liability Act where he was injured while employed in interstate commerce. *Raines v. Southern R. Co.*, 169 N. C. 189, 85 S. E. 294.

An action in a state court under the Federal Employers' Liability Act must be tried under the terms of that act. *Louisville & N. R. Co. v. Kemp*, 140 Ga. 657, 79 S. E. 558.

The Federal Employers' Liability Act cannot be invoked where the facts were not sufficiently developed at the trial to enable an appellate court to say that the plaintiff and defendant were engaged in interstate commerce at the time the former was injured. *Chicago & E. R. Co. v. Mitchell*, — Ind. App. —, 110 N. E. 78.

#### When Federal Law Not Pleased.

Necessity of pleading Federal Act, see *Infra XVI, J, 1, (b), (2)*.

The Federal Employers' Liability Act only is applicable to an action for the death of a railway employee where the declaration, although not distinctly alleging that it was based on such act, averred that the decedent met his death while in the employ of the defendant in interstate commerce. *Garrett v. Louisville & N. R. Co.*, 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769, affirmed 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32.

When a state of facts is set up which come fairly within the Federal Employers' Liability Act and the proof sustains the averments, the liability of the defendant must be determined by the provisions of such act. *Cole v. Atchison, T. & S. F. R. Co.*, 92 Kan. 132, 139 Pac. 1177.

A case which by allegation and proof is

brought within the Federal Employers' Liability Act, is controlled by it, although its provisions may not have been referred to in express terms in the pleadings or presented at the trial. *St. Louis & S. F. R. Co. v. Snowden*, — Okla. —, 149 Pac. 1083.

Where the plaintiff in an action for injuries to a railway employee alleged, and the evidence showed, that the defendant was a common carrier by rail, and that the plaintiff was employed by it in interstate commerce at the time of his injury, the action is governed by the Federal Employers' Liability Act. *Cross v. Chicago, B. & Q. R. Co.*, — Mo. App. —, 177 S. W. 1127.

The Federal Employers' Liability Act will be applied, although not pleaded by the plaintiff, where the answer alleges and the proof shows that an employee, at the time he met his death, was engaged in interstate commerce. *Calhoun v. Great N. R. Co.*, — Wis. —, 156 N. W. 198.

Where the defendant affirmatively alleged in its answer that a railway employee, at the time he was killed, was engaged in interstate commerce, the action is governed by the Federal Employers' Liability Act. *Bitondo v. New York C. & H. R. R. Co.*, 163 App. Div. 823, 149 N. Y. Supp. 339.

Where the defendant elicited, without objection, on the cross-examination of one of the plaintiff's witnesses, evidence tending to bring an action within the Federal Employers' Liability Act, either party, so long as such testimony remains in the record, may claim the benefit of the act without amending his pleadings. *Koennecke v. Seaboard A. L. R.*, 101 S. C. 86, 85 S. E. 374, affirmed 239 U. S. 352, — L. ed. —, 36 Sup. Ct. Rep. 126.

The defendant cannot show that an action for injuries to or the death of a railway employee is governed by the Federal Employers' Liability Act, where neither such act nor facts showing that it controls, are pleaded. *Mims v. Atlantic C. L. R. Co.*, 100 S. C. 375, 85 S. E. 372.

Where the evidence showed that a railway employee's injuries were received while he was engaged in interstate commerce, it is error to enforce the provisions of a statute instead of the Federal Employers' Liability Act, although the latter act was not pleaded. *Slavin v. Toledo, St. L. & W. R. Co.*, 236 U. S. 454, 59 L. ed. 671, 35 Sup. Ct. Rep. 306, reversing 88 Ohio St. 536, 106 N. E. 1077.

A widow cannot maintain an action under a state law for the death of her husband who was killed while engaged in interstate commerce for an interstate carrier, since the action is governed exclusively by the Federal Employers' Liability Act. *Thompson v. Wabash R. Co.*, 262 Mo. 468, 171 S. W. 364.



Where the complaint in an action for the death of an employee was based on a state law, without alleging that the decedent or the defendant was engaged in interstate commerce, or that the former left any surviving beneficiaries of the class designated in the Federal Employers' Liability Act, and, although the evidence showed that both were engaged in such commerce at the time of the accident, no application to amend the pleadings was made, the plaintiff cannot recover under the state law. *Kamboris v. Oregon, W. R. & N. Co.*, 75 Oreg. 358, 146 Pac. 1097.

Where an action is brought under a state law for the death of a railway employee, and during the trial facts are conceded which bring the action within the terms of the Federal Employers' Liability Act to the exclusion of the state law, and the plaintiff, without amending his complaint to comply with the Federal law, stipulates that the court may act on the admitted facts, there can be no recovery under the state law. *Flanders v. Georgia S. & F. R. Co.*, 68 Fla. 479, 69 So. 68.

Where, in an action by a widow in her own name and as tutrix of her minor children, for the death of the husband and father as the result of the negligence of a carrier, the petition disclosed a cause of action under the Federal Employers' Liability Act, and at the trial she elected to proceed under the state law without the defendant excepting to the capacity in which she sued, other than to object to the admission of evidence on the ground that the state law was superseded by the Federal act, and the evidence was sufficient to permit a recovery under either law, a judgment for the plaintiff cannot be sustained, since the only recovery permissible was under the Federal law by a personal representative. *Penny v. New Orleans G. N. R. Co.*, 135 La. 692, 66 So. 313.

#### **When Federal and State Law Pleaded.**

When a state law and the Federal Employers' Liability Act are declared upon in an action for injuries to an employee, the latter act controls where both the plaintiff and his employer were engaged in interstate commerce at the time of the accident. *Peek v. Boston & M. R. Co.*, 223 Fed. 448.

Where both a state law and the Federal Employers' Liability Act are declared on in separate counts, there can be no recovery under the local law for injuries sustained by an employee while engaged in interstate commerce. *Ex parte Atlantic C. L. R. Co.*, 190 Ala. 132, 67 So. 256.

#### **Negligence Not Within Federal Act.**

There may be a recovery under a state statute for the death of a brakeman who, while engaged in interstate commerce, was killed as the result of the failure of a car-

rier to block a frog or guard rail as required by such statute, since the Federal Employers' Liability Act does not control as it does not require the blocking of such appliances by interstate carriers. *St. Louis, I. M. & S. R. Co. v. McNamara*, 91 Ark. 515, 122 S. W. 102.

#### **Denial of Recovery Under State Law as Bar to Action Under Federal Law.**

The denial of a recovery under a state statute for the death of a railway employee in an action by his widow and surviving children for the alleged negligence of a carrier in failing to provide suitable appliances, does not bar a subsequent action by a personal representative under the Federal Employers' Liability Act, based on the negligence of a fellow servant, where the state law did not permit a recovery on that ground. *Troxell v. Delaware, L. & W. R. Co.*, 227 U. S. 434, 57 L. ed. 586, 33 Sup. Ct. Rep. 274, reversing 118 C. C. A. 272, 200 Fed. 44, and 105 C. C. A. 593, 183 Fed. 373, S. C. 185 Fed. 540, 180 Fed. 871.

### **2. State or Common Law.**

#### **(a) In General.**

#### **Defenses.**

##### **— Liability Under Federal Act.**

A railway company when sued under a state statute by an employee, may disprove liability thereunder by showing that the injuries for which the action was brought were sustained while the servant was employed in interstate commerce. *Slavin v. Toledo, St. L. & W. R. Co.*, 236 U. S. 454, 59 L. ed. 671, 35 Sup. Ct. Rep. 306, reversing 88 Ohio St. 536, 106 N. E. 1077.

##### **When Action May Be Submitted Under Either Law.**

An action for the death of a railway employee who was killed while employed on a train moving interstate commerce, will lie either under the Federal Employers' Liability Act or under a state statute which is not in conflict with the Federal law. *Delaware, L. & W. R. Co. v. Troxell*, 180 Fed. 871, reversed on other grounds 105 C. C. A. 593, 183 Fed. 373, S. C. 227 U. S. 434, 57 L. ed. 586, 33 Sup. Ct. Rep. 274.

An action for injuries received by a railway employee may be tried under either a state law or the Federal Employers' Liability Act, when the facts pleaded permit this to be done. *Mims v. Atlantic C. L. R. Co.*, 100 S. C. 375, 85 S. E. 372.

##### **Partial Reliance on State Laws.**

The Federal Employers' Liability Act constitutes the sole and supreme law on the subjects which it touches; and it can-

not be pieced out or supplemented by any state legislation. *Staley v. Illinois C. R. Co.*, 268 Ill. 356, 109 N. E. 342, L. R. A. 1916 A. 450, reversing 186 Ill. App. 593; *Jones v. Charleston & W. C. R. Co.*, 98 S. C. 197, 82 S. E. 415; *Southern R. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99, affirmed on other grounds 241 U. S. 229, 60 L. ed. —, 36 Sup. Ct. Rep. 588.

#### (b) Injury or Death of Employee in Interstate Commerce

##### In General.

There can be no recovery under a state law for injuries received by a railway employee while engaged in interstate commerce, since the remedy given by the Federal Employers' Liability Act is exclusive. *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, affirming 180 Ill. App. 511; *Oliver v. Northern P. R. Co.*, 196 Fed. 432; *Armbruster v. Chicago, R. I. & P. R. Co.*, 166 Ia. 155, 147 N. W. 337; *Jones v. Charleston & W. C. R. Co.*, 98 S. C. 197, 82 S. E. 415; *St. Louis, S. F. & T. R. Co.*, — Tex. Civ. App. —, 149 S. W. 1178.

A widow cannot recover in an action under a state law for the benefit of herself and children for the death of her husband who was killed while employed in interstate commerce, although the Federal Employers' Liability Act is not declared on. *Rich v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379, 148 S. W. 1011.

The plaintiff cannot recover for the death of an employee in an action under a state statute, in the individual names of the surviving beneficiaries, where the evidence shows that the decedent was engaged in interstate commerce when he was killed, since the action is governed by the Federal Employers' Liability Act. *Kansas City, M. & O. R. Co. v. Pope*, — Tex. Civ. App. —, 153 S. W. 163.

It is error to submit to the jury under a state law an action for the death of an employee who was killed while engaged in interstate commerce. *Chicago, R. I. & P. R. Co. v. Wright*, 239 U. S. 548, — L. ed. —, 36 Sup. Ct. Rep. 185, affirming 96 Neb. 87, 146 N. W. 1024, S. C. 94 Neb. 317, 143 N. W. 220.

There can be no recovery under a state statute for the death of a railway employee while engaged in interstate commerce as the result of the negligent operation of an interstate train, since a recovery, if permissible at all, must be under the Federal Employers' Liability Act. *Illinois C. R. Co. v. Doherty*, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31.

There can be no recovery under a state law for the benefit of a nondependent relative of a deceased railway employee who was killed while engaged in interstate

commerce, since the exclusive remedy is under the Federal Employers' Liability Act, which cannot be pieced out by state laws. *Jones v. Charleston & W. C. R. Co.*, 98 S. C. 197, 82 S. E. 415.

A surviving dependent parent cannot recover under a state statute for the death, while engaged in interstate commerce, of a son who left a widow and surviving children, since the right to recover is governed exclusively by the Federal Employers' Liability Act. *St. Louis, S. F. & T. R. Co. v. Geer*, — Tex. Civ. App. —, 149 S. W. 1178.

There can be no recovery in an action under a state law brought by a widow in her own name for the death of her husband while in the employ of a railway company, when the evidence shows that at the time he was killed he was engaged in interstate commerce, since the Federal Employers' Liability Act, although not pleaded by the defendant, controlled. *Giersch v. Atchison, T. & S. F. R. Co.*, — Okla. —, 158 Pac. 54.

#### (c) Injury or Death While Employed in Intrastate Commerce.

##### In General.

The state law and not the Federal Employers' Liability Act controls where a railway employee was injured while employed in intrastate commerce. *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, dismissing writ of error to 180 Ill. App. 511.

Where a carrier is engaged in intrastate commerce or in traffic that is not commerce at all, one who, while employed therein by the carrier, suffers an injury through the negligence of the latter, its agents or employees, must look for redress to the law of the state wherein the injury occurred, rather than to the Federal Employers' Liability Act, save where the accident was due to the violation by the carrier of some Federal safety statute. *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, — L. ed. —, 36 Sup. Ct. Rep. 188, affirming 214 N. Y. 413, 108 N. E. 644, L. R. A. 1916 C. 797.

The Federal Employers' Liability Act does not preclude a recovery under a state law for injuries sustained by a railway employee while engaged in intrastate commerce. *Thompson v. Wabash R. Co.*, 184 Fed. 554; *Fernette v. Pere Marquette R. Co.*, 175 Mich. 653, 672, 141 N. W. 1084, 144 N. W. 834.

When both the Federal Employers' Liability Act and the common law of a state are relied on in an action for injuries to an employee, it should be submitted under the state law where the evidence does not bring the case within the terms of the Federal act; which merely superseded but did

not repeal the common law. *Jones v. Chesapeake & O. R. Co.*, 149 Ky. 566, 149 S. W. 951. But see *S. C.* 153 Ky. 378, 155 S. W. 723.

The Federal Employers' Liability Act does not preclude a recovery under the common law or a local statute for injuries sustained by an employee while engaged in intrastate commerce. *Grow v. Oregon S. L. R. Co.*, 44 Utah 160, 138 Pac. 398, Ann. Cas. 1915 B. 481.

The Federal Employers' Liability Act does not apply to an action against an interstate carrier by an injured employee, where neither the pleadings nor the evidence show that the plaintiff was engaged in interstate commerce at the time of the accident. *Missouri, K. & T. R. Co. v. Odom*, — Tex. Civ. App. —, 152 S. W. 730.

An action for the death of a railway employee is controlled by a state law, where the declaration does not show that the defendant was engaged in interstate commerce at the time of the accident so as to bring the action within the purview of the Federal Employers' Liability Act. *Hem-mick v. Baltimore & O. S. R. Co.*, 184 Ill. App. 275, affirmed on other grounds 263 Ill. 241, 104 N. E. 1027.

#### **When Federal Act Pleaded.**

The fact that a declaration in an action for injuries to a railway employee alleged that the plaintiff and defendant were both engaged in interstate commerce, does not preclude a recovery under the common law, where the proof shows that the plaintiff was not employed in such commerce at the time he was injured, such allegation being regarded as surplusage. *Hayes v. Wabash R. Co.*, 180 Ill. App. 511, affirmed 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729.

Where a declaration counted on the Federal Employers' Liability Act only, and the proof showed that an employee was injured while engaged in intrastate commerce, a state court may treat as eliminated the allegation as to interstate commerce and permit a recovery under the state law. *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, dismissing writ of error to 180 Ill. App. 511.

#### **(d) Recovery by Parents.**

##### **Under Common or State Law.**

A parent cannot recover under a state statute for mental suffering caused by and for the loss of the services of a minor son, who was killed while employed in interstate commerce, since the Federal Employers' Liability Act provides the exclusive remedy. *Flanders v. Georgia S. & F. R. Co.*, 68 Fla. 479, 67 So. 68.

The Federal Employers' Liability Act does not preclude a recovery by a father from an interstate carrier under the common or a state law for the value of the services and earnings during minority of a minor son, who was injured while employed by the carrier in interstate commerce. *Nelson v. Illinois C. R. Co.*, — Ia. —, 155 N. W. 169.

The common-law right of a father to recover for injuries received by his minor son through the negligence of the latter's employer while engaged in interstate commerce, was not taken away by the Federal Employers' Liability Act. *Tonsellito v. New York C. & H. R. R. Co.*, 87 N. J. L. 651, 94 Atl. 804.

#### **(e) Nonprejudicial Submission Under State Law.**

##### **In General.**

##### **— Submission Favorable to Defendant.**

It was not prejudicial to the defendant to submit an action under a state law rather than under the Federal Employers' Liability Act, where the former law was more favorable to the defendant than the Federal act. *Chicago, R. I. & P. R. Co. v. Wright*, 239 U. S. 548, — L. ed. —, 36 Sup. Ct. Rep. 185, affirming 96 Neb. 87, 146 N. W. 1024, S. C. 94 Neb. 317, 143, N. W. 220.

The submission to the jury of an action for injuries to a railway employee, on the theory that it was founded on the Federal Employers' Liability Act, without compelling the plaintiff to amend his declaration by alleging such act, is not erroneous, where the evidence brought the case within such statute, and the defendant was not prejudiced because its liability under the Federal act was no greater than it would have been under the state law. *Erie R. Co. v. Kennedy*, 112 C. C. A. 76, 191 Fed. 332.

Where the instructions given in an action for injuries received by an employee, were more favorable to the defendant than those it would have been entitled to under the Federal Employers' Liability Act of 1906, it cannot object to the submission of the cause under a state law instead of the Federal Act. *Atchison, T. & S. F. R. Co. v. Mills*, — Tex. Civ. App. —, 116 S. W. 852.

The defendant in an action for injuries to an employee, was not prejudiced by its submission under a state law rather than the Federal Employers' Liability Act, where the only error alleged was the failure to permit the jury to apportion the damages for contributory negligence, and apparently the result would not have been altered had the Federal Act been applied. *Atchison, T. & S. F. R. Co. v. Tack*, — Tex. Civ. App. —, 130 S. W. 596.

### — Equal Liability Under Either Law.

Where the same party if anyone, is entitled to recover for injuries received by a railway employee, and the rules of law governing the trial of the issues are the same under a state law or the Federal Employers' Liability Act, and no question of jurisdiction is involved, it is immaterial under which law the action is tried. *Illinois C. R. Co. v. Nelson*, 128 C. C. A. 525, 212 Fed. 69.

Where a state statute relating to injuries of employees is similar to the Federal Employers' Liability Act, the defendant in an action for injuries to a railway employee, was not prejudiced by the submission of the action under the state instead of the Federal Act. *Fleming v. Norfolk S. R. Co.*, 160 N. C. 196, 76 S. E. 212.

### (f) Recovery Under Common Law on Denial Under Federal Act.

#### In General.

Where a recovery is denied under the Federal Employers' Liability Act for injuries suffered by an employee while engaged in interstate commerce, the action cannot be submitted as one at common law. *Lauer v. Northern P. R. Co.*, 83 Wash. 465, 145 Pac. 606.

Where the Federal Employers' Liability Act is declared on failure to sustain an action thereunder is not fatal, since there may be a recovery under a state law when the pleadings and proof are sufficient to permit it. *Alexander v. Great N. R. Co.*, — Mont. —, 154 Pac. 914.

### (g) Recovery Under State Workmen's Compensation Acts.

#### In General.

A burden is not imposed on interstate commerce by the declaration of the New York Workmen's Compensation Act, that it shall apply to employers and employees in interstate commerce, for whom a rule of liability or method of compensation has been or may be established by Congress, except to the extent that their connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce. *Jensen v. Southern P. Co.*, 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916 A. 403, Ann. Cas. 1916 B. 276, 9 N. C. C. A. 286, affirming 167 App. Div. 945, 152 N. Y. Supp. 1120; *Burns v. Southern P. Co.*, 215 N. Y. 736, 109 N. E. 606, 1068, affirming 167 App. Div. 945, 152 N. Y. Supp. 1101.

Employees of carriers which are engaged exclusively in interstate commerce are not within section 51 of the Ohio Workmen's Compensation Act, providing that such act shall apply to employers and employees

engaged in intrastate commerce, and also to those engaged in interstate and foreign commerce for whom a rule of liability or method of compensation has not been established by Congress, only to the extent that their mutual connection with interstate work may and shall be clearly separable and distinguishable from interstate and foreign commerce, and then only where such employer and any of its employees, working only within the state, shall, with the approval of the state liability board of awards, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of the state act. *Connole v. Norfolk & W. R. Co.*, 216 Fed. 823.

### Injury or Death While Employed in Interstate Commerce.

#### — In General.

Damages cannot be awarded under a state Workmen's Compensation Act for injuries to or the death of a railway employee while engaged in interstate commerce, since the exclusive remedy is provided by the Federal Employers' Liability Act. *Southern P. Co. v. Pillsbury*, 170 Cal. 782, 151 Pac. 277; *Staley v. Illinois C. R. Co.*, 268 Ill. 356, 109 N. E. 342, L. R. A. 1916 A. 450, reversing 186 Ill. App. 593; *Chicago, R. I. & P. R. Co. v. Industrial Board*, — Ill. —, 113 N. E. 80.

The Illinois Workmen's Compensation Act was not intended as cumulative to the remedy given by the Federal Employers' Liability Act for injuries received by an employee while engaged in interstate commerce. *Staley v. Illinois C. R. Co.*, 268 Ill. 356, 109 N. E. 342, L. R. A. 1916 A. 450, reversing 186 Ill. App. 593.

The New Jersey Workmen's Compensation Act permits a recovery for the death of a railway employee although killed while engaged in interstate commerce. *West Jersey Trust Co. v. Phila. & R. Co.*, — N. J. —, 95 Atl. 753.

Since the Federal Employers' Liability Act does not supersede a state Workmen's Compensation Act, an employee may recover under the latter act for injuries received while engaged in interstate commerce. *Rounsaville v. Cent. R. Co.*, 87 N. J. L. 371, 94 Atl. 392; *Hammill v. Penn. R. Co.*, 87 N. J. L. 388, 94 Atl. 313, affirmed — N. J. —, 96 Atl. 292.

The Ohio Workmen's Compensation Act does not preclude a recovery under the Federal Employers' Liability Act for injuries sustained by a person employed in interstate commerce. *Pitts. C. C. & St. L. R. Co. v. Sheets*, 15 Oh. Co. C. Rep. (N. S.) 305, affirmed 87 Oh. St. 476, 102 N. E. 1129.

#### — Injuries Not Caused by Negligence.

A railway employee who was injured

without negligence on the part of his employer, while he was engaged in interstate commerce, is not entitled to compensation under a state Workmen's Compensation Act, since the Federal Employers' Liability Act is paramount. *Smith v. Industrial Accident Comm.*, 26 Cal. App. 560, 147 Pac. 600.

A state Workmen's Compensation Act does not, regardless of a carrier's negligence of freedom from negligence, apply to an employee who is injured while engaged in interstate commerce, since his right to recover is controlled exclusively by the Federal Employers' Liability Act. *Staley v. Illinois C. R. Co.*, 268 Ill. 356, 109 N. E. 342, reversing 186 Ill. App. 593.

When death results to an employee of an interstate carrier without negligence on the part of the master as a producing cause either in whole or in part so as to invoke the Federal Employers' Liability Act, there may be a recovery under a state Workmen's Compensation Act. *Winfield v. Erie R. Co.*, — N. J. —, 96 Atl. 394.

Since the right to compensation created by the New Jersey Workmen's Compensation Act for the death of an employee is not a liability arising out of negligence, but a contractual obligation created with the consent of both the employer and the employee, and which exists in the absence of negligence on the former's part, such law affords a remedy for the death of an employee who is killed while engaged in interstate commerce where there is neither averment nor proof showing negligence on the part of the carrier sufficient to create responsibility under the Federal Employers' Liability Act. *Winfield v. Erie R. Co.*, — N. J. —, 96 Atl. 394.

When a proceeding is brought under a state Workmen's Compensation Law for the death of a railway employee who was killed while engaged in interstate commerce, in order to oust the court of jurisdiction it must affirmatively appear either by the pleadings or proof, that his death resulted in whole or in part from the negligence of the defendant, which will not be presumed, so as to create a responsibility under the Federal Employers' Liability Act. *Winfield v. Erie R. Co.*, — N. J. —, 96 Atl. 394.

A railway employee although employed in interstate commerce, may claim benefits under the New York Workmen's Compensation Act for accidental injuries which were in no manner attributable to the negligence of his employer. *Moore v. Lehigh V. R. Co.*, 169 App. Div. 177, 154 N. Y. Supp. 620.

An employee who is accidentally injured without negligence on the part of his employer, may recover under the New York Workmen's Compensation Act, notwithstanding that he was injured while en-

gaged in interstate commerce, since the Federal Employers' Liability Act does not apply to such a case. *Winfield v. New York C. & H. R. R. Co.*, 216 N. Y. 284, 110 N. E. 614, Ann. Cas. 1916 A. 817, 10 N. C. C. A. 916, affirming 168 App. Div. 351, 153 N. Y. Supp. 499.

An employee of an interstate carrier who, while tamping ties, was injured by a stone striking him in the eye, is not precluded by the Federal Employers' Liability Act from recovering under the New York Workmen's Compensation Act, since the Federal Act does not apply to accidental injuries not caused by the negligence of the employer. *Winfield v. New York C. & H. R. R. Co.*, 216 N. Y. 284, 110 N. E. 614, Ann. Cas. 1916 A. 817, 10 N. C. C. A. 916, affirming 168 App. Div. 351, 153 N. Y. Supp. 499.

#### **Employee of Interstate Carrier Injured While Engaged in Intrastate Commerce.**

A car shop employee who was injured while repairing a car which had been used by a carrier in both interstate and intrastate commerce, was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act so as to preclude an award under the New York Workmen's Compensation Act. *Okrzsezs v. Lehigh V. R. Co.*, 170 App. Div. 15, 155 N. Y. Supp. 919; *Parsons v. Delaware & H. R. Co.*, 167 App. Div. 536, 153 N. Y. Supp. 179.

#### **Injury to Employee of Intrastate Carrier.**

An employee of an intrastate railway, who was killed while uncoupling empty cars of a passenger train which ran wholly within the state, was not engaged in interstate commerce so as to bring an action for his death within the terms of the Federal Employers' Liability Act and to preclude an award under the Workmen's Compensation Act of the State of New York, although such train on its last trip carried baggage destined for points in another state. *Fairchild v. Penn. R. Co.*, 170 App. Div. 135, 155 N. Y. Supp. 751.

### **3. State Laws Relating to Particular Questions.**

Allowance of interest under state laws on verdict in action under Federal laws, see *infra* XIX, J.

#### **(a) In General.**

##### **Local Practice Rules.**

##### **— In General.**

An action in a state court based on the Federal Employers' Liability Act, is governed by the local rules of practice and procedure. *Chesapeake & O. R. Co. v. De*

Atley, 241 U. S. 310, 60 L. ed. —, 36 Sup. Ct. Rep. 564, reversing 159 Ky. 687, 167 S. W. 933.

Questions of practice in an action in a state court founded on the Federal Employers' Liability Act are controlled by the local rules. *McCullough v. Chicago, R. I. & P. R. Co.*, 160 Ia. 524, 142 N. W. 67, 47 L. R. A. (N. S.) 23.

The local rules of practice govern a state court in an action predicated on the Federal Employers' Liability Act. *Howell v. Atlantic C. L. R. Co.*, 99 S. C. 417, 83 S. E. 639.

Local rules of procedure apply to actions in state courts under the Federal Employers' Liability Act. *Sweet v. Chicago & N. W. R. Co.*, 157 Wis. 400, 147 N. W. 1054.

A state court in trying an action under the Federal Employers' Liability Act may follow the local rules of procedure and practice, since the Federal law does not deal with such matters but merely fixes the substantive rights of the parties. *Louisville & N. R. Co. v. Holloway*, 163 Ky. 125, 173 S. W. 343, S. C. 168 Ky. 262, 181 S. W. 1126.

The trial in a state court of an action based on the Federal Employers' Liability Act is regulated by the practice of the forum, since such act does not attach any conditions to the method of its enforcement in state courts. *Chesapeake & O. R. Co. v. Kelly*, 161 Ky. 655, 171 S. W. 185, reversed on other grounds 241 U. S. 485, 60 L. ed. —, 36 Sup. Ct. Rep. 630.

An action in a state court under the Federal Employers' Liability Act should be heard and determined in the same manner as cases arising under the prevailing state law. *Louisville & N. R. Co. v. Johnson*, 161 Ky. 824, 171 S. W. 847.

In an action in a state court, under the Federal Employers' Liability Act, the practice and procedure followed generally in common-law actions should be observed except as modified or changed by the Federal act. *Louisville & N. R. Co. v. Johnson*, 161 Ky. 824, 171 S. W. 847.

The practice and procedure of the forum applies to an action in a state court under the Federal Employers' Liability Act. *Chesapeake & O. R. Co. v. Meadows*, — Va. —, 89 S. E. 244.

#### — Affecting Substantive Rights.

A substantive right or defense arising under the Federal Employers' Liability Act cannot be lessened or destroyed by a rule of practice of a state court. *Norfolk & S. R. Co. v. Ferebee*, 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781, affirming 167 N. C. 290, 83 S. E. 360, S. C. 163 N. C. 351, 79 S. E. 685.

Since the Federal Employers' Liability Act is not a mere regulation of judicial procedure, its essential requirements can-

not be affected by possible waivers resulting from the order of presenting pleadings, or of procedure, which might operate in a local forum to affect a right given by a local law. *Flanders v. Georgia S. & F. R. Co.*, 68 Fla. 479, 69 So. 68.

#### — Statutory Lien.

In an action under the Federal Employers' Liability Act, which was begun more than a year after the plaintiff was injured, he is not entitled to a lien on the defendant's property to the exclusion of all persons, including mortgagees, trustees, etc., as permitted by a state statute declaring that the lien should not be effectual unless suit is brought or the claim filed, by order of the court, with the receiver of the road, within a year after the cause of action accrued, since the requirement as to the time for bringing action was a condition upon which the right to the lien depended. *St. Louis, I. M. & S. R. Co. v. Ingram*, — Ark. —, 187 S. W. 452.

Where an employee's action for injuries was brought within a year from the time they were received, and on the reversal of a judgment in his favor he took a nonsuit and began an action on the Federal Employers' Liability Act more than a year after the right of action accrued, the plaintiff was not entitled to a lien on the defendant's property, to the exclusion of all persons, including mortgages, trustees, etc., as permitted by a state law, which declared that the lien should not be effectual unless suit was brought or the claim filed by order of the court with the receiver of the road, within one year after the cause accrued. *St. Louis, I. M. & S. R. Co. v. Ingram*, — Ark. —, 187 S. W. 452.

In an action founded on the Federal Employers' Liability Act, begun more than a year after the cause of action accrued, the plaintiff is not entitled to a lien under a state law on the property of the defendant to the exclusion of all persons, including mortgagees, trustees, etc., where the statute declared that the lien should not be effectual unless suit was brought or the claim filed, by order of the court, with the receiver of the road, within one year after the cause accrued, since the statute did not give the claimant one year after his claim was reduced to judgment in which to file it with the receiver. *St. Louis, I. M. & S. R. Co. v. Ingram*, — Ark. —, 187 S. W. 452.

#### Interest as Damages on Affirmance of Judgment.

When the defendant, in an action in a state court under the Federal Employers' Liability Act, obtained a supersedeas and a judgment for the plaintiff was affirmed, 10 per cent damages may be added by virtue of a law of the forum making such damages the penalty, to all persons obtaining a supersedeas. *Louisville & N. R. Co. v.*

Stewart, 241 U. S. 261, 60 L. ed. —, 36 Sup. Ct. Rep. 586, affirming 163 Ky. 823, 174 S. W. 744, S. C. 156 Ky. 550, 161 S. W. 557, 157 Ky. 642, 163 S. W. 755.

### (b) Appeal and Error.

Applicability of state statutes precluding reversals for harmless error, see *infra* XX, D, 7.

### Taking Away Right.

A state may take away the right to appeal even in an action under the Federal Employers' Liability Act. *Tyndall v. New York C. & H. R. R. Co.*, 213 N. Y. 691, 107 N. E. 577, affirming 162 App. Div. 920, 146 N. Y. Sup. 1115.

### (c) Assumed Risk.

Effect of state laws abolishing defense of assumed risk, see *supra* IX, C, 3.

What constitutes assumed risk in an action based on the Federal Employers' Liability Act prosecuted in a state court, will be determined according to the state law. *Hawkins v. St. Louis & S. F. Ry. Co.*, 189 Mo. App. 201, 174 S. W. 129; *Hosheit v. Lusk*, 190 Mo. 431, 177 S. W. 712; *Cross v. Chicago, B. & Q. R. Co.*, — Mo. App. —, 177 S. W. 1127.

### (d) Contributory Negligence.

#### Burden of Proof.

A state law regarding the burden of proving contributory negligence does not apply to an action in a state court when based on the Federal Employers' Liability Act. *Cent. Vt. R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, Ann. Cas. 1916 B. 252, affirming 87 Vt. 330, 89 Atl. 618.

### (e) Damages.

Since the question of the proper measure of damages is inseparably connected with the right of action in cases arising under the Federal Employers' Liability Act, it must be settled in an action in a state court, according to the general principles of law as administered in the Federal Courts. *Chesapeake & O. R. Co. v. Kelly*, 241 U. S. 485, 60 L. ed. —, 36 Sup. Ct. Rep. 630, reversing 160 Ky. 296, 169 S. W. 736, S. C. 161 Ky. 655, 171 S. W. 185.

The damages recoverable in an action under the Federal Employers' Liability Act for the death of an employee are governed by the rules established by the Supreme Court of the United States instead of by the state law of the state in which the action is brought. *Louisville & N. R. Co. v. Stewart*, 157 Ky. 642, 163 S. W. 755, S. C. 156 Ky. 550, 161 S. W. 557, 163 Ky.

823, 174 S. W. 744, reversed on other grounds 241 U. S. 485, 60 L. ed. —, 36 Sup. Ct. Rep. 630.

### (f) Evidence.

Sufficiency of evidence to take case or particular questions to jury, see *infra* XIX, C, 2.

### In General.

In an action in a state court under the Federal Employers' Liability Act, the local rules of evidence apply unless otherwise provided by Federal legislation. *Kansas City S. R. Co. v. Leslie*, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915 B 834, reversed on other grounds 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844.

The law of the state in a court of which an action is brought under the Federal Employers' Liability Act governs as to the method of proof of negligence. *Bennett v. Southern R. Co.*, 98 S. C. 42, 79 S. E. 710, affirmed on other grounds, 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566, 10 N. C. C. A. 853.

### Time of Giving and Order of Proof.

A state court may, in an action founded on the Federal Employers' Liability Act, follow its own rules of practice respecting the time when and the order in which evidence shall be submitted. *Central Vt. R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, Ann. Cas. 1916 B. 252, affirming 87 Vt. 330, 89 Atl. 618.

### Quantity of Proof.

The law of the forum governs an action under the Federal Employers' Liability Act as to the quantity of proof of negligence. *Bennett v. Southern R. Co.*, 98 S. C. 42, 79 S. E. 710, affirmed on other grounds 233 U. S. 80, 58 L. Ed. 860, 34 Sup. Ct. Rep. 566, 10 N. C. C. A. 853.

The plaintiff need not establish his case by a preponderance of the evidence in an action in a state court under the Federal Employers' Liability Act, where the local practice does not require it. *Louisville & N. R. Co. v. Winkler*, 162 Ky. 843, 173 S. W. 151, 9 N. C. C. A. 146.

The rule of the Federal courts that a case will not be submitted to a jury when the evidence preponderates in favor of either party will not be applied by a state court in an action based on the Federal Employers' Liability Act, but instead the "scintilla" rule of the forum will be followed, since such act does not prescribe the practice to be followed in such cases. *Louisville & N. R. Co. v. Holloway*, 163 Ky. 125, 173 S. W. 343, S. C. — Ky. —, 181

S. W. 1126; Louisville & N. R. Co. v. Johnson, 161 Ky. 824, 171 S. W. 847.

The "scintilla" rule of the forum will be followed by a state court in an action based on the Federal Employers' Liability Act. Louisville & N. R. Co. v. Johnson, 161 Ky. 824, 171 S. W. 847; Dutton v. Atlantic C. L. R. Co., — S. C. —, 88 S. E. 263.

#### **Burden of Proof.**

A state statute placing on the defendant the burden of showing notice of a defect causing injury to an employee is applicable to an action under the Federal Employers' Liability Act, although the accident occurred in another state, since it is a rule of evidence merely. Pitts, C., C. & St. L. R. Co. v. Sheets, 15 Ohio C. C. Rep. (N. S.) 305, affirmed 87 Ohio St. 476, 102 N. E. 1129.

#### **Presumption of Negligence.**

A state statute creating a presumption of negligence from injuries caused by the running of a train does not apply to an action based on the Federal Employers' Liability Act for injuries sustained by an employee while engaged in the operation of a train. Kansas City S. R. Co. v. Cook, 100 Ark. 467, 140 S. W. 579.

A state statute which raises a presumption against a carrier in certain cases upon proof of injury from its locomotives or cars does not apply to an action in a state court under the Federal Employers' Liability Act. Louisville & N. R. Co. v. Kemp, 140 Ga. 657, 79 S. E. 558.

A state statute making proof of defects in appliances prima facie evidence of the negligence of the defendant in an action for injuries received by an employee, does not apply to an action for injuries sustained while engaged in interstate commerce, since such statute was superseded by the Federal Employers' Liability Act. South Covington & C. St. R. Co. v. Finan, 153 Ky. 340, 155 S. W. 742.

#### **(g) Judgment.**

##### **Arrest.**

A motion in arrest of judgment will be denied under local rules of practice in an action in a state court based on the Federal Employers' Liability Act, where some of the counts of the plaintiff's declaration state a cause of action. White v. Cent. Vt. R. Co., 87 Vt. 330, 89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916 B. 252.

#### **(h) Jury.**

##### **In General.**

A jury trial in a state court under the Federal Employers' Liability Act is governed by the jury system of the forum. Chesapeake & O. R. Co. v. Kelly, 161 Ky.

655, 171 S. W. 185, affirmed 241 U. S. 485, 60 L. ed. —, 36 Sup. Ct. Rep. 630.

#### **Majority Verdict.**

State laws permitting majority verdict, see infra XIX, I, 2.

#### **(i) Limitations.**

##### **Statute Saving Rights.**

Since the two years within which an action must be brought under the Federal Employers' Liability Act is a limitation on the remedy and right created by such act, it cannot be affected by a state law providing that where an action is commenced within the period of limitation and judgment is rendered against the plaintiff upon any ground not conclusive of his right of action, he may bring a new suit within one year thereafter. Vaught v. Virginian & S. W. R. Co., 132 Tenn. 679, 179 S. W. 314.

Where an action was brought under the Federal Employers' Liability Act within two years from the time it accrued, and with the permission of the court the plaintiff took a voluntary nonsuit, a new action cannot be commenced after the expiration of the two years prescribed by the act, under the provisions of a state law providing that when an action begun within the period of limitation is determined against the plaintiff on grounds not conclusive of his right of action, he may bring a new suit within one year. Vaught v. Virginian & S. W. R. Co., 132 Tenn. 679, 179 S. W. 314.

#### **(j) Limitation on Amount of Recovery.**

##### **In General.**

A state statute limiting the amount of recovery in actions for wrongfully causing death does not apply to proceedings under the Federal Employers' Liability Act. Devine v. Chicago, R. I. & P. R. Co., 266 Ill. 248, 107 N. E. 595, Ann. Cas. 1916 B. 481, affirming 185 Ill. App. 488, affirmed 239 U. S. 52, 60 L. ed. —, 36 Sup. Ct. Rep. 27; Thornboro v. Kansas City, M. & O. R. Co., 91 Kan. 684, 139 Pac. 410, Ann. Cas. 1915 D. 314.

The provisions of the Code of the District of Columbia limiting the amount recoverable in actions under the death act, did not apply to suits brought under the Federal Employers' Liability Act of 1906, since each act was applicable only to cases within its terms. Hyde v. Southern R. Co., 31 App. D. C. 466.

A recovery under the Federal Employers' Liability Act for wrongful death is not restricted to the amount prescribed by a state workmen's compensation law. Grybowski v. Erie R. Co., — N. J. —, 95 Atl. 764.



**(k) Negligence.**

Application of state statutes creating presumption of negligence, see *supra* XVI, D, 3, (f).

**What Amounts to Negligence.**

Since the Federal Employers' Liability Act does not undertake to define the character or degree of negligence necessary to a recovery under it, an action based thereon in a state court is governed by the laws of the forum in determining whether the acts or omission complained of constitute negligence. *Cincinnati, N. O. & T. P. R. Co. v. Eastham*, 160 Ky. 458, 169 S. W. 886, L. R. A. 1915 C 27.

Whether the conduct of an employer amounts to negligence is to be determined, in an action under the Federal Employers' Liability Act for injuries received by an employee, by the common law of the state wherein the accident occurred, since such act does not define negligence nor limit the common-law rules. *Helm v. Cincinnati, N. O. & T. P. R. Co.*, 156 Ky. 240, 160 S. W. 945.

There is no difference in an action for an injury to a railway employee, either under the Federal Employers' Liability Act or a state law, in the character or degree of negligence necessary to sustain a recovery, except where a defect in cars, engines, machinery or other equipment is involved. *Cincinnati, N. O. & T. P. R. Co. v. Eastham*, 160 Ky. 458, 169 S. W. 886, L. R. A. 1915 C 27.

A state statute has no bearing on the issue of negligence in an action based on the Federal Employers' Liability Act, for injuries received by an employee while engaged in interstate commerce. *Knapp v. Great N. R. Co.*, 130 Minn. 405, 153 N. W. 848.

A presumption of negligence, created by a state statute, from injury caused by the running of locomotives, being a local rule of evidence merely, applies to an action in a state court under the Federal Employers' Liability Act. *Louisville & N. R. Co. v. Rhoda*, — Fla. —, 71 So. 369, reversed without opinion 238 U. S. 608, 59 L. ed. 1487, 35 Sup. Ct. Rep. 662.

**(l) Next of Kin.**

State law determining who are next of kin, see *supra* XIII, C, 5, (f).

**(m) Pleading.****In General.**

Questions of pleading in actions in state courts, under the Federal Employers' Liability Act, are governed by the local rules of practice. *McCullough v. Chicago, R. I. & P. R. Co.*, 160 Ia. 524, 142 N. W. 67, 47 L. R. A. (N. S.) 23.

Local rules of pleading control an action in a state court under the Federal Employers' Liability Act. *Chesapeake & O. R. Co. v. Kelly*, 161 Ky. 655, 171 S. W. 185, reversed on other grounds 241 U. S. 485, 60 L. ed. —, 36 Sup. Ct. Rep. 630.

**Sufficiency.**

Where the petition in an action for injuries to an employee does not show that it is based on the Federal Employers' Liability Act, it will be held to be based on the state law, and the sufficiency of the pleading will be tested by that law. *Missouri, K. & T. R. Co. v. Neaves*, — Tex. Civ. App. —, 127 S. W. 1090.

The question whether a complaint in an action in a state court sets up a cause of action under the Federal Employers' Liability Act is one of pleading and practice to be decided according to the state laws. *Renn v. Seaboard A. L. R. Co.*, 170 N. C. 128, 86 S. E. 964, affirmed 241 U. S. 290, 60 L. ed. —, 36 Sup. Ct. Rep. 567.

**Assumed Risk.**

Whether the defense of assumption of risk need be specially pleaded in an action in a Federal court under the Federal Employers' Liability Act depends on the rules which obtain in the state wherein the action is tried. *New York, N. H. & H. R. Co. v. Vizvari*, 126 C. C. A. 632, 210 Fed. 118, L. R. A. 1915 C 9.

**Departure.****— Waiver.**

Whether the defendant waived a departure in the plaintiff's pleading which by amendment was changed from a common-law action to one under a state law and the Federal Employers' Liability Act, is to be determined by the rules of the state court in which the action is pending. *McAdow v. Kansas City W. R. Co.*, — Mo. App. —, 164 S. W. 188, affirmed on other grounds 240 U. S. 51, 60 L. ed. —, 36 Sup. Ct. Rep. 252.

**Estoppel by Pleadings.****— To Show Employment in Interstate Commerce.**

Where the showing of a complaint, in an action for injuries received by an engineer, that he was employed in intrastate commerce only, was not denied by the defendant's answer, under N. C. R. S. 1905, § 503, such employment was admitted, and the defendant could not, in order to bring the action within the Federal Employers' Liability Act, show that at the time the plaintiff was injured he was engaged in interstate commerce. *Fleming v. Norfolk S. R. Co.*, 160 N. C. 196, 76 S. E. 212.

**(n) Survival.****In General.**

Since the cause of action under the Federal Employers' Liability Act is given by a Federal statute, recourse cannot be had to a state statute in order to determine whether the cause of action given the injured employee survived his death. *Walsh v. New York, N. H. & H. R. Co.*, 173 Fed. 494, affirmed on other grounds 223 U. S. 1, 56 L. ed. 327, 32 Sup. Ct. Rep. 169, 38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875.

Prior to the amendment of 1910 an employee's right of action did not survive under the Federal Employers' Liability Act, notwithstanding state legislation on the subject, since the question of survival is one of substance and not of procedure. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 193, Ann. Cas. 1914 C. 176, reversing 189 Fed. 495.

A state statute providing that a cause of action for personal injuries should survive and pass to the personal representative of a deceased employee was held not affected by the Federal Employers' Liability Act, since the state act did not confer a right of action but merely preserved one which would otherwise abate. *St. Louis, I. M. & S. R. Co. v. Hesterly*, 98 Ark. 240, 135 S. W. 874, reversed 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703.

**(o) Verdict.****Directing Verdict.**

The local rules of practice as to directing verdicts apply in an action in a state court under the Federal Employers' Liability Act. *Howell v. Atlantic C. L. R. Co.*, 99 S. C. 417, 83 S. E. 639.

**When Scintilla of Evidence.**

In determining whether the issues shall be submitted to the jury in an action founded on the Federal Employers' Liability Act, the scintilla doctrine of the forum may be applied by a state court to the exclusion of the rule adopted by the Federal courts. *Mulligan v. Atlantic C. L. R. Co.*, — S. C. —, 88 S. E. 445.

If, on the trial of an action in a state court based on the Federal Employers' Liability Act, it appears that, admitting the plaintiff's evidence and every fair inendment reasonably deducible therefrom to be true, he has failed to make out his case, a verdict should be directed for the defendant, although under the law of the forum the case should be submitted if there is any evidence to support the plaintiff's case, even though the weight of the evidence, both numerically and in probative value, is with the defendant. *Louis-*

*ville & N. R. Co. v. Johnson*, 161 Ky. 824, 171 S. W. 847.

**Special Verdicts.**

A Federal court will not, in an action based on the Federal Safety Appliance Act, adopt a rule of state practice with respect to taking and considering the propriety or effect of a special verdict. *Spokane & E. I. R. Co. v. Campbell*, 133 C. C. A. 370, 217 Fed. 518, affirmed on other grounds 241 U. S. 497, 60 L. ed. —, 36 Sup. Ct. Rep. 685.

**(p) Witnesses.****Competency.**

The law of the forum determines the competency of witnesses in an action founded on the Federal Employers' Liability Act. *Bowers v. Southern R. Co.*, 10 Ga. App. 367, 73 S. E. 677.

**E. Jurisdiction of Courts.****1. Federal Courts.****(a) In General.****Original Jurisdiction.**

The circuit court of the United States had original jurisdiction of an action founded on the Federal Employers' Liability Act. *Clark v. Southern P. Co.*, 175 Fed. 122.

**Exclusive Jurisdiction.**

The Federal courts do not have exclusive jurisdiction of actions based on the Federal Employers' Liability Act. Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*), 223 U. S. 1, 56 L. ed. 327, 32 Sup. Ct. Rep. 169, 38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875, reversing 82 Conn. 373, 73 Atl. 762.

The enforcement of rights under the Federal Employers' Liability Act cannot be regarded as impliedly restricted to the Federal courts, in view of the concurrent jurisdiction clause of the judiciary act (25 Stat. 433, ch. 866, U. S. Comp. St. 1901, p. 508). *Missouri, K. & T. R. Co. v. Lenahan*, 39 Okla. 283, 135 Pac. 383.

**Concurrent Jurisdiction with State Courts.**

The jurisdiction conferred by the amendment to section 6 of the Federal Employers' Liability Act upon the courts of the United States is concurrent with that of the courts of the several states. *Teel v. Chesapeake & O. R. Co.*, 123 C. C. A. 240, 204 Fed. 918, 47 L. R. A. (N. S.) 21.

The Federal Employers' Liability Act may be enforced by action either in a Fed-

eral or a state court. *St. Louis, I. M. & S. R. Co. v. Conley*, 110 C. C. A. 97, 187 Fed. 949.

### Residence of Parties as Affecting Jurisdiction.

A Federal court of a district in which the defendant did not reside did not, previously to the amendment of section 6, have jurisdiction of an action under the Federal Employers' Liability Act for injuries received by an employee, as his complaint showed, while engaged in interstate commerce. *Newell v. Baltimore & O. R. Co.*, 181 Fed. 698.

Prior to the amendment of section 6 of the Federal Employers' Liability Act, where there was a diversity of citizenship, an action thereunder could be maintained only in a Federal court of the district wherein the defendant resided. *Whittaker v. Illinois C. R. Co.*, 176 Fed. 130.

Prior to the amendment of section 6 of the Federal Employers' Liability Act, an action could not be maintained thereunder in a Federal court of a district in which neither the plaintiff nor the defendant resided. *Smith v. Detroit & T. S. L. R. Co.*, 175 Fed. 506; *Cound v. Atchison, T. & S. F. R. Co.*, 173 Fed. 527.

Section 6 of the Federal Employers' Liability Act, as amended, does not apply to an action begun previously to the adoption of the amendment in a Federal court of a district in which the defendant did not reside. *Newell v. Baltimore & O. R. Co.*, 181 Fed. 698.

### When Construction of Federal Act Involved.

A Federal court has jurisdiction of an action which is removed from a state court, where it is necessary to determine the meaning of the phrase "person employed by such carrier in such commerce," as used in the Federal Employers' Liability Act, notwithstanding that the action was dismissed because the plaintiff was not so employed. *Colasurdo v. Central R. of N. J.*, 180 Fed. 832, affirmed 113 C. C. A. 379, 192 Fed. 901, writ of error dismissed 226 U. S. 617, 57 L. ed. 383, 27 Sup. Ct. Rep. 111.

### (b) Waiver of Defect in Jurisdiction.

#### Action in Wrong District.

Where the declaration in an action for injuries received by a railway employee set up neither a state law nor the Federal Employers' Liability Act, and the defendant alleged and the proof showed that it was an interstate carrier, and that the plaintiff was injured while employed in interstate commerce, the defendant waived

the objection that it was sued in the wrong district. *Erie R. Co. v. Kennedy*, 112 C. C. A. 76, 191 Fed. 332.

### 2. State Courts.

Investing state courts with jurisdiction as affecting validity of Federal Act, see supra I, B, 5.

### (a) In General.

#### Jurisdiction of Actions Under Federal Act.

A state court has jurisdiction of an action founded on the Federal Employers' Liability Act. *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, dismissing writ of error to 180 Ill. App. 511; *Midland V. R. Co. v. Le Moyne*, 104 Ark. 327, 148 S. W. 654; *St. Louis, I. M. & S. R. Co. v. Hesterly*, 98 Ark. 240, 135 S. W. 874; *Atlantic C. L. R. Co. v. Whitney*, 62 Fla. 124, 56 So. 937, S. C. 65 Fla. 72, 61 So. 179, 3 N. C. C. A. 812; *Southern R. Co. v. Howerton*, 182 Ind. 208, 232, 106 N. E. 369, 105 N. E. 1025, reversing — Ind. App. —, 101 N. E. 121, 103 N. E. 121; *McCullough v. Chicago, R. I. & P. R. Co.*, 160 Iowa 524, 142 N. W. 67, 47 L. R. A. (N. S.) 23; *Bradbury v. Chicago, R. I. & P. R. Co.*, 149 Iowa 51, 128 N. W. 1, 40 L. R. A. (N. S.) 684, writ of error dismissed 223 U. S. 711, 56 L. ed. 624, 32 Sup. Ct. Rep. 520; *Penny v. New Orleans G. N. R. Co.*, 135 La. 692, 66 So. 313; *Moliter v. Wabash R. Co.*, 180 Mo. App. 84, 168 S. W. 250; *Horton v. Seaboard A. L. R. Co.*, 157 N. C. 146, 72 S. E. 958, S. C. 169, N. C. 108, 85 S. E. 218, affirmed 239 U. S. 595, — L. ed. —, 36 Sup. Ct. Rep. 180; *Kambris v. Oregon, W. R. & N. Co.*, 75 Oreg. 358, 146 Pac. 1097; *Golligher v. Penn. R. Co.*, 237 Pa. 152, 85 Atl. 129, reversing 20 Pa. Dist. Rep. 273; *Gulf. C. & S. F. R. Co. v. Lester*, — Tex. Civ. App. —, 149 S. W. 841; *Missouri, K. & T. R. Co. v. Blalack*, — Tex. Civ. App. —, 128 S. W. 706; *Lynch v. Central Vt. R. Co.*, — Vt. —, 95 Atl. 683.

Rights arising under the Federal Employers' Liability Act may be enforced as of right, in the courts of the several states, where their jurisdiction, as prescribed by local laws, is adequate to the occasion, the enforcement of the act not being restricted to the Federal courts. *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*), 223 U. S. 1, 56 L. ed. 327, 32 Sup. Ct. Rep. 169, 38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875, reversing 82 Conn. 373, 73 Atl. 762.

State courts have concurrent jurisdiction with the Federal courts over actions based on the Federal Employers' Liability Act. *Lemon v. Louisville & N. R. Co.*, 137 Ky. 276, 125 S. W. 701.

The Federal Employers' Liability Act may be enforced in a state court as well as in the Federal courts. *Illinois C. R. Co. v. Doherty*, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31; *St. Louis, I. M. & S. R. Co. v. Conley*, 110 C. C. A. 97, 187 Fed. 949.

A state court has jurisdiction to try the merits of an action founded on the Federal Employers' Liability Act, including the question whether the plaintiff was injured while engaged in interstate commerce. *Chesapeake & O. R. Co. v. Shaw*, 168 Ky. 537, 182 S. W. 653.

The courts of the several states can not decline jurisdiction under the Federal Employers' Liability Act because it is not in harmony with the policy of a state, since the act establishes a policy for all states. *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)*, 223 U. S. 1, 56 L. ed. 327, 32 Sup. Ct. Rep. 169, 38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875, reversing 82 Conn. 373, 73 Atl. 762.

The Missouri Court of Appeals has power to construe and apply the Federal Employers' Liability Act. *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328.

#### (b) Prior to Amendment of 1910.

##### In General.

Previous to the amendment of 1910 a state court had jurisdiction of an action based on the Federal Employers' Liability Act. *Owens v. Chicago G. W. R. Co.*, 113 Minn. 49, 128 N. W. 1011, writ of error dismissed 225 U. S. 716, 56 L. ed. 1270, 32 Sup. Ct. Rep. 834; *White v. Missouri P. R. Co.*, — Mo. —, 178 S. W. 83.

An action will lie in a state court under the Federal Employers' Liability Act for injuries received by a railway employee between the time of the passage of the act and the amendment of 1910 relating to the jurisdiction of such courts. *White v. Missouri P. R. Co.*, — Mo. —, 178 S. W. 83.

#### (c) Effect of Amendment.

##### In General.

By the amendment of section 6 of the Federal Employers' Liability Act, Congress did not attempt to enlarge or regulate the jurisdiction of state courts, or to control or affect their mode of procedure, but merely to prescribe their duty where their ordinary jurisdiction is appropriate, and is invoked in conformity with local laws, in an action arising under the Federal Act, which is susceptible of adjudication according to the prevailing rules of procedure. *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)*, 223 U. S. 1, 56 L. ed. 327, 32 Sup.

Ct. Rep. 169, 38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875, reversing 82 Conn. 373, 73 Atl. 762.

The amendment of 1910 to section 6 of the Federal Employers' Liability Act in relation to the jurisdiction of state courts under its terms, does not confer original jurisdiction on such courts, but merely recognizes and makes plain that which already existed. *Chesapeake & O. R. Co. v. Kelly*, 161 Ky. 655, 171 S. W. 185.

The amendment of 1910 did not vest state courts with original jurisdiction in actions under the Federal Employers' Liability Act, but merely recognized an existing right. *White v. Missouri P. R. Co.* — Mo. —, 178 S. W. 83.

#### (d) Effect of State Law Permitting Majority Verdict.

##### In General.

Majority verdicts in general, see *infra* XIX, I, 2.

The fact that under the law of the forum a verdict may be rendered by less than the full panel of jurors does not prevent a state court from being a court of competent jurisdiction within the meaning of the Federal Employers' Liability Act. *Chesapeake & O. R. Co. v. Shaw*, 168 Ky. 537, 182 S. W. 653.

A state court is not deprived of jurisdiction of an action founded on the Federal Employers' Liability Act by reason of the fact that by the law of the forum a verdict may be rendered by a less number of jurors than the full panel. *Louisville & N. R. Co. v. Holloway*, 168 Ky. 262, 181 S. W. 1126, S. C. 163 Ky. 125, 173 S. W. 343.

Since an injured employee possessed a right of action against a negligent employer and a state court had jurisdiction thereof prior to the enactment of the Federal Employers' Liability Act, the fact that the verdict of the jury in such a court may be rendered by less than the whole panel of the jury does not, because in violation of the Seventh amendment to the Federal Constitution, deprive a state court of jurisdiction of an action under the Federal Act. *Chesapeake & O. R. Co. v. Kornhoff*, 167 Ky. 353, 180 Pac. 523.

The fact that a state law permits a verdict in civil cases to be rendered by a jury of ten men, does not prevent the courts of such state from being courts of "competent jurisdiction" within the meaning of section 28 of the Judicial Code, which prohibits the removal from state courts of competent jurisdiction to Federal courts, on the ground of diverse citizenship, of actions under the Federal Employers' Liability Act. *Gibson v. Bellingham & N. R. Co.*, 213 Fed. 488.

### 3. Territorial Courts.

#### Waiver of Transfer to State Court on Admission of Territory.

Where an action under the Federal Employers' Liability Act, was pending in a district court of the territory of Arizona when the territory became a state, and the defendant thereafter answered to the merits in that court, the objection that under section 32 of the Arizona Enabling Act, the action should have been transferred to the proper state court, was waived. *Arizona & N. M. R. Co. v. Clark*, 235 U. S. 669, 59 L. ed. 415, 35 Sup. Ct. Rep. 210, affirming 125 C. C. A. 305, 207 Fed. 817.

### F. Removal of Causes.

Prohibition on removal as affecting validity of Federal act, see *supra* I, B, 6.

#### 1. In General.

(No decisions.)

#### 2. Prior to Amendment of 1910.

##### In General.

Prior to the amendment of 1910 an action based on the Federal Employers' Liability Act was removable from a state to a Federal court. *Lemon v. Louisville & N. R. Co.*, 137 Ky. 276, 125 S. W. 701.

An action under the Federal Employers' Liability Act of 1906 could not be removed from a state to a Federal court on the ground that it arose under a law of the United States, where it did not so appear from the plaintiff's pleadings, since such fact could not be shown by the petition for removal. *Malloy v. Northern P. R. Co.*, 151 Fed. 1019.

Where an action founded on the Federal Employers' Liability Act was, prior to the amendment of section six, removed by the defendant from a state to a Federal court because of diverse citizenship, the plaintiff might object that neither the plaintiff nor defendant were residents of the district to which the suit was removed. *Bottoms v. St. Louis & S. F. R. Co.*, 179 Fed. 318.

### 3. Since Amendment.

#### (a) In General

##### Removal From State Courts Prohibited.

Section 6 of the Federal Employers' Liability Act, as amended, precludes the removal of actions founded thereon from a state court of competent jurisdiction to a Federal court. *Kansas City S. R. Co. v. Leslie*, 238 U. S. 599, 59 L. ed. 1478, 35

Sup. Ct. Rep. 844, reversing 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915, B. 834; *Hulac v. Chicago & N. W. R. Co.*, 194 Fed. 747; *Kansas City S. R. Co. v. Cook*, 100 Ark. 467, 140 S. W. 579; *Southern R. Co. v. Puckett*, 16 Ga. App. 556, 85 S. E. 809; *De Atley v. Chesapeake & O. R. Co.*, 147 Ky. 315, 144 S. W. 95.

An action for the death of a railway employee is not removable from a state to a Federal court where the petition declares unequivocally on the Federal Employers' Liability Act. *Smith v. Camas P. R. Co.*, 216 Fed. 799.

The effect of the amendment to the Federal Employers' Liability Act of 1910 was to withdraw the right to remove causes arising thereunder from a state to a Federal court, and to require litigants who desired to obtain a review by reason of the presence of a Federal question to proceed by writ of error to the state court having final jurisdiction. *Lloyd v. North Carolina R. Co.*, 162 N. C. 485, 78 S. E. 489, S. C. 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520.

If, in the course of a trial in a state court of an action founded on the Federal Employers' Liability Act which is not removable to a Federal court, the decision of the case depends upon the construction of the act, and some right or privilege claimed by the defendant is denied, the latter is not remediless since he may remove the action to the Federal Supreme Court by writ of error. *Miller v. Illinois C. R. Co.*, 168 Fed. 982.

When a state court has jurisdiction of an action based on the Federal Employers' Liability Act, it is not bound to surrender it on a petition for removal to a Federal court, until a case has been made on the face of such petition showing that the petitioner is entitled to its transfer. *Chesapeake & O. R. Co. v. Shaw*, 168 Ky. 537, 182 S. W. 653.

When the Federal Employers' Liability Act is set up in the plaintiff's complaint in a state court the action does not stand removed to a Federal court on the filing of a petition by the defendant for removal on the ground of diverse citizenship, where such petition alleges that the plaintiff's averments as to his employment in interstate commerce are false and were made for the express purpose of preventing removal. *Chesapeake & O. R. Co. v. Shaw*, 168 Ky. 537, 182 S. W. 653.

##### Retroactive Effect of Amendment.

The amendment of 1910 as to the removal of causes does not apply to a suit begun prior to the amendment. *Ft. Smith & W. R. Co. v. Blevins*, 35 Okla. 378, 130 Pac. 525.

**(b) Grounds.****(1) In General.**

(No decisions.)

**(2) Action Arising Under Law of United States.****In General.**

Section 6 of the Federal Employers' Liability Act, as amended, does not forbid the removal of actions based thereon from state to Federal courts solely on the ground that they arise under a law of the United States, but for any other cause as well. *Hulac v. Chicago & N. W. R. Co.*, 194 Fed. 747; *DeAtley v. Chesapeake & O. R. Co.*, 201 Fed. 591.

An action based on the Federal Employers' Liability Act cannot be removed by the defendant from a state to a Federal court on the ground that it arises under a law of the United States. *Leggett v. Great N. R. Co.*, 180 Fed. 314.

It is only because an action under the Federal Employers' Liability Act arises under a law of the United States that its removal from a state to a Federal court is precluded by section 6 of the act, as amended. *Van Brimmer v. Texas & P. R. Co.*, 190 Fed. 394.

An action for injuries received by an employee through the negligence of an interstate carrier, when expressly based on the Federal Employers' Liability Act, is, for the purpose of removal from a state to a Federal court, one arising under such act, although the negligence charged was not within the act nor sustained by the facts alleged, since there could be no recovery except under the Federal act, for injuries received while employed in interstate commerce. *DeAtley v. Chesapeake & O. R. Co.*, 201 Fed. 591.

The prohibition by the amendment of 1910, of the removal from state to Federal Courts of actions based on the Federal Employers' Liability Act, is not limited to cases where removal is claimed on the ground that, as the action is brought under such act, a question arising under a law of the United States is involved, but such amendment forbids removal on other grounds as well. *Missouri, K. & T. R. Co. v. Bunkley*, — Tex. Civ. App. —, 153 S. W. 937.

**When Construction of Federal Law Involved.**

Where the petition shows that the plaintiff's right to recover depends wholly upon the Federal Employers' Liability Act, the construction and application thereof are necessarily involved so as to permit the defendant to remove the action from a state to a Federal court. *Calhoun v. Cen-*

*tral of G. R. Co.*, 7 Ga. App., 528, 67 S. E. 374.

An action brought by a widow in her own name under a state statute for the death of her husband while employed in interstate commerce, is not an action under the Federal Employers' Liability Act which may be removed by the defendant to a Federal court on the ground that the true meaning, intent and operation of the Federal act is involved. *Thompson v. Wabash R. Co.*, 184 Fed. 554.

An action based on the Federal Employers' Liability Act cannot be removed by the defendant from a state to a Federal court on the ground that the right of the plaintiff to recover depends on the construction of a Federal statute, where the plaintiff's pleadings do not disclose that such a question is involved, but it merely appears that the disposition of the case depends upon the application of such act to the facts. *Miller v. Illinois C. R. Co.*, 168 Fed. 982.

Where it does not appear from the pleadings that the final decision of an action founded on the Federal Employers' Liability Act depends on a construction of the act, its meaning not being in question, but only its application to the facts being involved, the action does not arise under a law of the United States within the meaning of the Act of March 3, 1887, ch. 373, § 2, 24 St. 553, U. S. Comp. St. as amended by Act of 1901, p. 509, so as to permit its removal from a state to a Federal court. *Nelson v. Southern R. Co.*, *Gaston v. same*, 172 Fed. 478.

Where the facts alleged in a complaint bring a case within the Federal Employers' Liability Act, and there is no allegation of any dispute between the plaintiff and defendant as to the construction of the act, or of any controversy over the law applicable to the proceeding, the action is not one arising under a law of the United States which the defendant may remove from a state to a Federal court. *Leggett v. Great N. R. Co.*, 180 Fed. 314.

**(3) Diverse Citizenship.****Vested Rights.**

The privilege of removing an action from a state to a Federal court because of diverse citizenship, or on the right of action created by the Federal Employers' Liability Act, is not a vested right. *Teel v. Chesapeake & O. R. Co.*, 123 C. C. A. 240, 204 Fed. 918, 47 L. R. A. (N. S.) 21.

**Repeal of Removal Act of 1875.**

The Removal Act of March 3, 1875, ch. 137, 18 St. 470, U. S. Comp. St. 1901, p. 508, was impliedly repealed by section 6 of the

**Federal Employers' Liability Act**, as amended, in so far as it related to the removal from state to Federal courts for diversity of citizenship, of actions arising under the latter act. *Saiek v. Penn. R. Co.*, 193 Fed. 303.

#### **Removal for Diverse Citizenship Prohibited.**

The removal from state courts of competent jurisdiction to Federal courts for diversity of citizenship, of actions founded on the Federal Employers' Liability Act, is precluded by section 6 as amended. *St. Louis & S. F. R. Co. v. Conarty*, 106 Ark. 421, 155 S. W. 93, reversed on other grounds 238 U. S. 243, 59 L. ed. 1290, 35 Sup. Ct. Rep. 785; *Teel v. Chesapeake & O. R. Co.*, 123 C. C. A. 240, 204 Fed. 918, 47 L. R. A. (N. S.) 21; *Eng v. Southern P. Co.*, 210 Fed. 92; *De Alley v. Chesapeake & O. R. Co.*, 201 Fed. 591; *Kelly v. Chesapeake & O. R. Co.*, 201 Fed. 602; *Hulac v. Chicago & N. W. R. Co.*, 194 Fed. 747; *Kansas City S. R. Co. v. Cook*, 100 Ark. 467, 140 S. W. 579; *Fish v. Chicago, R. I. & P. R. Co.*, 263 Mo. 106, 172 S. W. 340, 8 N. C. C. A. 538; *Pankey v. Atchison, T. & S. F. R. Co.*, 180 Mo. App. 185, 168 S. W. 274, 6 N. C. C. A. 74; *Missouri, K. & T. R. Co. v. Bunkley*, — Tex. Civ. App. —, 153 S. W. 937; *Moore v. St. Joseph & G. I. R. Co.*, — Mo. —, 186 S. W. 1035.

The removal for diverse citizenship of actions founded on the Federal Employers' Liability Act, from a state court of competent jurisdiction to a Federal court is absolutely prohibited by section 6 of such act, as amended, and section 28 of the Judicial Code of 1911, 36 St. 1904, U. S. Comp.-St. 1913, § 1010. *Lombardo v. Boston & M. R. Co.*, 223 Fed. 427; *Peek v. Boston & M. R. Co.*, 223 Fed. 448; *Burnett v. Spokane, P. & S. R. Co.*, 210 Fed. 94; *Patton v. Cincinnati, N. O. & T. P. R. Co.*, 208 Fed. 29; *McChesney v. Illinois C. R. Co.*, 197 Fed. 85; *Strauser v. Chicago, B. & Q. R. Co.*, 193 Fed. 293; *Lee v. Toledo, St. L. & W. R. Co.*, 193 Fed. 685; *Ullrich v. New York, N. H. & H. R. Co.*, 193 Fed. 768; *Symonds v. St. Louis & S. E. R. Co.*, 192 Fed. 353.

Section 6 of the Federal Employers' Liability Act and section 28 of the Judicial Code, do not limit the removal of cases arising under the former act solely on the ground that they are based on an act of Congress, but include diversity of citizenship as well. *Strauser v. Chicago, B. & Q. R. Co.*, 193 Fed. 293.

Section 6 of the Federal Employers' Liability Act, as amended, does not preclude the removal from a state to a Federal court of an action founded thereon, for diversity of citizenship or for other statutory grounds. *Van Brimmer v. Texas & P. R. Co.*, 190 Fed. 394.

#### **When Both Parties Nonresidents.**

Section 6 of the Federal Employers' Liability Act as amended precludes the removal from a state to a Federal court of an action based on such statute, where both parties are domiciled in different states. *Jones v. Kansas City S. R. Co.*, 137 La. 178, 68 So. 401, reversed on other grounds, 241 U. S. 181, 60 L. ed. —, 36 Sup. Ct. Rep. 513.

Where an action founded on the Federal Employers Liability Act, was begun in a court of a state other than that in which the plaintiff or defendant resided, it cannot, against the objections of the former, be removed by the latter to a Federal court of the district in which the suit was pending, where the jurisdiction of such court depended solely on the claim that the action was under a Federal law. *Hubbard v. Chicago, M. & St. P. R. Co.*, 176 Fed. 994.

#### **Fraudulent or Improper Joinder of Defendants.**

##### **— In General.**

An alleged fraudulent joinder of a resident railway company with a nonresident railway company as defendants in an action in a state court based on the Federal Employers' Liability Act, will not permit the nonresident defendant to remove the action to a Federal court on the ground that the plaintiff was not injured while engaged in interstate commerce. *Southern R. Co. v. Lloyd*, 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210, affirming 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489.

A petition for the removal from a state to a Federal court of an action founded on the Federal Employers' Liability Act, will not be granted on a general allegation of the fraudulent joinder of a resident defendant with a nonresident railway company for the express purpose of preventing a removal. *Lloyd v. Southern R. Co.*, 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489, affirmed 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210.

The fact that a resident defendant was joined with a nonresident railway company as defendant in an action under the Federal Employers' Liability Act, is not such a fraudulent act as will permit the defendant to remove the suit from a state to a Federal court on the ground of diverse citizenship. *Lloyd v. Southern R. Co.*, 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489, affirmed 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210.

Where an action under the Federal Employers' Liability Act was brought in a state court against the nonresident lessee

of a piece of railway lying wholly within one state, and the resident lessor, to recover for injuries received by an engineer in the employ of the lessee, while he was preparing an engine used in interstate commerce for a trial trip after it came from a repair shop and while it was standing on a track owned by the lessor, such joinder of defendants was not so fraudulent as to permit the lessee to remove the action to a Federal court. *Lloyd v. North Carolina R. Co.*, 162 N. C. 485, 78 S. E. 489, S. C. 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, affirmed 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210.

The fact that in an action for the death of a railway employee engaged in interstate commerce, there was an improper joinder of a negligent coemployee who was liable only under a state law, with a carrier which was answerable only under the Federal Employers' Liability Act, does not permit the removal of the cause from a state court of competent jurisdiction to a Federal court on the ground of diverse citizenship. *Kelly v. Chesapeake & O. R. Co.*, 201 Fed. 602.

#### —Discontinuance as to One Defendant.

In an action in a state court under the Federal Employers' Liability Act against a resident and a nonresident railway corporation, where a nonsuit was taken as to the resident defendant, from which the plaintiff appealed to a state court of last resort, such nonsuit did not give the other defendant the right to remove the action to a Federal court, since section 28 of the Judicial Code (36 St. L. 1897, ch. 231, Comp. St. 1913, § 1010) precludes removal of such an action for diverse citizenship. *Southern R. Co. v. Lloyd*, 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210, affirming 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489.

Where both a resident and a nonresident railway corporation were joined as defendants in an action in a state court under the Federal Employers' Liability Act, and the plaintiff, on an adverse intimation by the trial court, discontinued his action as to the resident defendant, reserving proper exceptions, and such nonsuit was erroneous, a petition subsequently presented by the remaining defendant for the removal of the cause to a Federal court on the ground of diverse citizenship, was properly denied. *Lloyd v. North Carolina R. Co.*, 162 N. C. 485, 78 S. E. 489, S. C. 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210.

#### When State and Federal Laws Plead.

The fact that a complaint in an action for the death of a railway employee counts on the Federal Employers' Liability Act, the common law and a state labor law,

does not prevent the action being a cause arising under the Federal act within the meaning of section 6 of that act, so as to preclude the removal of the action from a state to a Federal court because of diverse citizenship. *Ullrich v. New York, N. H. & H. R. Co.*, 193 Fed. 768.

Where a complaint in addition to stating a cause of action under the Federal Employers' Liability Act for injuries to an employee, also set up facts not necessary to a statement of a cause of action under such statute, but which showed liability under the common law as well as a state law, the defendant could not, on the ground of diverse citizenship, remove the suit from a state to a Federal court, where under the law of the state the complaint disclosed a single cause of action. *Rice v. Boston & M. R. Co.*, 203 Fed. 580.

Where a petition in an action for injuries to an employee sets up in one count the Federal Employers' Liability Act and the common law and a state statute in another, the defendant may remove the action from a state to a Federal court, as it is not within section 6 of the Federal act. *Flas v. Illinois C. R. Co.*, 229 Fed. 319.

An action for injuries received by a railway employee may be removed by the defendant from a state to a Federal court on the ground of diverse citizenship, where a cause of action under a state law is set up in one count of the plaintiff's petition, and the Federal Employers' Liability Act relied on in another count, since section 6 of that act does not apply to such a case. *Strother v. Union P. R. Co.*, 220 Fed. 731.

An action for the death of a railway employee is removable from a state to a Federal court on the ground of diverse citizenship, where one of the two counts of the petition was based on a state law and the other, although founded on the Federal Employers' Liability Act, did not, by failing to allege that the deceased left surviving him any of the beneficiaries designated in the Federal act, state a cause of action thereunder. *Thomas v. Chicago & N. W. R. Co.*, 202 Fed. 766.

#### When Federal Act Plead by Amendment.

Where the petition, in an action in a state court under a state statute, for the death of an employee who was struck by a train while he was repairing a track, claimed \$3,000 damages, and alleged that such work was an essential and necessary part of the interstate commerce in which the defendant was engaged as a common carrier, the latter cannot remove the action on the ground of diverse citizenship to a Federal court, after the Federal Employers' Liability Act was set up by way of amendment and greater damages claimed,



although it was not averred that the train which caused the disaster was employed in interstate commerce. *Stafford v. Norfolk & W. R. Co.*, 202 Fed. 605.

#### **Failure to Aver Defendant's Employment in Interstate Commerce.**

An action to recover for injuries sustained by an employee is removable from a state to a Federal court because of diverse citizenship, where the declaration, although alleging that the plaintiff was injured while employed in interstate commerce, failed to aver that the defendant at the time was a common carrier by rail engaged in such commerce. *Walton v. Southern R. Co.*, 179 Fed. 175.

#### **(4) Prejudice or Local Influence.**

##### **In General.**

Section 6 of the Federal Employers' Liability Act and section 28 of the Judicial Code do not limit the removal of cases arising under the former act solely on the ground that they are based on an act of Congress, but preclude removal for local influence or prejudice. *Strauser v. Chicago, B. & Q. R. Co.*, 193 Fed. 293.

#### **(5) Defendant Federal Corporation.**

##### **In General.**

The defendant cannot remove from a state to a Federal court an action based on the Federal Employers' Liability Act, on the ground that it is a corporation organized under an act of Congress. *Texas & P. R. Co., v. Rasmussen*, — Tex. Civ. App. —, 161 S. W. 212.

The fact that a railway company was incorporated under an Act of Congress does not make an action against it when based on the Federal Employers' Liability Act, one arising under the laws of the United States which it may remove from a state to a Federal court notwithstanding the prohibition against removal contained in the latter act. *Texas & P. R. Co. v. Sherer*, — Tex. Civ. App. —, 183 S. W. 404.

#### **(6) State Law Permitting Majority Verdict.**

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An action under the Federal Employers' Liability Act cannot be removed from a state court to a Federal court because the laws of a state permit a verdict to be rendered in civil cases by a jury of ten men. *Gibson v. Bellingham & N. R. Co.*, 213 Fed. 488.

#### **4. Petition for Removal.**

##### **Sufficiency.**

In no case can the right of the defendant

to remove from a state to a Federal court an action founded on the Federal Employers' Liability Act, be established by a removal petition which amounts simply to a traverse of the facts alleged in the plaintiff's petition, and in that manner try the merits of a cause of action good upon the face of the pleadings. *Southern R. Co. v. Lloyd*, 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210, affirming 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489.

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#### **5. Power of State Court to Determine Sufficiency of Petition.**

##### **In General.**

A state court may, in an action founded on the Federal Employers' Liability Act, pass on the sufficiency of a petition for its removal to a Federal court before surrendering jurisdiction to that court. *Lloyd v. Southern R. Co.*, 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489, affirmed on other grounds 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210.

A state court may determine whether a petition for removal to a Federal court is sufficient on its face to effect a removal. *Chesapeake & O. R. Co. v. Shaw*, 168 Ky. 537, 182 S. W. 653.

When the Federal Employers' Liability Act is set up a state court has jurisdiction to determine the truth of the defendant's petition for removal to a Federal court on the ground of diverse citizenship, where such petition alleges that the averments of the plaintiff's pleadings as to his employment in interstate commerce, were false and made for the sole purpose of fraudulently preventing the removal of the action. *Chesapeake & O. R. Co. v. Shaw*, 168 Ky. 537, 182 S. W. 653.

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A Federal court will remand to a state court an action founded on the Federal Employers' Liability Act, when improperly removed by the defendant in defiance to the express provisions of the act. *Lombardo v. Boston & M. R. Co.*, 223 Fed. 427.

An action for injuries to a railway employee will be remanded by a Federal to a state court from which it was removed

of a piece of railway lying wholly within one state, and the resident lessor, to recover for injuries received by an engineer in the employ of the lessee, while he was preparing an engine used in interstate commerce for a trial trip after it came from a repair shop and while it was standing on a track owned by the lessor, such joinder of defendants was not so fraudulent as to permit the lessee to remove the action to a Federal court. *Lloyd v. North Carolina R. Co.*, 162 N. C. 485, 78 S. E. 489, S. C. 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, affirmed 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210.

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A state court may, in an action founded on the Federal Employers' Liability Act, pass on the sufficiency of a petition for its removal to a Federal court before surrendering jurisdiction to that court. *Lloyd v. Southern R. Co.*, 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489, affirmed on other grounds 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210.

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When the Federal Employers' Liability Act is set up a state court has jurisdiction to determine the truth of the defendant's petition for removal to a Federal court on the ground of diverse citizenship, where such petition alleges that the averments of the plaintiff's pleadings as to his employment in interstate commerce, were false and made for the sole purpose of fraudulently preventing the removal of the action. *Chesapeake & O. R. Co. v. Shaw*, 168 Ky. 537, 182 S. W. 653.

#### **6. Remand to State Court.**

##### **In General.**

A Federal court will remand to a state court an action founded on the Federal Employers' Liability Act, when improperly removed by the defendant in defiance to the express provisions of the act. *Lombardo v. Boston & M. R. Co.*, 223 Fed. 427.

An action for injuries to a railway employee will be remanded by a Federal to a state court from which it was removed

by the defendant, where the petition disclosed a cause of action under the Federal Employers' Liability Act for injuries sustained while the plaintiff was engaged in interstate commerce. *Tralich v. Chicago, M. & St. P. R. Co.*, 217 Fed. 675.

Where an action under the Federal Employers' Liability Act for injuries to a railway employee was, before the plaintiff filed his declaration, removed by the defendant on the ground of diverse citizenship from a state to a Federal court, the action will be remanded to the former court if at any time it affirmatively appears either from the pleadings filed by the plaintiff or in any other appropriate manner, that the suit was in fact one under the Federal act. *Patton v. Cincinnati, N. O. & T. P. R. Co.*, 208 Fed. 29.

#### **When Construction of Federal Act Necessary.**

Where a construction of the Federal Employers' Liability Act is necessary a Federal court will not, regardless of the outcome of the action, remand it to a state court from which it was removed by the defendant for diverse citizenship, although the parties are all residents of the same state. *Colasurdo v. Central R. of N. J.*, 180 Fed. 832, affirmed 113 C. C. A. 379, 192 Fed. 901, writ of error dismissed by stipulation 226 U. S. 617, 57 L. ed. 383, 33 Sup. Ct. Rep. 111.

#### **What Determined on Motion to Remand.**

Where the petition in an action in a state court for the death of a railway employee declares unequivocally on the Federal Employers' Liability Act, a Federal court will not determine, on a motion to remand the case to the state court from which it was removed by the defendant, whether the facts pleaded were sufficient to constitute a cause of action under such statute. *Smith v. Cameas P. R. Co.*, 216 Fed. 799.

#### **Mandamus to Compel Remand.**

A writ of mandamus will not be granted by the Supreme Court of the United States to compel a district judge to remand to a state court an action removed by the defendant, although it arose under the Federal Employers' Liability Act after the amendment of 1910, since the remedy is an appropriate appellate proceeding. *Ex parte Ray*, 234 U. S. 70, 58 L. ed. 1217, 34 Sup. Ct. Rep. 722.

#### **Annexing Conditions to Remand.**

##### **—Election Between State and Federal Law.**

A Federal court cannot, on remanding to a state court an action wrongfully removed by the defendant because of diverse citizenship, require the plaintiff to elect

to proceed under the Federal Employers' Liability Act, where his complaint in an action for the death of a railway employee was planted on such act and also combined therewith as a single cause of action facts which brought it within the common law as well as a state statute. *Rice v. Boston & M. R. Co.*, 203 Fed. 580.

#### **Effect of Remand.**

##### **—Plea to Jurisdiction.**

Where an erroneous order of a state court for the removal to a Federal court of an action founded on the Federal Employers' Liability Act, was reversed by the state supreme court, with directions to proceed with the action, a plea to the jurisdiction subsequently filed on the ground that the transcript had been filed and the cause docketed in the Federal court was properly overruled. *Lloyd v. Southern R. Co.*, 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489, affirmed on other grounds 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210.

#### **7. Waiver of Wrongful Removal.**

##### **In General.**

The provisions of section 6 of the Federal Employers' Liability Act and section 28 of the Judicial Code, which prohibit the removal from a state court of competent jurisdiction to a Federal court of actions founded on the liability act, do not create a mere personal privilege or exemption which the plaintiff may waive by appearance or consent in the latter court; since they limit the jurisdiction of Federal courts as a class, and withhold it entirely through removal proceedings, in cases arising under the Employers' Liability Act. *Patton v. Cincinnati, N. O. & T. P. R. Co.*, 208 Fed. 29.

When an action founded on the Federal Employers' Liability Act is improperly removed by the defendant from a state to a Federal court, the plaintiff must move seasonably for its remand, for if he consents to it remaining in the latter court the action may proceed to final judgment therein. *Thomas v. Chicago & N. W. R. Co.*, 202 Fed. 766.

##### **By Pleading in Federal Court.**

Where an action founded on the Federal Employers' Liability Act for injuries received by a railway employee was, before the plaintiff filed his declaration, removed by the defendant on the ground of diverse citizenship, from a state to a Federal court, the plaintiff, by filing such pleading in the Federal Court, did not waive the objection that such court was without jurisdiction under section 6 of such act and section 28 of the Judicial

Code, prohibiting removals in such cases. *Patton v. Cincinnati, N. O. & T. P. R. Co.*, 208 Fed. 29.

The fact that after the removal by the defendant from a state court to a Federal court of an action under the Federal Employers' Liability Act, the plaintiff replied to the defendant's answer was not a waiver of the objection that the action was not removable. *Burnett v. Spokane, P. & S. R. Co.*, 210 Fed. 94.

The objection that an action based on the Federal Employers' Liability Act was not removable from a state to a Federal court was waived by the plaintiff, where after the latter court sustained a demurrer to a portion of his complaint he amended it by leave of the court, and had the case set down for trial. *Stephens v. Chicago, M. & St. P. R. Co.*, 206 Fed. 854.

### Taking Depositions.

Where an action based on the Federal Employers' Liability Act was improperly removed by the defendant from a state to a Federal court of a district in which neither party resided, they could not object to such removal where they waived the defect by stipulating for the issuance of a commission to take depositions. *Clark v. Southern P. Co.*, 175 Fed. 122.

Where an action under the Federal Employers' Liability Act was improperly removed by the defendant from a state to a Federal court, the plaintiff, by taking, on notice to the defendant, and filing the deposition of a witness in the latter court before a transcript of the proceedings in the state court was filed, did not thereby waive his right to insist that the suit should be remanded to the state court. *Hubbard v. Chicago, M. & St. P. R. Co.*, 176 Fed. 994.

### G. Election of Remedies.

#### 1. In General.

(No decisions.)

#### 2. Between State and Federal Laws.

See also *infra* XVI, J, 1 (d), (5).

#### (a) In General.

(No decisions.)

#### (b) Voluntary Election.

### In General.

An employee cannot elect whether he will proceed under a state law or the Federal Employers' Liability Act for injuries sustained while engaged in interstate commerce. *Vickery v. New London N. R. Co.*, 87 Conn. 634, 89 Atl. 277.

### (c) Compulsory Election.

Requiring election as condition of remand to state court, see *supra* XVI, F, 6.

### In General.

Where neither party to an action for injuries to a railway employee claims the benefit of the Federal Employers' Liability Act, the plaintiff cannot be compelled to elect between it and a state law, although the court finds that the Federal act controls. *Graber v. Duluth, S. S. & A. R. Co.*, 159 Wis. 414, 150 N. W. 489.

The plaintiff should be required to elect whether he will proceed under the common law or the Federal Employers' Liability Act, when his petition in an action for personal injuries alleges that the defendant was a carrier engaged in interstate and intrastate commerce, and that the plaintiff, at the time of his injury, was employed by the defendant at a work in furtherance of both. *Cincinnati, N. O. & T. P. R. Co. v. Clarke*, — Ky. —, 185 S. W. 94.

The defendant was not prejudiced, in an action against a carrier for injuries sustained by an employee, by the overruling of a motion to require the plaintiff to elect between the common law and the Federal Employers' Liability Act, when the petition alleged that the defendant was engaged in both interstate and intrastate commerce and that the plaintiff was employed at a work in the furtherance of the same at the time he was injured, where the defendant did not demur to such petition, but denied the plaintiff's allegations and set up assumed risk and contributory negligence, and all evidence offered by the defendant with reference to such defenses was fully heard. *Cincinnati, N. O. & T. P. R. Co. v. Clarke*, — Ky. —, 185 S. W. 94.

### When Both State and Federal Law Pleaded.

Where both a state law and the Federal Employers' Liability Act are pleaded in an action for personal injuries, the plaintiff may be required to elect under which law he will proceed. *Thompson v. Cincinnati, N. O. & T. P. R. Co.*, 165 Ky. 256, 176 S. W. 1006; *South Covington & C. St. R. Co. v. Finan*, 153 Ky. 340, 155 S. W. 742.

Where the plaintiff, in an action for injuries sustained while in the employ of a railway company, stated his cause of action in the alternative under a state law and the Federal Employers' Liability Act, he should be required to elect under which he will proceed. *Louisville & N. R. Co. v. Moore*, 156 Ky. 708, 161 S. W. 1129.

In an action for the death of a railway employee, where the plaintiff alleged that the decedent at the time he was killed was

engaged in the service of an interstate carrier on a train used in either interstate or intrastate commerce, but that he did not know which, although one or the other fact was true, the plaintiff should be required on motion of the defendant to elect whether he will rely on the state law or the Federal Employers' Liability Act. *Louisville & N. R. Co. v. Strange*, 156 Ky. 439, 161 S. W. 239.

The failure to require the plaintiff to elect under which law he will proceed is reversible error, where a state law and the Federal Employers' Liability Act were declared on in the alternative. *Louisville & N. R. Co. v. Moore*, 156 Ky. 708, 161 S. W. 1129.

The failure to require the plaintiff to elect which he will rely on is error when both the Federal Employers' Liability Act and a state law are declared on. *South Covington & C. St. R. Co. v. Finan*, 153 Ky. 340, 155 S. W. 742.

The failure to require the plaintiff to elect under which law he will proceed, where he declares alternatively on a state law and the Federal Employers' Liability Act, is not prejudicial to the defendant, where at the conclusion of the evidence the court rules that the action was governed by the local law. *Louisville & N. R. Co. v. Moore*, 156 Ky. 708, 161 S. W. 1129.

#### **Between Different Actions on State and Federal Laws.**

Where a widow brought an action in her own name under a state law for the death of her husband while employed by a carrier which was engaged in both interstate and intrastate commerce, and subsequently brought another action as administratrix in the same court under the Federal Employers' Liability Act, and both were brought on together for trial, the plaintiff could not be compelled to elect, before the introduction of any testimony, as to which action she would rely upon. *Corbett v. Boston & M. R. Co.*, 219 Mass. 351, 107 N. E. 60, 9 N. C. C. A. 691.

Where a widow brought an action under a state law and subsequently another under the Federal Employers' Liability Act for the death of her husband, she cannot be compelled in the latter case to elect which she will prosecute. *Fosher v. Lehigh & N. E. R. Co.*, 20 Pa. Dist. Rep. 444.

#### **(d) Action Under State Law as Election.**

##### **In General.**

Where a widow brought an action in her own name under a state law for the death of her husband while employed by a carrier engaged in both interstate and intrastate commerce, and subsequently brought another action as administratrix

in the same court under the Federal Employers' Liability Act, and the two were brought on for trial together, the one under the state law was not superseded by that under the Federal Act; nor was the court deprived of jurisdiction to hear the first action during the pendency of the second. *Corbett v. Boston & M. R. Co.*, 219 Mass. 351, 107 N. E. 60, 9 N. C. C. A. 691.

#### **Effect of Termination of Action Under State Law.**

##### **— Discontinuance.**

By bringing and subsequently discontinuing an action either under the common law or a state statute for the death of an employee a personal representative is not barred by the doctrine of election from bringing another action under the Federal Employers' Liability Act. *Hogan v. New York C. & H. R. R. Co.*, 139 C. C. A. 328, 223 Fed. 890.

##### **— Nonsuit.**

A judgment of nonsuit with costs to the defendant, in an action prosecuted under a state law by a widow and minor children for the killing of a railway employee while engaged in interstate commerce, is not a bar to a subsequent action by a personal representative under the Federal Employers' Liability Act, where the order of nonsuit expressly reserved the right to institute an action under the Federal act for the benefit of such persons. *Oliver v. Northern P. R. Co.*, 196 Fed. 432.

The fact that a widow improperly brought an action under a state law for the killing of her husband while engaged in interstate commerce, which resulted in a nonsuit, did not amount to a conclusive election to proceed under such law so as to preclude a subsequent action by a personal representative under the Federal Employers' Liability Act. *Oliver v. Northern P. R. Co.*, 196 Fed. 432.

#### **Effect of Setting Up Federal Act by Amendment.**

Where at the close of his case the plaintiff amended his complaint which in a single count alleged a cause of action under a state law, by setting up the Federal Employers' Liability Act, he thereby elected to abandon the state law, and could not, after the direction of a verdict for the defendant, resort to the state law. *Bravis v. Chicago, M. & St. P. R. Co.*, 133 C. C. A. 228, 217 Fed. 234.

##### **(e) Waiver and Estoppel**

#### **To Insist That Federal Act Controls.**

##### **— In General.**

By obtaining an affirmative instruction on a count under the Federal Employers'

Liability Act on the ground that the plaintiff was not employed in interstate commerce at the time he was injured, the defendant is not precluded from requesting a further affirmative instruction as to counts based on the state law on the theory that plaintiff was in fact engaged in such commerce at the time in question. *Louisville & N. R. Co. v. Carter*, — Ala. —, 70 So. 655.

#### — Failure to Plead Federal Act.

The failure of the defendant to plead the Federal Employers' Liability Act in an action by a widow in her own name under a state law for the death of her husband, is not a waiver of the right to insist that the Federal act controlled. *Sells v. Atchison, T. & S. F. R. Co.*, — Mo. —, 181 S. W. 106.

#### — Pleading Contributory Negligence.

By pleading contributory negligence a carrier does not estop itself from asserting that an action for injuries to an employee, based on a state law, is in fact governed by the Federal Employers' Liability Act. *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703, reversing 98 Ark. 240, 135 S. W. 874; *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144.

By pleading contributory negligence in an action based on a state law for the death of an employee, the defendant does not waive the right to insist that the action is governed by the Federal Employers' Liability Act. *Sells v. Atchison, T. & S. F. R. Co.*, — Mo. —, 181 S. W. 106.

#### —By Pleading Assumed Risk.

The fact that assumed risk is pleaded by the defendant in an action in the name of a widow for the death of her husband does not prevent the defendant from asserting on appeal that the Federal Employers' Liability Act controls. *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144.

#### — Trying Action Under State Law.

By trying an action for the wrongful death of an employee, as one founded on a state law, the defendant does not waive the right to urge that it was in fact governed by the Federal Employers' Liability Act. *Sells v. Atchison, T. & S. F. R. Co.*, — Mo. —, 181 S. W. 106.

### H. Parties.

#### 1. In General.

(No decisions.)

### 2. Who May Maintain Action for Death.

#### (a) In General.

(No decisions.)

#### (b) Personal Representative

#### Personal Representative Must Bring Action for Death.

A personal representative only can maintain an action under the Federal Employers' Liability Act for the death of an employee. *Pecos & N. T. R. Co. v. Rosenbloom*, 240 U. S. 439, 60 L. ed. —, 36 Sup. Ct. Rep. 390, reversing — Tex. —, 173 S. W. 217, 177 S. W. 952, — Tex. Civ. App. —, 141 S. W. 175; *American R. Co. v. Birch*, 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 693, reversing 5 Porto Rico Fed. Rep. 273; *Fithian v. St. Louis & S. F. Co.*, 188 Fed. 842; *La Casse v. New Orleans, T. & M. R. Co.*, 135 La. 129, 64 So. 1012; *Penny v. New Orleans G. N. R. Co.*, 135 La. 692, 66 So. 313; *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144; *Rich v. St. Louis, S. F. R. Co.*, 166 Mo. App. 379, 148 S. W. 1011; *Missouri, K. & T. R. Co. v. Lenahan*, 39 Okl. 283, 135 Pac. 383; *Cincinnati, N. O. & T. P. R. Co. v. Bonham*, 130 Tenn. 435, 171 S. W. 79; *St. Louis S. W. R. Co. v. Brothers*, — Tex. Civ. App. —, 165 S. W. 488; *Eastern R. Co. v. Ellis*, — Tex. Civ. App. —, 153 S. W. 701; *Rivera v. Atchison, T. & S. F. R. Co.*, — Tex. Civ. App. —, 149 S. W. 223, 3 N. C. C. A. 788; *Gulf, C. & S. F. R. Co. v. Lester*, — Tex. Civ. App. —, 149 S. W. 841.

#### Who Is Personal Representative.

The term "personal representative" as used in the Federal Employers' Liability Act, means an administrator or executor. *Rivera v. Atchison, T. & S. F. R. Co.* — Tex. Civ. App. —, 149 S. W. 223, 3 N. C. C. A. 788.

The words "personal representative" as used in the Federal Employers' Liability Act, has reference either to an administrator or executor and not to a surviving widow of a deceased employee. *Missouri, K. & T. R. Co. v. Lenahan*, 39 Okl. 283, 135 Pac. 383.

#### Ancillary Administrator.

An ancillary administrator who was appointed in a state where a railway employee was killed, may maintain an action in the courts thereof under the Federal Employers' Liability Act, especially when approved by the domiciliary administrator who was the principal beneficiary. *Anderson v. Louisville & N. R. Co.*, 127 C. C. A. 277, 210 Fed. 689.

**(c) Surviving Beneficiaries.****Action in Name of Surviving Beneficiary or Dependents.**

A widow cannot maintain an action in her own name under the Federal Employers' Liability Act, for the death of her husband who was killed while employed in interstate commerce, since a personal representative only can maintain the action. *Thompson v. Wabash R. Co.*, 184 Fed. 554; *Sells v. Atchison, T. & S. F. R. Co.*, — Mo. —, 181 S. W. 106; *Hearst v. St. Louis, I. M. & S. R. Co.*, 188 Mo. App. 36, 173 S. W. 86; *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144; *Missouri, K. & T. R. Co. v. Lenahan*, 39 Okl. 283, 135 Pac. 383; *Cincinnati, N. O. & T. P. R. Co. v. Bonham*, 130 Tenn. 435, 171 S. W. 79.

The widow and child of a deceased railway employee cannot maintain an action in their own names under the Federal Employers' Liability Act, for his death, since the personal representative is the only one who can maintain the action. *American R. Co. v. Birch*, 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603, reversing 5 Porto Rico Fed. Rep. 273.

A widow cannot recover in her individual capacity and as tutrix of her minor children, under the Federal Employers' Liability Act for the death of the husband and father, since the action must be brought by the personal representative. *Penny v. New Orleans G. N. R. Co.*, 135 La. 692, 66 So. 313.

A widow cannot recover, as permitted by a state statute, in her individual name for the benefit of herself and children, for the death of her husband, who was killed while employed in interstate commerce, since a personal representative only can recover under the Federal Employers' Liability Act. *Gulf, C. & S. F. R. Co. v. Lester*, — Tex. Civ. App. —, 149 S. W. 841.

A surviving beneficiary cannot maintain an action in her own name under the Federal Employers' Liability Act for the death of an employee who was killed while engaged in interstate commerce. *Rich v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379, 148 S. W. 1011; *Eastern R. Co. v. Ellis*, — Tex. Civ. App. —, 153 S. W. 701; *Gulf, C. & S. F. R. Co. v. Lester*, — Tex. Civ. App. —, 149 S. W. 841.

The surviving relatives of a deceased employee cannot under the Federal Employers' Liability Act, maintain an action in their individual names as permitted by a state law, for his death. *St. Louis S. W. R. Co. v. Brothers*, — Tex. Civ. App. —, 165 S. W. 488.

An action cannot be maintained under the Federal Employers' Liability Act, by the surviving beneficiaries in their own names for the death of an employee, al-

though permitted by a state law. *Kansas City, C. M. & O. R. Co. v. Pope*, — Tex. Civ. App. —, 152 S. W. 185.

A sole beneficiary can maintain an action under the Federal Employers' Liability Act only as the personal representative of a deceased railway employee. *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914, B. 134, affirming 113 C. C. A. 665, 192 Fed. 919.

**Next of Kin.**

Next of kin who were dependent on a deceased railway employee cannot maintain an action in their own names under the Federal Employers' Liability Act. *Fithian v. St. Louis & S. F. R. Co.*, 188 Fed. 842.

**(d) Substitution of Personal Representative for Surviving Beneficiary.**

Setting up representative capacity by amendment, see *infra* XVI, J, 4 (c).

**During Pendency of Action.**

The parents of a deceased employee who, under both the state law and the Federal Employers' Liability Act, were his sole beneficiaries, may, in an action brought in their individual names, be substituted as plaintiffs in a representative capacity. *Bixler v. Penn. R. Co.*, 201 Fed. 553.

An administrator may be substituted for the plaintiff in an action in the name of a widow under a state law for the death of her husband, although more than 2 years after the cause of action arose, so as to invoke the Federal Employers' Liability Act. *Nashville, C. & St. L. R. Co. v. Anderson*, — Tenn. —, 185 S. W. 677.

**After Judgment.**

Where a widow as sole surviving beneficiary, obtained a judgment in her own name under a state law for the death of her husband who was killed while engaged in interstate commerce, and pending the disposition of a motion in arrest of judgment and for a new trial on the ground that the sole remedy was under the Federal Employers' Liability Act, she was appointed administratrix of her deceased husband's estate, she cannot thereafter file her appearance as personal representative, and prove her appointment and adopt the judgment rendered in her individual name so as to cure the defect in parties. *Dungan v. St. Louis & S. F. R. Co.*, 178 Mo. App. 164, 165 S. W. 1116.

A widow who brought an action in her own name as sole surviving beneficiary of her deceased husband, who was killed while employed in interstate commerce, al-



cannot, after the rendition of a judgment in her favor, file an appearance as administratrix of her husband's estate, and adopt the former proceedings and judgment as fully as though the action had been originally prosecuted by her in a representative capacity. *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144.

A widow who brought an action in her own name under a state statute for the death of her husband, who was killed while employed in interstate commerce, and who, after a judgment in her favor and before the determination of the defendant's motion for a new trial on the ground that the Federal Employers' Liability Act controlled and that the plaintiff could not recover thereunder in her own name, filed her appearance as administratrix of her husband's estate and adopted all of the prior proceedings, the motion for a new trial should have been granted, and the administratrix could proceed to trial anew on an amended petition in her representative capacity. *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144.

#### (e) Waiver of Misjoinder.

##### Answering to Merits.

By pleading assumption of risk and contributory negligence in an action by a widow in her own name as sole surviving beneficiary of her deceased husband who was killed while engaged in interstate commerce, the defendant did not adopt the theory that the action was based on a state law so as to preclude the setting up on appeal of the plaintiff's incapacity to recover in her own name under the Federal Employers' Liability Act. *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144.

By answering to the merits in an action for the death of a railway employee, the defendant does not waive the objection that the suit could be maintained only by a personal representative under the Federal Employers' Liability Act, instead of by the surviving beneficiaries in their own name as permitted by a state law. *Gulf, C. & S. F. R. Co. v. Lester*, — Tex. Civ. App. —, 149 S. W. 841.

##### Failure to Plead Incapacity.

The objection that a widow could not recover in her own name for the death of her husband in an action based on the Federal Employers' Liability Act, was not waived by the defendant's failure to plead her want of capacity to maintain the action. *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144.

The right of the defendant to attack the jurisdiction of a state court in an action

under a law of the forum prosecuted by the surviving beneficiaries of an employee, who was killed while engaged in interstate commerce, on the ground that it should have been brought by a personal representative under the Federal Employers' Liability Act, was not waived by the failure of the defendant to raise such question by plea in abatement. *Eastern R. Co. v. Ellis*, — Tex. Civ. App. —, 153 S. W. 701.

#### 3. Defendants.

##### (a) In General.

(No decisions.)

##### (b) Joint Tortfeasors.

Effect of release of one joint tortfeasor, see *supra* IV, H.

##### In General.

The fact that a railway switchman who was injured when he was knocked from the top of a freight car by a trolley wire negligently maintained by a street railway company at a street crossing, might not be able to join such company and his employers as defendants in an action under the Federal Employers' Liability Act, does not alter their liability as joint tortfeasors. *Louisville & N. R. Co. v. Allen*, 67 Fla. 257, 65 So. 8, L. R. A. 1915 C. 20.

##### Judgment Against.

Where the petition in an action under the Federal Employers' Liability Act against two corporate defendants alleged that the plaintiff, although nominally in the employ of one of them was in fact working for the other, and was injured by the negligence of both defendants while he was repairing a railway tunnel used by his actual employer as a common carrier, a judgment against both defendants will be sustained where one of them was a common carrier and the other was in fact operating the railway. *Copper R. & N. W. R. Co. v. Heney*, 128 C. C. A. 131, 211 Fed. 459.

##### (c) Carrier and Negligent Coemployees.

##### Joinder.

An employee whose negligence contributed to the death of a coemployee, cannot be joined as a defendant with an interstate carrier in an action based on the Federal Employers' Liability Act, since such act applies only to common carriers. *Kelly v. Chesapeake & O. R. Co.* 201 Fed. 602.

Coemployees whose negligence causes an injury to a railway employee, cannot be joined as defendants with an interstate carrier in an action based on the Federal Employers' Liability Act. *Thompson v.*

Cincinnati N. O. & T. P. R. Co., 165 Ky. 256, 176 S. W. 1006.

Where both a state law and the Federal Employers' Liability Act are declared on in an action for personal injuries against an interstate carrier and a co-employee whose negligence caused the accident, and the plaintiff elects to proceed under the Federal law, the action should be dismissed as to the individual defendants, since they cannot be joined with the carrier in such an action. *Thompson v. Cincinnati, N. O. & T. P. R. Co.*, 165 Ky. 256, 176 S. W. 1006.

#### (d) Lessor and Lessee.

##### Joinder.

An interstate railway company and its lessor of an intrastate line which became a part of an interstate system, may be joined as defendants in an action under the Federal Employers' Liability Act for an injury received on such line by an employee of the lessee, resulting from its negligence. *Lloyd v. Southern R. Co.* 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489, affirmed on other grounds 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210.

#### I. Revivor.

Bringing in personal representative by amendment, see *infra* XVI, J, 4, (c).

##### In Name of Administrator.

Where an injured employee died after bringing suit under the Federal Employers' Liability Act, and the action was revived in the name of his administrator on a petition that, although not alleging that the decedent left a widow or children, reaffirmed each and every allegation of the original petition, which averred that the plaintiff had a dependent wife and minor child, there may be a recovery by the administrator for their benefit, notwithstanding that the order of revivor did not provide that the action should be for their benefit. *Cincinnati, N. O. & T. P. R. Co. v. Claybourn*, — Ky. —, 183 S. W. 903.

#### J. Pleading.

State laws governing, see *supra* XVI, D, 3, (m).

##### 1. Declaration or Complaint.

###### (a) In General.

(No decisions.)

###### (b) What Must Be Alleged.

###### (1) In General.

##### Bringing Action in Statutory Period.

It is incumbent on the plaintiff, in an action based on the Federal Employers'

Liability Act for wrongful death, to allege that his action was brought within the time limit prescribed by section 6 of the act. *American R. Co. v. Coronas*, 144 C. C. A. 599, 230 Fed. 545.

##### Municipal Ordinance.

The benefit of a municipal ordinance requiring the ringing of locomotive bells, cannot unless pleaded, be claimed by the plaintiff in an action based on the Federal Employers' Liability Act for the death of a section man who, while cleaning ice and snow from switches on a stormy night, was struck by a train which passed a station at high speed without giving warning of its approach. *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328.

#### (2) Federal Law.

##### In General.

The facts and not the pleadings determine whether an action will lie under the Federal Employers' Liability Act. *Corbett v. Boston & M. R. Co.*, 219 Mass. 351, 107 N. E. 60, 9 N. C. C. A. 691.

A right or immunity under the Federal Employers' Liability Act must be specially set up or claimed at the proper time and in the proper manner, in order to be available in an action for injuries to or the death of a railway employee. *Koennecke v. Seaboard A. L. R. Co.*, 101 S. C. 86, 85 S. E. 374, affirmed 239 U. S. 352, — L. ed. —, 36 Sup. Ct. Rep. 126.

While a state court will recognize that the Federal Employers' Liability Act is supreme with respect to the responsibility of railroads engaged in interstate commerce to their employees who are injured or killed in such commerce, yet, before such court is called upon to administer the Federal law, the party desiring to avail himself of any right, privilege or immunity thereunder must, by appropriate pleadings or evidence, bring to the attention of the trial court the facts showing that his cause of action or defense falls within its terms. *Chicago, R. I. & P. R. Co. v. McBee*, — Okla. —, 145 Pac. 331.

Where the petition in an action for an injury to a railway employee, counts neither on the state nor the Federal law, if the defendant desires to interpose the defense that the action is governed by the Federal Employers' Liability Act, he should request that the plaintiff make his petition more specific and definite as to the character of the defendant's business. *McIntosh v. St. Louis & S. F. R. Co.*, 182 Mo. App. 188, 168 S. W. 821.

##### Necessity for Pleading Federal Law.

The Federal Employers' Liability Act need not be expressly pleaded or referred

to in an action for injuries to or the death of an employee, since such act will govern where the facts alleged show that the accident occurred while the employee was engaged in interstate commerce. *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914 B. 134, affirming 113 C. C. A. 665, 192 Fed. 919; *Kelly v. Chesapeake & O. R. Co.*, 201 Fed. 602; *McChesney v. Illinois C. R. Co.*, 197 Fed. 85; *Ullrich v. New York, N. H. & H. R. Co.*, 193 Fed. 768; *Whittaker v. Illinois C. R. Co.*, 176 Fed. 130; *Smith v. Detroit & T. S. L. R. Co.*, 175 Fed. 506; *Gainesville M. R. v. Vandiver*, 141 Ga. 350, 80 S. E. 997; *Vandalia R. Co. v. Stringer*, 182 Ind. 676, 106 N. E. 865, rehearing denied 182 Ind. 684, 107 N. E. 673; *Southern R. Co. v. Hower-ton*, — Ind. App. —, 101 N. E. 121, 103 N. E. 121, reversed on other grounds 182 Ind. 208, 232, 106 N. E. 369, 105 N. E. 1025; *Lemon v. Louisville & N. R. Co.*, 137 Ky. 276, 125 S. W. 701; *Denoyer v. Railway Trans. Co.*, 121 Minn. 269, 141 N. W. 175; *Ahrens v. Chicago, M. & St. P. R. Co.*, 121 Minn. 335, 141 N. W. 297; *Nystrom v. Lake Shore & M. S. R. Co.*, 17 Oh. C. C. Rep. (N. S.) 507; *Missouri, K. & T. R. Co. v. Lenahan*, 39 Okla. 283, 135 Pac. 383; *Mims v. Atlantic C. L. R. Co.*, 100 S. C. 375, 85 S. E. 372; *Rowlands v. Chicago & N. W. R. Co.*, 149 Wis. 51, 135 N. W. 156, writ of error dismissed 229 U. S. 627, 57 L. ed. 1357, 33 Sup. Ct. Rep. 771; *Pipes v. Missouri P. R. Co.*, — Mo. —, 184 S. W. 79.

The Federal Employers' Liability Act need not be expressly referred to in the declaration in an action brought in a state court to recover for injuries received by a railway employee while engaged in interstate commerce, since the court must take notice of the act. *Bouchard v. Central Vt. R. Co.*, 87 Vt. 399, 89 Atl. 475, L. R. A. 1915 C. 33.

The Federal Employers' Liability Act need not be specially pleaded in an action in a state court for injuries to a railway employee, since it will be judicially noticed. *McDonald v. Railway Transfer Co.*, 121 Minn. 273, 141 N. W. 177.

The fact that a petition in an action for injuries sustained by a railway employee, did not directly allege that it was prosecuted under the Federal Employers' Liability Act, did not prevent such statute from controlling, since the averments of the pleadings determine its applicability. *Tralich v. Chicago, M. & St. P. R. Co.*, 217 Fed. 675.

A person who desires to avail himself of the provisions of the Federal Employers' Liability Act, must plead facts which bring his case within the act, although its terms and provisions need not be alleged. *Erie R. Co. v. Welsh*, 89 Ohio St. 81, 105 N. E. 189.

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need not be pleaded, since it is sufficient to bring it into operation if the facts alleged show a cause of action or a defense under its terms. *St. Louis, I. M. & S. R. Co. v. Hesterly*, 98 Ark. 240, 135 S. W. 874.

When the pleadings show that a railway employee was killed while engaged in interstate commerce, the Federal Employers' Liability Act controls. *Mims v. Atlantic C. L. R. Co.*, 100 S. C. 375, 85 S. E. 372.

It is unnecessary for the plaintiff in an action for the death of a railway employee, to allege the right to recover under any particular law, either state or the Federal Employers' Liability Act, since all that is necessary is for the petition to set forth facts sufficient to permit a recovery under any law which the court has jurisdiction to apply. *Atkinson v. Bullard*, 14 Ga. App. 69, 80 S. E. 220.

When an action is brought against a carrier by an employee, all that he need allege is a statement of the facts showing his relation as an employee and the circumstances under which he was injured, so as to disclose negligence on the part of the defendant, and a right to recover under any law, state or Federal, which the court will judicially notice, and that law will be applied. *Gainesville M. R. v. Vandiver*, 141 Ga. 350, 80 S. E. 997.

Where the facts alleged bring an action within the terms of the Federal Employers' Liability Act, although the common law is relied on, there may be a recovery under the Federal act. *Carpenter v. Kansas City S. R. Co.*, 189 Mo. App. 164, 175 S. W. 234.

Notwithstanding that the complaint in an action for the death of an employee does not expressly declare on the Federal Employers' Liability Act, nor allege that the decedent was engaged in interstate commerce at the time he was killed, such act controls, where it was set up in the answer and the case was tried under its terms. *St. Louis, I. M. & S. R. Co. v. Sharp*, 115 Ark. 308, 171 S. W. 95, writ of error dismissed 238 U. S. 697, 59 L. ed. 1504, 35 Sup. Ct. Rep. 939.

In an action for injuries sustained by a railway employee the pleadings need not refer to the Federal Employers' Liability Act, since the allegation and proof of facts showing that his injuries were sustained while employed by the defendant in interstate commerce will bring the action within the purview of the Federal law. *Hartman v. Chicago, B. & Q. R. Co.*, — Mo. App. —, 182 S. W. 148.

The petition in an action for injuries sustained by an employee, need not specifically aver that it is based on the Federal Employers' Liability Act where the facts alleged indicate whether that act or a state

law should control. *Chicago, R. I. & G. R. Co. v. Cosio*, — Tex. Civ. App. —, 182 S. W. 83.

### When Facts Proven Bring Case Within Federal Act.

The Federal Employers' Liability Act, although not pleaded, will govern an action where the facts proven show that an employee was killed or injured while employed in interstate commerce. *Cound v. Atchison, T. & S. F. R. Co.*, 173 Fed. 527; *St. Louis, I. M. & S. R. Co. v. Coke*, 118 Ark. 49, 175 S. W. 1177; *Vandalia R. Co. v. Stringer*, 182 Ind. 676, 106 N. E. 865, rehearing denied 182 Ind. 684, 107 N. E. 673.

Where the proof in an action for injuries to a railway employee brings the case within the Federal Employers' Liability Act, he is entitled to the benefits of such act although it was neither pleaded nor pressed at the trial. *Grand Trunk W. R. Co. v. Lindsay*, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914 C. 168, affirming 120 C. C. A. 166, 201 Fed. 836.

Where the petition in an action for injuries received by a railway employee sets up a cause of action under either the common law or a state statute, he cannot recover under the Federal Employers' Liability Act, although the evidence brings the case within the terms of the Federal law. *Moliter v. Wabash R. Co.*, 180 Mo. App. 84, 168 S. W. 250.

### (3) Employment in Interstate Commerce.

#### Defendant.

In an action founded on the Federal Employers' Liability Act the petition should allege that the defendant is a common carrier by rail engaged in interstate commerce. *Cincinnati, N. O. & T. P. R. Co. v. Tucker*, 168 Ky. 144, 181 S. W. 940; *Southern R. Co. v. Howerton*, 182 Ind. 208, 232, 106 N. E. 369, 105 N. E. 1025, reversing — Ind. App. —, 101 N. E. 121, 103 N. E. 121; *Cincinnati, H. & D. R. Co. v. Gross*, — Ind. —, 111 N. E. 653; *Sells v. Atchison, T. & S. F. R. Co.*, — Mo. —, 181 S. W. 106.

A cause of action under the Federal Employers' Liability Act is not shown by a complaint which does not aver that the defendant was a common carrier in interstate commerce by rail. *Shade v. Northern P. R. Co.*, 206 Fed. 353.

An allegation of the declaration in an action for injuries received by an employee, that he was engaged in the transportation of interstate commerce at the time he was injured, does not disclose a cause of action under the Federal Employers' Liability Act, where it did not allege that at the time the defendant was a com-

mon carrier by rail in such commerce. *Walton v. Southern R. Co.*, 179 Fed. 175.

A complaint in an action for the death of a railway employee, alleging in substance that the defendant was a railway corporation operating a line of road within the state as a common carrier of freight and passengers for hire, without alleging that it was engaged in interstate commerce or that the decedent was injured while employed therein, shows that the action was not based on the Federal Employers' Liability Act. *St. Louis, I. M. & S. R. Co. v. Hesterly*, 98 Ark. 240, 135 S. W. 874.

#### Injured Employee.

In an action founded on the Federal Employers' Liability Act the petition should allege the injured person's employment in interstate commerce or state facts from which it may be reasonably inferred. *Cincinnati, N. O. & T. P. R. Co. v. Tucker*, 144 Ky. 168, 181 S. W. 940.

The complaint in an action in which the Federal Employers' Liability Act is relied on, must allege that an employee was engaged in interstate commerce at the time he was killed or injured. *Southern R. Co. v. Howerton*, 182 Ind. 208, 232, 106 N. E. 369, 105 N. E. 1025, reversing — Ind. App. —, 101 N. E. 121, 103 N. E. 121; *Cincinnati, H. & D. R. Co. v. Gross*, — Ind. —, 111 N. E. 653.

That a railway employee was engaged in interstate commerce at the time of his injury or death, must be distinctly alleged by the plaintiff in an action founded on the Federal Employers' Liability Act. *Stafford v. Norfolk & W. R. Co.*, 202 Fed. 605.

In an action founded on the Federal Employers' Liability Act, the petition should allege facts from which it may be reasonably inferred that the plaintiff was engaged in interstate commerce at the time of his injury, although it is not necessary that such act should be pleaded or that the plaintiff should claim thereunder, since it is sufficient if the facts alleged bring a cause of action within the terms of the act. *Cincinnati, N. O. & T. P. R. Co. v. Tucker*, 144 Ky. 168, 181 S. W. 940.

#### Alternative Allegations.

An alternative allegation of a petition, in an action for the death of a railway employee, that the decedent at the time he was killed was in the employ of an interstate carrier, but that the plaintiff did not know, although one fact or the other was true, whether at the time of the fatal accident the decedent was actually engaged in interstate or intrastate commerce, is not within a state statute permitting the alternative allegation of the existence of either one fact or another one of which is true but which one the plaintiff cannot

say. *Louisville & N. R. Co. v. Strange*, 156 Ky. 439, 161 S. W. 239.

In an action for the death of a railway employee where it is alleged that the plaintiff did not know whether his intestate was employed in interstate or intrastate commerce at the time he was killed, the pleadings may be drawn to meet proof as to either employment, without being objectionable as an attempt to recover under both the state law and the Federal Employers' Liability Act. *International & G. N. R. Co. v. Reek*, — Tex. Civ. App. —, 179 S. W. 699.

#### **Curing Defects in Complaint from Allegations of Defendant's Pleadings.**

See also *infra* XVI, J, 8.

The failure of the plaintiff to allege in his declaration that his intestate was employed in interstate or foreign commerce at the time he was killed is cured where such omission was supplied by the plea and replication. *White v. Central Vt. R. Co.*, 87 Vt. 330, 89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916 B. 252.

#### **(4) Existence of Beneficiaries.**

##### **Necessity for Allegation of.**

The plaintiff's pleadings in an action founded on the Federal Employers' Liability Act for the death of an employee, must allege that the latter left surviving beneficiaries of one of the classes designated by the act. *Bankson v. Illinois C. R. Co.*, 196 Fed. 171, *Farley v. New York, N. H. & H. R. Co.*, 87 Conn. 328, 87 Atl. 990; *Illinois C. R. Co. v. Doherty*, 153 Ky. 363, 155 S. W. 1119 47 L. R. A. (N. S.) 31; *Melzner v. Northern P. R. Co.*, 46 Mont. 277, 127 Pac. 1002.

An allegation as to the identity of the beneficiaries in an action brought under the Federal Employers' Liability Act, is a proper if not a necessary averment. *Gulf, C. & S. F. R. Co. v. McGinnis*, — Tex. Civ. App. —, 147 S. W. 1188, reversed on other grounds 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806.

An allegation of a petition that a carrier and an employee at the time of his death, were engaged in interstate commerce, is insufficient to show a cause of action under the Federal Employers' Liability Act, where it was not alleged that any of the beneficiaries described in the act survived his death. *Thomas v. Chicago & N. W. R. Co.*, 202 Fed. 766.

An allegation of a petition in an action for the death of a railway employee, that a cause of action accrued to the plaintiff under the Federal Employers' Liability Act, being a conclusion, does not enlarge facts previously pleaded which do not

show that the intestate left a surviving widow, child, parent or next of kin. *Thomas v. Chicago & N. W. R. Co.*, 202 Fed. 766.

#### **(5) Pecuniary Loss.**

##### **In General.**

The pecuniary loss sustained by a widow and children from the death of a railway employee must be alleged in an action based on the Federal Employers' Liability Act. *Nashville, C. & St. L. R. Co. v. Anderson*, — Tenn. —, 185 S. W. 677.

##### **From Death of Son.**

The declaration, in an action under the Federal Employers' Liability Act brought by a personal representative for the benefit of the parents of a deceased employee, must contain a positive averment of their pecuniary loss. *Garrett v. Louisville & N. R. Co.*, 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32, affirming 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769.

The nature of the pecuniary loss sustained by a parent from the death of a son must be alleged in the pleadings in an action founded on the Federal Employers' Liability Act. *Garrett v. Louisville & N. R. Co.*, 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769, affirmed 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32.

A declaration, in an action based on the Federal Employers' Liability Act for the benefit of the father and the brother and sister of a deceased employee, should aver their pecuniary loss. *Illinois C. R. Co. v. Porter*, 125 C. C. A. 55, 207 Fed. 311.

A judgment was properly rendered against a personal representative in an action under the Federal Employers' Liability Act brought for the benefit of the parents of a deceased railway employee, where the plaintiff refused to amend his declaration on permission being granted him, so as to allege a pecuniary loss to such beneficiaries. *Garrett v. Louisville & N. R. Co.*, 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32, affirming 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769.

##### **Waiver.**

The failure of the declaration, in an action under the Federal Employers' Liability Act, to aver that those for whose benefit the action was prosecuted, suffered any pecuniary loss from the death of an employee, was waived where the defendant neither demurred to the declaration nor made objection on such ground at the trial. *Illinois C. R. Co. v. Porter*, 125 C. C. A. 55 207 Fed. 311.

A petition in an action by parents under the Federal Employers' Liability Act for

the death of a son, which did not directly allege that the action was brought in their behalf, or that they sustained pecuniary loss by his death was held sufficient, where its sufficiency was not directly assailed. *McCullough v. Chicago, R. I. & P. R. Co.*, 160 Ia. 524, 142 N. W. 67, 47 L. R. A. (N. S.) 23.

#### (6) Due Care.

##### In General.

Since assumed risk is no longer a defense to an action for injuries sustained by an employee in consequence of a carrier's violation of the Federal Safety Appliance Act, it is not necessary for the former to allege that at the time of his injury he exercised due care and caution for his protection. *Lucas v. Peoria & E. R. Co.*, 171 Ill. App. 1.

#### (7) Negating Assumed Risk.

##### In General.

A complaint based on the Federal Employers' Liability Act, must by appropriate averments, negative the assumption by an injured employee of the risks involved. *Cincinnati, H. & D. R. Co. v. Gross*, — Ind. —, 111 N. E. 653.

A complaint based on the Federal Employers' Liability Act which fails to aver that the plaintiff did not have full knowledge of the conditions the permitting of which to exist is charged as negligence, does not negative assumption of risk. *Cincinnati, H. & D. R. Co. v. Gross*, — Ind. —, 111 N. E. 653.

#### (c) Sufficiency.

##### (1) In General.

#### Testing Pleadings by Objection to Introduction of Evidence.

As the testing of the sufficiency of the petition in an action based on the Federal Employers' Liability Act, by an objection to the introduction of evidence thereunder, is in disfavor, it will be confined to narrow limits, and such an objection is not sufficient to raise a question which must be supported by evidence. *McIntosh v. St. Louis & S. F. R. Co.*, 182 Mo. App. 188, 168 S. W. 821.

#### Action in Dual Capacity.

An allegation of a petition in an action under the Federal Employers' Liability Act, that the suit was brought by the widow as administratrix of her deceased husband, for the use and benefit of herself as surviving widow, does not show that the action was prosecuted in a dual capacity. *Gulf, C. & S. F. R. Co. v. McGinnis*, —

*Tex. Civ. App.* —, 147 S. W. 1188, reversed on other grounds 228 U. S. 173, 57 L. ed. 585, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806.

#### (2) To Invoke Federal Act.

##### In General.

A petition for injuries sustained by an engineer from a defect while inspecting an engine just from a repair shop preparatory to making a trial trip, was held on its face to make a case invoking the jurisdiction of a state court under the Federal Employers' Liability Act, where it alleged in substance the leasing by one defendant of an intrastate railway to the other defendant, an interstate carrier, and that the plaintiff was injured while the engine stood on a side track belonging to the lessor, and that such engine was and had been used exclusively in interstate commerce. *Southern R. Co. v. Lloyd*, 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210, affirming 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489.

A petition which alleges that a railway employee was injured in a territory of the United States while in the performance of his duties, discloses an action under the Federal Employers' Liability Act, although that act was not referred to. *Clark v. Southern P. Co.*, 175 Fed. 122.

A complaint alleging in substance that the defendant owned and operated an interstate railroad on which it was engaged in hauling and carrying freight and passengers in and through designated states, is sufficient to bring a carrier within the Federal Employers' Liability Act. *Cincinnati, H. & D. R. Co. v. Gross*, — Ind. —, 111 N. E. 653.

A complaint alleging in substance that the plaintiff, while in the employ of a common carrier as a switchman, was injured while engaged in the operation of "pushing" a car employed in interstate commerce, is sufficient to bring an action within the Federal Employers' Liability Act, although not specifically referred to. *Denoyer v. Railway Transfer Co.*, 121 Minn. 269, 141 N. W. 175.

A petition in an action in a state court, alleging in substance that the defendant was a corporation organized under the state laws, operating a railway between points entirely within the state, and that the plaintiff while in its employ, was injured by the negligence of a coemployee as they were repairing a bridge, was held to state a cause of action under the Federal Employers' Liability Act, although no particular law was pleaded; since it is common knowledge that intrastate roads handle passengers and freight in interstate commerce, and it is unnecessary to specifically allege that the defendant was en-

gaged in such commerce in order that the court take notice that the Federal act controlled. *McIntosh v. St. Louis & S. F. R. Co.*, 182 Mo. App., 188, 168 S. W. 821.

A petition in an action for injury to a switchman, shows a cause of action under the Federal Employers' Liability Act and not under the Safety Appliance Act, where the negligence alleged was not the defective condition of the coupling apparatus on an interstate car, but the negligence of the engineer of a switch engine in failing to see that the couplers of the engine and car would not meet, and in not observing the switchman's signal to stop the engine when there was still time to do so. *Trowbridge v. Kansas City & W. B. R. Co.*, — Mo. App. —, 179 S. W. 777.

A complaint alleging that an engineer in the employ of an interstate carrier, while inspecting his engine in the course of his duty, after it had been turned over to a hostler, was injured when the latter in violation of custom and a rule of their employer, started the engine without first ringing the bell, when he knew or should have known the position of the engineer, states a cause of action under the Federal Employers' Liability Act. *Taylor v. Southern R. Co.*, 56 Ind. App. 625, 101 N. E. 506.

A cause of action under the Federal Employers' Liability Act was shown by a complaint which alleged in substance, although such act was not mentioned, that while the plaintiff was employed in interstate commerce by a common carrier by rail, engaged in such commerce between some of the states, he was injured in the performance of his duties while coaling engines at a coal chute when a buggy or cart of coal he was wheeling broke through the defective or rotten floor or platform of the chute. *Southern R. Co. v. Peters*, — Ala. —, 69 So. 611.

A cause of action under the Federal Employers' Liability Act is shown by a declaration alleging in substance, that the defendant was an interstate carrier; that the plaintiff at the time he was injured, was in its employ as a brakeman in interstate commerce; that in the discharge of his duties he was frequently required to cross numerous tracks in a railway yard; that it was the duty of the defendant to use due and proper care and precaution in running, controlling, shifting and managing its trains, engines and cars, to provide lights and signals on them at night, and to sound warnings of their approach, so as to prevent the plaintiff from being struck by them; and that the latter while crossing a yard on his way from his train after its arrival in the yard on a dark night, was struck and injured by an engine running backwards without lights, or without giving warning by the ringing of its bell or

the sounding of its whistle. *Easter v. Virginian R. Co.*, — W. Va. —, 86 S. E. 37.

A cause of action under the Federal Employers' Liability Act, was shown by a complaint which alleged in substance that a fireman was killed by the negligence of his engineer and conductor while they were handling a train employed in interstate commerce between different states, and that the decedent left a widow and two children surviving, for whose benefit the action was prosecuted. *Watson v. St. Louis, I. M. & S. R. Co.*, 169 Fed. 942, affirmed without opinion 223 U. S. 745, 56 L. ed. 639, 32 Sup. Ct. Rep. 533.

A cause of action under the Federal Employers' Liability Act for the death of an engineer as the result of the derailment of an engine, was shown by a petition which alleged that the defendant was a common carrier in interstate commerce, that the decedent was employed therein, that his death was caused by the negligence of the officers, agents and employees of the defendant, and by defects and insufficiencies of its rails, tracks, engines, appliances and machinery. *Kelly v. Chesapeake & O. R. Co.*, 201 Fed. 602.

A petition alleging that the plaintiff sustained injury while employed in repairing the roadbed and tracks of a railway extending into another state, is sufficient to show liability under the Federal Employers' Liability Act without specifically referring to such statute. *Chicago, R. I. & G. R. Co. v. Cosio*, — Tex. Civ. App. —, 182 S. W. 83.

A petition in an action for the death of a brakeman, which alleged in substance that suit was brought by an administrator, that the defendant's railway ran between points in different states, and that at the time the plaintiff's intestate was killed he was engaged in making up a train for movement in interstate commerce, sufficiently showed that the action was based on the Federal Employers' Liability Act instead of a state law. *Ft. Worth & D. C. R. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279.

A petition alleging that at the time he was injured the plaintiff was in the employ of a railway company whose road lay entirely within one state, and that the accident happened while he was acting as a brakeman on a train running entirely within the state, shows a cause of action under a state law and not the Federal Employers' Liability Act. *Missouri, K. & T. R. Co. v. Hawley*, — Tex. Civ. App. —, 123 S. W. 726.

A petition in an action for the death of a railway employee, held not to disclose liability under the Federal Employers' Liability Act. (The facts not being stated in the opinion.) *Shipp v. Texas & P. R. Co.*, 119 C. C. A. 667, 201 Fed. 1023, writ of

error dismissed 229 U. S. 623, 57 L. ed. 1356, 33 Sup. Ct., Rep. 1050.

A complaint which alleged that the defendant's railroad extended from a city in one state to a town in another, that it was an interstate road employed in interstate commerce, and that the plaintiff was injured while employed as a bridge builder on such road, is sufficient to bring an action within the terms of the Federal Employers' Liability Act. *Camp v. Atlanta & C. A. L. R. Co.*, 100 S. C. 294, 84 S. E. 825.

A cause of action under the Federal Employers' Liability Act was shown by a complaint alleging in substance that the plaintiff, who resided in one state, was injured while in another state in the discharge of his duties, by the negligence of his employer, an interstate carrier operating a line of railway between two states, although there was no allegation as to its interstate business. *Renn v. Seaboard A. L. R. Co.*, 170 N. C. 128, 86 S. E. 964, affirmed on other grounds, 241 U. S. 290, 60 L. ed. —, 36 Sup. Ct. Rep. 567.

### (3) To Show Employment in Interstate Commerce.

#### In General.

That an engine which ran over and killed an employee, was at the time engaged in interstate commerce, is not shown in an action under the Federal Employers' Liability Act, by an allegation that the defendant was engaged in interstate commerce, since an affirmative allegation as to the use of the locomotive therein was necessary. *Illinois C. R. Co. v. Rogers*, 136 C. C. A. 530, 221 Fed. 52.

That a railway employee and a carrier were employed in interstate commerce at the time of an injury was sufficiently shown, in an action under the Federal Employers' Liability Act, by a declaration which alleged in substance, that at the time of an accident the defendant owned and operated as a common carrier, a line of railway in interstate business; that its cars were propelled by steam; and that the plaintiff while in its employ as a switchman, was injured while uncoupling cars from an engine employed in the movement of both interstate and intrastate cars as circumstances required. *Atlantic C. L. R. Co. v. Reaves*, 125 C. C. A. 599, 208 Fed. 141.

A complaint which alleged that the plaintiff while engaged as a member of a construction gang, in the maintenance and repair of the roadbed and tracks of an interstate carrier, by removing earth therefrom, was injured through the negligence of an engineer in charge of a steam shovel, and that such roadbed and tracks were used for the transportation and movement of the defendant's trains in the conduct of

its interstate business, showed that the plaintiff was employed in interstate commerce at the time of his injury, so as to state a cause of action under the Federal Employers' Liability Act, although it was not alleged that the action was based on such statute. *Tralich v. Chicago, M. St. P. R. Co.*, 217 Fed. 675.

An allegation of a petition in an action for injuries sustained by a laborer employed in a construction gang, that the accident was caused by the negligence of an engineer operating a steam shovel while the plaintiff was engaged in removing earth from the roadbed and tracks used by a carrier in interstate commerce, is not controlled by a further allegation descriptive of the operation of the shovel for the removal of earth and rubbish from alongside the roadbed, so as to show that the plaintiff was not employed in interstate commerce at the time he was injured, within the meaning of the Federal Employers' Liability Act. *Tralich v. Chicago, M. & St. P. R. Co.*, 217 Fed. 675.

Where the complaint in an action for injuries to a brakeman, alleged that the defendant was a common carrier by rail between different states and that the plaintiff, while acting as a brakeman on a local freight train running between two states, was injured by a defect in a car, it was sufficient to show that the accident occurred while he was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, although it was not alleged that the defective car was used in such commerce. *Kansas City S. R. Co. v. Cook*, 100 Ark. 467, 140 S. W. 579.

That a fireman was engaged in interstate commerce was sufficiently shown in an action based on the Federal Employers' Liability Act, by petition alleging that at the time of his injury he was employed on a train running between cities in different states. *Charleston & W. C. R. Co. v. Brown*, 13 Ga. App. 744, 79 S. E. 932.

A complaint alleging in substance that the defendant owned and operated an interstate railway on which it was engaged in hauling and carrying freight and passengers in and through designated states, and alleging further that the plaintiff, while employed as a brakeman on a freight train, was injured through the negligence of the defendant, does not disclose a cause of action under the Federal Employers' Liability Act, since it did not show the plaintiff's employment in interstate commerce. *Cincinnati, H. & D. R. Co. v. Gross*, — Ind. —, 111 N. E. 653.

A complaint in an action for the death of a yard clerk who was struck by an engine while he was in a railway yard, showed that he was engaged in interstate commerce, where it alleged in substance that it was his daily duty to go into the



yard and make a record of all incoming and outgoing cars; that there was a constant movement of interstate traffic in the yard; and that he was killed while performing his duties; although it did not allege that at the time of the accident there were any cars in the yard which were employed in such commerce. *Pitts., C. C. & St. L. R. Co. v. Farmers' T. & S. Co.*, 183 Ind. 287, 108 N. E. 108.

That the plaintiff and defendant were engaged in interstate commerce is shown by a declaration alleging that the latter owned and operated a railway system extending through two designated states, and that the plaintiff was injured while in the defendant's employ, constructing, repairing and maintaining its roadway. *Jorgenson v. Grand Rapids & I. R. Co.*, — Mich. —, 155 N. W. 535.

A complaint in an action based on the Federal Employers' Liability Act, sufficiently shows that a branch line on which the plaintiff was working at the time of his injury, was used in interstate commerce, where it alleges that the defendant was a domestic corporation owning and operating an interstate system of railway, with branch lines within the state wherein the accident occurred, engaged in commerce between the several states from Minnesota to Puget Sound and Oregon, and that the branch in question extended southeasterly from the City of Tacoma. *Smith v. Northern P. R. Co.*, 79 Wash. 448, 140 Pac. 685, 5 N. C. C. A. 947.

A complaint alleging that the plaintiff at the time he was injured, was employed by the defendant as a fireman on an engine hauling passengers, baggage and mail between designated cities in different states, shows that he was engaged in interstate commerce so as to bring the action within the Federal Employers' Liability Act, although not specifically pleaded. *Rowlands v. Chicago & N. W. R. Co.*, 149 Wis. 51, 135 N. W. 156, writ of error dismissed 229 U. S. 627, 57 L. ed. 1357, 33 Sup. Ct. Rep. 771.

#### (4) To Show Negligence.

##### In General.

A cause of action under the Federal Employers' Liability Act was stated by a declaration alleging in substance that an engineer of an interstate train, who was given orders to meet another train at a certain point, on his arrival found an entry on the train register indicating that such train had passed, when instead it had gone back to another station and on its return trip collided with the plaintiff's train to his injury. *Bouchard v. Central Vt. R. Co.*, 87 Vt. 399, 89 Atl. 475, L. R. A. 1915 C. 33.

##### General Allegations.

A general allegation of negligence in a

petition, although the particular acts complained of are not specified, is sufficient in an action in a state court under the Federal Employers' Liability Act, where such pleading is in accordance with the law of the forum. *Louisville & N. R. Co. v. Stewart*, 156 Ky. 550, 161 S. W. 557, S. C. 163 Ky. 823, 174 S. W. 744, affirmed on other grounds, 241 U. S. 261, 60 L. ed. —, 36 Sup. Ct. Rep. 586.

A complaint which alleged in substance that a yard clerk, while in the discharge of his duties, was struck and killed by a negligently operated locomotive, was held sufficient, in an action based on the Federal Employers' Liability Act, to show the violation by the defendant of a duty owed the decedent, which was the proximate cause of his death. *Pitts., C. C. & St. L. R. Co. v. Farmers' T. & S. Co.*, 183 Ind. 287, 108 N. E. 108.

##### Defective Brakes.

The negligence of a carrier with respect to the insufficiency of the brakes of a heavily loaded freight car which ran away and killed a trainman who was riding it, was sufficiently charged in a complaint under the Federal Employers' Liability Act, by an allegation that the brakes "were out of repair, and insufficient to hold" the car, and that the "accident occurred by reason of the negligence of defendant and its servants or employees." *Sandridge v. Atchison, T. & S. F. R. Co.*, 113 C. C. A. 653, 193 Fed. 867.

##### Negligence of Fellow Servants.

A petition in an action for injuries to a flagman, alleging the existence of a hazardous custom requiring flagmen to leave moving trains for orders and to board such trains to deliver the orders and to resume their duties, and that for such purpose the plaintiff left a train by the direction of the engineer, and as the result of the latter's negligence he was injured while attempting to board the moving train, shows that the act of the engineer was that of a co-employee within the meaning of the Federal Employers' Liability Act. *De Atley v. Chesapeake & O. R. Co.*, 147 Ky. 315, 144 S. W. 95, reversed on other grounds, 241 U. S. 310, 60 L. ed. —, 36 Sup. Ct. Rep. 564.

##### Jumping from Engine in Fright.

A cause of action under the Federal Employers' Liability Act is shown by a complaint alleging in substance that a brakeman employed by an interstate carrier was injured by jumping in fright from a locomotive when the engineer negligently injected cold water into the boiler after permitting the water therein to become low, which caused the crown sheet to blow out with a loud report. *Vandalia R. Co. v.*

Stringer, 182 Ind. 676, 106 N. E. 865, rehearing denied 182 Ind. 684, 107 N. E. 673.

#### **Defendant's Knowledge of Defects.**

An allegation of a complaint under the Federal Employers' Liability Act, that the plaintiff was injured by being thrown from a rapidly moving locomotive by reason of a defect therein which was due to the negligence of the defendant, was sufficient without alleging the defendant's knowledge of the defect or its failure to exercise due care to discover it. *Atlantic C. L. R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 693, reversed on other grounds — Ala. —, 67 So. 256.

#### **(5) To Show Dependency.**

##### **In General.**

A complaint is sufficient under the Federal Employers' Liability Act, to permit a recovery for the death of a railway employee, where it alleged that the suit was brought on behalf of the next of kin of the deceased, an unmarried man, and gave the names and ages of his mother, brother and sister, and it further stated that at the time of his death the mother was wholly dependent and the other relatives partly dependent upon the decedent. *Illinois C. R. Co. v. Stewart*, 138 C. C. A. 444, 223 Fed. 30.

Where the petition in an action under the Federal Employers' Liability Act for the death of an employee, shows the relation to him of the beneficiaries for whose benefit the action is brought, a general averment that they were dependent on the decedent, had a pecuniary interest in his life and suffered a pecuniary loss by his death is sufficient without setting out in detail the reasons showing their dependency or the extent of their pecuniary loss. *Louisville & N. R. Co. v. Holloway*, 168 Ky. 262, 181 S. W. 1126, S. C. 163 Ky. 125, 173 S. W. 343.

#### **(6) To Show Acts Within Scope of Employment.**

##### **In General.**

A complaint based on the Federal Employers' Liability Act, which alleged in substance that the plaintiff was employed by the defendant as a section foreman, and that the former, while on his way with a push-car to obtain necessary materials for the construction and repair of the defendant's track, and while standing on the slowly moving push-car as it was propelled in front of a hand-car, was thrown therefrom and injured by the act of a fellow servant on the hand-car in giving the push-car a sudden kick or shove with his foot, stated a cause of action, and was not objectionable for failing to show that the negligent em-

ployee acted within the scope of his employment, where the defendant's answer admitted that at the time and place of the accident the plaintiff and his co-employees were engaged in interstate commerce and were on their way for necessary materials for the construction and repair of the defendant's right of way. *Arizona E. R. Co. v. Bryan*, — Ariz. —, 157 Pac. 376.

That the employee whose negligent act caused an injury to a section foreman acted within the scope of his employment, is sufficiently shown in an action founded on the Federal Employers' Liability Act, by a complaint alleging in substance that the plaintiff, when on his way to procure necessary materials for the construction and repair of a track, and while standing on a push-car as it was slowly propelled in front of a hand-car, was thrown therefrom and injured when it was given a sudden kick or push by an employee riding on the hand-car, especially where the defendant did not request that the complaint be made more specific. *Arizona E. R. Co. v. Bryan*, — Ariz. —, 57 Pac. 376.

#### **(d) Pleading Both Federal and State Laws**

##### **(1) In General.**

##### **Effect of Reference to State Law.**

The reference to a state statute in the declaration in an action against an interstate carrier for the death of an employee, does not vitiate the pleading where the action can be maintained only under the Federal Employers' Liability Act. *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914 B. 134, affirming 113 C. C. A. 665, 192 Fed. 919.

Reference to a state law in a declaration in an action for the death of a railway employee may be disregarded where the facts bring the action within the scope of the Federal Employers' Liability Act. *Nashville, C. & St. L. R. Co. v. Anderson*, — Tenn. —, 185 S. W. 677.

##### **Setting Up State or Common Law.**

A state law and the Federal Employers' Liability Act may be pleaded in the same complaint. *Midland V. R. Co. v. Ennis*, 109 Ark. 206, 159 S. W. 214.

The fact that a state statute is set out in a petition in an action for injuries received by an employee, does not prevent the application of the Federal Employers' Liability Act where the facts bring the case within its terms. *Stafford v. Norfolk & W. R. Co.*, 202 Fed. 605.

Facts showing the liability of the defendant in an action for injuries received by an

employee, under the common law, a state employers' liability statute and the Federal Employers' Liability Act, may be set up in the same complaint, since but a single cause of action is disclosed. *Payne v. New York, S. & W. R. Co.*, 201 N. Y. 436, 95 N. E. 19, reversing 141 App. Div. 833, 125 N. Y. Supp. 1011.

A complaint in an action for injuries to a railway employee may be so drawn as to permit a recovery either under the common law, a state statute or the Federal Employers' Liability Act, as the evidence may permit. *Delaware, L. & W. R. Co. v. Yurkonis*, 137 C. C. A. 23, 220 Fed. 429, affirmed on other grounds 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902.

### (2) In Same Count.

#### In General.

A cause of action under the Federal Employers' Liability Act for the death of an employee while engaged in interstate commerce, cannot be joined in the same count with a claim under a state law. *Bankson v. Illinois C. R. Co.*, 196 Fed. 171.

### (3) Separate Counts.

#### In General.

If it appears that an employee's injuries were received in interstate commerce a carrier does not lose the right to assert that the Federal Employers' Liability Act controls merely because the plaintiff presents his claim alternatively in different counts. *Osborne v. Gray*, 241 U. S. 16, — L. ed. —, 36 Sup. Ct. Rep. 486, affirming 5 Tenn. Civ. App. 619.

#### Joinder.

Counts under both a state law and the Federal Employers' Liability Act may be joined in an action for an injury to or the death of a railway employee. *Ex parte Atlantic C. L. R. Co.*, 190 Ala. 132, 67 So. 256, S. C. 9 Ala. App. 499, 63 So. 693; *Atkinson v. Bullard*, 14 Ga. App. 69, 80 S. E. 220.

Counts under the Federal Employers' Liability Act and at common law may be joined in a declaration in an action brought in a state court for an injury to a railway employee. *Bouchard v. Central Vt. R. Co.*, 87 Vt. 399, 89 Atl. 475, L. R. A. 1915 C. 33.

Where the state law permits the joinder of counts under the Federal Employers' Liability Act and for common law negligence, there may be a recovery in a Federal court under either count, in an action for injuries to or for the death of an employee, in accordance with the evidence at the trial. *Bankson v. Illinois C. R. Co.*, 196 Fed. 171.

### Completeness of Counts.

Although the plaintiff in an action for the death of a railway employee may declare in separate counts both on the Federal Employers' Liability Act and a state law, yet each count must be complete in itself and set forth a cause of action without the necessity of resorting to the averments of any other count. *Atkinson v. Bullard*, 14 Ga. App. 69, 80 S. E. 220.

Where both a state law and the Federal Employers' Liability Act are declared on in separate counts, it is essential that the initial pleading or its amendment be so drawn that the court may determine under which law the respective counts are intended to assert a claim for liability. *Ex parte Atlantic C. L. R. Co.*, 190 Ala. 132, 67 So. 256.

### (4) Requiring Separation of or More Specific Statements.

#### Separation.

Where liability under a state statute is claimed in the same count with the Federal Employers' Liability Act, for the death of an employee while engaged in interstate commerce, the plaintiff will be required to divide and separate such causes of action. *Bankson v. Illinois C. R. Co.*, 196 Fed. 171.

When facts showing the liability of the defendant in an action for injuries to an employee, under the common law, a state employers' liability statute and the Federal Employers' Liability Act, are set up in the same complaint the plaintiff cannot be compelled to separately state and number the facts relied on to support his action under each law, as separate and distinct causes. *Payne v. New York, S. & W. R. Co.*, 201 N. Y. 436, 95 N. E. 19, reversing 141 App. Div. 833, 125 N. Y. Supp. 1011.

### More Specific Statement.

#### —Employment in Interstate or Intrastate Commerce.

Where the pleadings of the plaintiff in an action for the death of a railway employee, were based wholly upon the assumption that he was employed in intrastate commerce at the time of his death, and recovery was sought under a state law, the defendant's motion to require the plaintiff to make his petition more specific so as to show whether he was proceeding under the state law or the Federal Employers' Liability Act, was properly overruled. *Louisville & N. R. Co. v. Parker*, 165 Ky. 658, 177 S. W. 465.

### (5) Election.

See also *supra* XVI, G.

#### In General.

In an action for the death of a railway

employee where it was alleged that the plaintiff did not know whether his intestate was employed in interstate or intrastate commerce at the time of his death, the pleadings may be drawn to meet proof as to either employment without the plaintiff being required to elect whether he will proceed under the state law or the Federal Employers' Liability Act. *International & G. N. R. Co. v. Reek*, — Tex. Civ. App. —, 179 S. W. 699.

#### **Between Counts.**

Where both common-law negligence and the Federal Employers' Liability Act are relied on in different counts, in an action in a Federal court for injuries to or the death of a railway employee, the plaintiff cannot be compelled to elect which count he will rely on. *Bankson v. Illinois C. R. Co.*, 196 Fed. 171.

### **2. Demurrer.**

#### **In General.**

Where the second paragraph of the complaint in an action under the Federal Employers' Liability Act, averred in substance the same facts that appeared in the first paragraph, and further alleged that other employees of the defendant wilfully ran a locomotive over the plaintiff's intestate; and the defendant's memorandum to its demurrer to the second paragraph stated the same grounds of its demurrer to the first paragraph, by force of § 348 Burn's Ind. St. 1914, the defendant waived its right to a consideration of its demurrer to the second paragraph for insufficiency of facts. *Pitts. C. C. & St. L. R. Co. v. Farmers' T. & S. Co.*, 183 Ind. 287, 108 N. E. 108.

#### **Grounds.**

##### **—Declaration Under State Law Showing Employment in Interstate Commerce.**

A declaration in an action under a state law for the death of a railway employee, is demurrable where it discloses that he was killed while engaged in interstate commerce. *Dewberry v. Southern R. Co.*, 175 Fed. 307.

##### **—Negligence Charged Not Proximate Cause of Injury.**

A petition in an action based on the Federal Employers' Liability Act, which alleged that a fireman on an interstate train was injured by jumping from the engine when he believed that a derailment was inevitable as the result of the negligence of the defendant in permitting the rails to buckle and become out of line and in failing to give sufficient signals so as to permit a timely stopping of the train, was not subject to either a general or special demurrer on the ground that as the

engine did not in fact leave the rails, the negligence charged was not the proximate cause of the injury. *Charleston & W. C. R. Co. v. Brown*, 13 Ga. App. 744, 79 S. E. 932.

##### **—Injury Due to Combined Negligence of Plaintiff and Fellow Servant.**

A declaration in an action based on the Federal Employers' Liability Act, is not demurrable on the ground that it showed that the plaintiff's injuries were caused either by the negligence of a fellow employee or the combined negligence of the latter and the plaintiff. *Easter v. Virginian R. Co.*, — W. Va. —, 86 S. E. 37.

##### **—Failure to Negative Exceptions to Rule.**

Where the declaration in an action under the Federal Employers' Liability Act for the death of a freight conductor in a rear end collision, when properly construed, amounts to a general charge of negligence, and also avers a negligent violation of a particular rule of a carrier in the operation of trains, the right to recover is not limited solely to negligent infractions of such rule, and the pleading was not bad on demurrer for failing to negative certain exceptions of the rule. *Culp v. Virginian R. Co.*, — W. Va. —, 87 S. E. 187.

##### **—Limitations.**

Where a petition in an action under the Federal Employers' Liability Act, does not show on its face that the cause of action is barred by the limitation prescribed by the act, a demurrer urged specially on that ground should be overruled. *Lindsay v. Chicago, R. I. & P. R. Co.*, — Okla. —, 155 Pac. 1173.

A declaration disclosing that the plaintiff was appointed administrator within two years prior to the bringing of an action under the Federal Employers' Liability Act for wrongful death, is not demurrable although it fails to show that the action was begun within two years from the death of the intestate. *American R. Co. v. Coronas*, 144 C. C. A. 599, 230 F. 545.

### **3. Plea or Answer.**

#### **(a) In General.**

(No decisions.)

#### **(b) What Defenses Must Be Pleaded.**

##### **(1) In General.**

(No decisions.)

##### **(2) Assumed Risk.**

#### **In General.**

Assumed risk must be pleaded by the defendant in an action under the Federal

Employers' Liability Act. *Alabama G. S. R. Co. v. Skotzy*, — Ala. —, 71 So. 335.

When assumption of a risk not usually and ordinarily incident to the service, is relied on as a defense to an action under the Federal Employers' Liability Act, it must be specially pleaded. *Phillips v. Union P. R. Co.*, — Neb. —, 158 N. W. 966.

Assumption of risk must be pleaded by the defendant in an action under the Federal Employers' Liability Act. *Vickery v. New London N. R. Co.*, 87 Conn. 634, 89 Atl. 277; *Texas & P. R. Co. v. Prothro*, — Tex. Civ. App. —, 174, S. W. 302.

Under the North Carolina practice, assumption of risk must be specially pleaded by the defendant in an action in a court of that state based on the Federal Employers' Liability Act. *Lloyd v. Southern R. Co.*, 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489, affirmed on other grounds 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210.

When evidence tending to prove assumption of risk is given by the plaintiff in an action under the Federal Employers' Liability Act, the defendant may have the benefit of it although such defense was not specifically pleaded. *New York, N. H. & H. R. Co. v. Vizvari*, 126 C. C. A. 632, 210 Fed. 118, L. R. A. 1915 C. 9.

### (3) Contributory Negligence.

#### Effect of Pleading.

When contributory negligence is pleaded by the defendant in an action based on the Federal Employers' Liability Act, the question of the plaintiff's right to recover is removed from the case, and the only question remaining is the amount of his recovery. *Arizona E. R. Co. v. Bryan*, — Ariz. —, 157 Pac. 376.

### (4) Employment in Interstate Commerce.

#### In General.

The Federal Employers' Liability Act must be pleaded by the defendant when relied on, or at least such facts be averred as to show that it is applicable to an action for injuries to a railway employee. *Mims v. Atlantic C. L. R. Co.*, 100 S. C. 375, 85 S. E. 372.

If the rights of the plaintiff, in an action under a state law, are in any way affected by the Federal Employers' Liability Act, the defendant must plead and prove such fact. *St. Louis & S. F. R. Co. v. Cox*, — Tex. Civ. App. —, 159 S. W. 1042.

When the pleadings of the plaintiff show a cause of action under a state law the defendant must plead the Federal Employers' Liability Act if he would contend

that it controls. *Louisville & N. R. Co. v. Barrett*, 143 Ga. 742, 85 S. E. 923; *Pelton v. Illinois C. R. Co.*, 171 Ia. 91, 150 N. W. 236.

The defendant must plead the Federal Employers' Liability Act in order to invoke its protection in an action based on a state law for the death of an employee. *Central of Ga. R. Co. v. DeLoach*, — Ga. App. —, 89 S. E. 433.

When the petition, in an action for the death of a railway employee, disclosed a perfect action under a state law, the defendant must, under the Missouri Code, plead the Federal Employers' Liability Act in its answer if it would assert that it controls. *Taber v. Missouri P. R. Co.*, — Mo. —, 186 S. W. 688.

In an action for the death of a railway employee based on a state law, the defendant need not affirmatively plead the Federal Employers' Liability Act in order to obtain its benefit, since it will be applied where the evidence shows that the decedent was killed while engaged in interstate commerce. *Chrosciel v. New York C. & H. R. Co.*, — App. Div. —, 159 N. Y. Supp. 924.

Since an allegation of the defendant's answer, in an action against a railway company for injuries to an employee, that if the defendant were liable its responsibility was regulated by the Federal Employers' Liability Act, stated a proposition of law and did not controvert any allegation of the plaintiff's petition, no issue was made thereby, where the defendant denied that the plaintiff was in its employ or under its direction or control and did not allege that at the time of the plaintiff's injury it was engaged in interstate commerce. *Wichita F. & N. W. R. Co. v. Puckett*, — Okla. —, 157 Pac. 112.

### (5) Limitations.

#### In General.

Since the provisions of section 6 of the Federal Employers' Liability Act as to the time in which an action must be begun do not annex a condition to the right of action, such limitations must be specially pleaded. *Burnett v. Atlantic C. L. R. Co.*, 163 N. C. 186, 79 S. E. 414, reversed 239 U. S. 199, 60 L. ed. —, 36 Sup. Ct. Rep. 75.

The objection that an action based on the Federal Employers' Liability Act was begun more than two years after it accrued may be urged by the defendant even though not pleaded as a defense, where the record on appeal sustain the objection. *Atlantic C. L. R. v. Burnett*, 239 U. S. 199, — L. ed. —, 36 Sup. Ct. Rep. 75, reversing 163 N. C. 186, 79 S. E. 414.

**(c) Plea in Abatement.****Prior Action Under State Law.**

A plea in abatement in an action under the Federal Employers' Liability Act, which alleges the pendency of a prior action for the same cause based on the common law or a state law, is bad on demurrer where the record of such action is not enrolled. *Tinkham v. Boston & M. R. Co.*, 77 N. H. 111, 88 Atl. 709.

**(d) What May Be Shown Under General Denial.****Assumed Risk.**

Assumed risk cannot be shown under the general issue in an action founded on the Federal Employers' Liability Act. *Alabama G. S. R. Co. v. Skotzy*, — Ala. —, 71 So. 335.

**Employment in Interstate Commerce.**

Where the facts alleged show a cause of action under a state law for the death of a railway employee, without referring to interstate commerce, and the defendant filed a general denial only, the latter cannot defeat the action by showing that the decedent was engaged in such commerce at the time he was killed, since such defense must be pleaded. *Louisville & N. R. Co. v. Barrett*, 143 Ga. 742, 85 S. E. 923.

An allegation of a complaint in an action founded on the Federal Employers' Liability Act, that the plaintiff was employed in interstate commerce at the time he was injured, was not put in issue under the Iowa rule of practice, by a general denial, since such question must be raised by an affirmative plea. *Pelton v. Illinois C. R. Co.*, 171 Ia. 91, 150 N. W. 236; writ of error dismissed, 239 U. S. 655, 60 L. ed. —, 36 Sup. Ct. Rep. 166.

It may be shown under the general denial, in an action under a state law brought by a widow in her own name against a railway company for the death of her husband, that the decedent was engaged in interstate commerce, and that, since the Federal Employers' Liability Act controlled, she was not the proper party to maintain the action. *Giersch v. Atchison, T. & S. F. R. Co.*, — Okla. —, 158 Pac. 54.

The defendant may show under a general denial in an action under a state law by a widow in her own name for the death of her husband by the negligence of an alleged intrastate carrier, that it was engaged in interstate commerce and that the Federal Employers' Liability Act controlled. *Sells v. Atchison T. & S. F. R. Co.*, — Mo. —, 181 S. W. 106.

**Plaintiff's Negligence Sole Cause of Injury.**

That the plaintiff's negligence was the

sole cause of his injury, and that it was not produced by the negligence of the defendant may be shown under the general issue in an action based on the Federal Employers' Liability Act. *Southern R. Co. v. Peters*, — Ala. —, 69 So. 611.

**(e) Demurrer to Plea or Answer.****Plea of Contributory Negligence.**

Special pleas setting up contributory negligence in bar of an action founded on the Federal Employers' Liability Act, are demurrable. *Southern R. Co. v. Peters*, — Ala. —, 69 So. 611.

Since an alternative plea of assumption of risk and that an employee knew or negligently failed to discover the defect which caused his injury, was as much a plea of contributory negligence as of assumed risk, it was demurrable in an action under the Federal Employers' Liability Act, since its effect was to set up contributory negligence as a bar to the action. *Southern R. Co. v. Peters*, — Ala. —, 69 So. 611.

**4. Amendments.****(a) In General.**

(No decisions.)

**(b) Setting up Federal Act.****(1) In General.****Complaint or Declaration.**

A new and different cause of action was held not shown by an amendment to a petition in an action for the negligent killing of a railway employee, which set up other and further grounds of negligence, as well as the Federal Employers' Liability Act. *Zitnek v. Union P. R. Co.*, 95 Neb. 152, 145 N. W. 344, writ of error dismissed, 239 U. S. 650, 60 L. ed. — 36 Sup. Ct. Rep. 159.

A petition in an action for an injury to an employee, may be amended so as to set forth a cause of action under the Federal Employers' Liability Act. *Southern R. Co. v. Puckett*, 16 Ga. App. 551, 85 S. E. 809.

A personal representative suing under a state law for the death of an employee cannot, after the appearance of the defendant and over its objection, amend his declaration by setting forth a right of action under the Federal Employers' Liability Act, since a new cause of action is thereby introduced. *Findley v. Coal & C. R. Co.*, — W. Va. —, 87 S. E. 198.

Where the defendant elicited on the cross-examination of one of the plaintiff's witnesses, facts tending to bring an action within the terms of the Federal Employers' Liability Act, the plaintiff may amend his complaint so as to shift his action from

a state law to the Federal act. *Koennecke v. Seaboard A. L. R. Co.*, 101 S. C. 86, 85 S. E. 374, affirmed 239 U. S. 352, — L. ed. —, 36 Sup. Ct. Rep. 126.

A petition in an action for injuries to an employee, which sets forth the relation between him and the defendant and describes the circumstances under which the injury occurred, makes out a case of negligence without alleging that the defendant was engaged in interstate commerce at the time of the accident, since that may be set up by amendment. *Gainsville M. R. v. Vandiver*, 141 Ga. 350, 80 S. E. 997.

A new cause of action is not introduced in an action for an injury to a railway employee, by an amendment showing the employment of either the plaintiff or defendant in interstate commerce, where the original pleading contains the necessary averment of the other's employment in such commerce and discloses an intent to state a cause of action under the Federal Employers' Liability Act. *Lucchetti v. Philadelphia & R. R. Co.*, 233 Fed. 137.

#### Time for Amendment.

##### — During Trial.

A complaint disclosing a common-law action for injuries to an employee may be amended at the trial so as to invoke the Federal Employers' Liability Act. *Vickery v. New London N. R. Co.*, 87 Conn. 634, 89 Atl. 277.

The plaintiff may be permitted even during the trial, to amend his complaint so as to shift his action from a state law to the Federal Employers' Liability Act, where there is not such a material change in the claim or the defense as to result in prejudice to the adverse party. *Koennecke v. Seaboard A. L. R. Co.*, 101 S. C. 86, 85 S. E. 374, affirmed 239 U. S. 352, — L. ed. —, 36 Sup. Ct. Rep. 126.

Permitting the plaintiff to amend his pleadings after the close of his testimony so as to bring an action specifically under the Federal Employers' Liability Act, and requiring the defendant to proceed with the trial was not an abuse of discretion which amounted to a denial of due process of law under the Fourteenth Amendment of the Federal Constitution. *Seaboard A. L. R. Co. v. Koennecke*, 239 U. S. 352, — L. ed. —, 36 Sup. Ct. Rep. 126, affirming 101 S. C. 86, 85 S. E. 374.

Under sections 505 and 507, R. S. N. Carolina, a complaint in an action in a state court for injuries received by a railway employee may be amended at the close of the trial so as to bring the action within the Federal Employers' Liability Act, by alleging that at the time of his injury the plaintiff was employed in interstate commerce. *Renn v. Seaboard A. L.*

*R.*, 170 N. C. 128, 86 S. E. 964, affirmed 241 U. S. 290, 60 L. ed. —, 36 Sup. Ct. Rep. 567.

##### — On Remand from Appellate Court.

Where the case shown on appeal is under a state law the court will not determine the rights of the parties under the Federal Employers' Liability Act, but on a new trial the lower court may permit such amendments as may be desired and may determine the action under the Federal law. *Cincinnati, N. O. & T. P. R. Co. v. Goode*, 155 Ky. 153, 159 S. W. 695.

#### (3) After Two Years.

##### In General.

The plaintiff in an action for the negligent killing of a railway employee, may amend his petition by setting up the Federal Employers' Liability Act and alleging other and different grounds of negligence, without rendering his pleading vulnerable to a plea of the statute of limitations. *Zitnek v. Union P. R. Co.*, 95 Neb. 152, 145 N. W. 344, writ of error dismissed 239 U. S. 650, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

A complaint based on a state law may be amended more than two years after the cause of action accrued, by setting up the employment of the plaintiff in interstate commerce at the time he was injured so as to invoke the Federal Employers' Liability Act, since but one cause of action was stated, and the amendment relates back to the original complaint and becomes a part thereof. *Curtice v. Chicago & N. W. R. Co.*, — Wis. —, 156 N. W. 484.

The refusal to permit the defendant in an action based on a state statute for injuries to a railway employee, to amend its answer at a term other than the appearance term, by setting up the Federal Employers' Liability Act, was not prejudicial error, where the liability of the defendant was no greater under the state law than under the Federal Act, and there was evidence sufficient to sustain a recovery under either law. *Southern R. Co. v. Ansley*, 8 Ga. App. 325, 68 S. E. 1086.

A complaint setting up a common-law action for injuries sustained by an employee, may be amended more than two years after the cause of action accrued by invoking the Federal Employers' Liability Act. *Vickery v. New London N. R. Co.*, 87 Conn. 634, 89 Atl. 277.

A petition in an action for injuries to an employee, when based on a state law, may be amended more than two years after the cause of action accrued by setting up the Federal Employers' Liability Act, since the amendment will relate back to the time

of filing the original petition. *Gainesville M. R. v. Vandiver*, 141 Ga. 350, 80 S. F. 997.

Where the declaration in an action for injuries to an employee is expressly based on a state statute although it is averred that the defendant owned and operated a railway system extending through two designated states, such pleading may be amended more than two years after the cause of action accrued, so as to bring it within the Federal Employers' Liability Act. *Jorgenson v. Grand Rapids & I. R. Co.*, — Mich. —, 155 N. W. 535.

Where a cause of action arises under the Federal Employers' Liability Act, and suit is brought under a state law, or by some person not authorized to maintain it under the Federal law, defects in the original petition may be cured by amendment, although made more than two years after the cause of action accrued, where a new and distinct cause is not set up, since the amendment relates back to the filing of the original petition. *Cincinnati, N. O. & T. P. R. Co. v. Goode*, 163 Ky. 60, 173 S. W. 329.

#### When Action Begun Within Two Years.

Where an action was begun within two years from the time an employee was injured, his complaint, which disclosed a cause of action under a state law, may, after the expiration of the two years, be amended by setting up the Federal Employers' Liability Act. *Smith v. Atlantic C. L. R. Co.*, 127 C. C. A. 331, 210 Fed. 761.

A new and distinct cause of action was not disclosed by the amendment of a complaint more than two years after the accrual of a cause of action, by a positive averment that the plaintiff was employed in interstate commerce at the time of his injury, where the original complaint imperfectly set up a cause of action under the Federal Employers' Liability Act. *Seaboard A. L. R. Co. v. Renn*, 241 U. S. 290, 60 L. ed. —, 36 Sup. Ct. Rep. 567, affirming 170 N. C. 128, 86 S. E. 964.

An action may be brought within the Federal Employers' Liability Act by amendment of the petition more than two years after the cause of action accrued. *Baltimore & O. R. Co. v. Smith*, 169 Ky. 593, 184 S. W. 1108.

The plaintiff, in an action for injuries received while in the employ of a carrier, may be permitted to amend his complaint more than two years after his injury where the action was begun within that period, by alleging his employment at the time in interstate commerce. *Renn v. Seaboard A. L. R.*, 170 N. C. 128, 86 S. E. 964, affirmed 241 U. S. 290, 60 L. ed. —, 36 Sup. Ct. Rep. 567.

Where an action for injuries sustained

by an employee was begun within two years after the accident, and the pleadings, although sufficient to show a cause of action under the Federal Employers' Liability Act, were treated as falling within a state law, a new or different cause of action which was barred by the period of limitation prescribed by the Federal act, was not presented by an amendment made more than two years after the injury, which reiterated the averments of the original petition, and set them out more fully so as to show that the action arose under the Federal law. *Cincinnati, N. O. & T. P. R. Co. v. Goode*, 163 Ky. 60, 173 S. W. 329.

When the petition in an action under the Federal Employers' Liability Act is held bad on general demurrer, its amendment so as to state a cause of action which did not before exist, does not permit the bar of the statute of limitations if the action was not barred when the first petition was filed. *Eastern R. Co. v. Ellis*, — Tex. Civ. App. —, 153 S. W. 701.

Where the complaint in an action by a widow for the death of her husband was amended more than a year after the action was begun, so as to shift the action from a state statute to the Federal Employers' Liability Act of 1906, a new cause of action was introduced which was barred by the provisions of such act. *Hall v. Louisville & N. R. Co.*, 157 Fed. 464, affirmed 98 C. C. A. 664, 174 Fed. 1021.

#### (c) Alleging Representative Capacity.

Substitution of personal representation for beneficiary as plaintiff, see *supra* XIV, H, 2 (d).

#### More Than Two Years After Action Begun.

##### — Action in Name of Beneficiary.

A woman suing in her individual capacity as the sole surviving parent of a son who was killed while in the employ of an interstate carrier, may, under section 954, U. S. R. S., U. S. Comp. St. 1901, p. 696, amend her declaration by alleging her representative capacity so as to permit a recovery under the Federal Employers' Liability Act. *Missouri K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914 B. 134, affirming 113 C. C. A. 665, 192 Fed. 919.

Where a woman, suing in her individual capacity as sole surviving parent and beneficiary of her son, who was killed while in the employ of an interstate carrier, was permitted more than two years after his death, to amend her declaration by alleging her representative capacity so as to permit a recovery under the Federal Employers' Liability Act, such amendment was not equivalent to the commencement of a new action so as to render it subject



to the two years' limitation prescribed by section 6 of such act. *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914 B. 134, affirming 113 C. C. A. 665, 192 Fed. 919.

A widow who sues individually under a state law for the death of her husband, may amend her complaint in an action under the Federal Employers' Liability Act, so as to allege her representative capacity as administratrix. *Hall v. Louisville & N. R. Co.*, 157 Fed. 464, affirmed 98 C. C. A. 664, 174 Fed. 1021.

The parents of a deceased railway employee, who, under both the state law and the Federal Employers' Liability Act, were his sole beneficiaries, may, in an action under the latter act brought in their individual names, be substituted as plaintiffs in a representative capacity, more than two years after the action was instituted. *Bixler v. Penn. R. Co.*, 201 Fed. 553.

The declaration in an action in the name of a widow for the death of her husband, may be amended more than two years after the cause of action accrued by alleging her representative capacity so as to bring the action within the terms of the Federal Employers' Liability Act. *Gray v. Kent*, 5 Tenn. Civ. App. 519, affirmed 240 U. S. —, L. ed. —, 36 Sup. Ct. Rep. 486.

The amendment, in an action for wrongful death, of the petition more than two years after the cause of action accrues, so as to permit the intervention of an administrator, does not introduce a new cause of action which is barred by the terms of the Federal Employers' Liability Act. *Ft. Worth Belt R. Co. v. Jones*, — Tex. Civ. App. —, 182 S. W. 1184.

Where a widow, within two years after the death of her husband, brought an action in her own name to recover for the benefit of herself and children, and more than two years thereafter filed an amended petition alleging her representative capacity so as to bring the action within the terms of the Federal Employers' Liability Act, the suit was not barred by the limitation prescribed by such statute. *Texarkana & Ft. S. R. Co. v. Casey*, — Tex. Civ. App. —, 172 S. W. 729.

The change from a widow, as party plaintiff, to the administrator of the estate of a deceased employee, so as to invoke the Federal Employers' Liability Act, although made more than two years after the cause of action accrued, is not a change of the cause of action, where the original declaration, although based on a state law, disclosed facts sufficient to permit a recovery under the Federal law with the exception of alleging the employment of the decedent in interstate commerce. *Nashville, C. & St. L. R. Co. v. Anderson*, — Tenn. —, 185 S. W. 677.

In an action under a state law in the

name of a widow for the death of her husband, his administrator may be substituted as plaintiff more than two years after the cause of action arose, and the declaration may be amended by striking out all reference to the state law and by setting up the interstate character of the decedent's employment, so as to invoke the Federal Employers' Liability Act, since the amendments did not change the original cause of action, especially where the defendant's answer to the original declaration alleged the decedent's employment in interstate commerce. *Nashville, C. & St. L. R. Co. v. Anderson*, — Tenn. —, 185 S. W. 677.

Where the declaration, in an action in the name of a widow for the death of her husband, although based on a state law, set up acts of negligence cognizable under the Federal Employers' Liability Act, with the exception of the interstate character of the decedent's services, and the defendant's answer alleged the decedent's employment in interstate commerce, and two years after the cause of action arose an administrator was substituted as plaintiff for the widow, and the declaration was amended by striking out all reference to the state law, the interstate nature of the decedent's employment was sufficiently brought out in the pleadings prior to the running of the two year's statute of limitations. *Nashville, C. & St. L. R. Co. v. Anderson*, — Tenn. —, 185 S. W. 677.

#### —On Remand.

Where a judgment in favor of a widow who in her own name brought an action against a carrier under a state statute for the death of her husband, was reversed by the Supreme Court of the United States on the ground that the Federal Employers' Liability Act controlled, she may on the remand of the action to a state court, amend her petition more than two years after the cause of action accrued, by alleging her representative capacity. *St. Louis, S. F. & T. R. Co. v. Smith*, — Tex. Civ. App. —, 171 S. W. 512.

#### —After Death of Employee Who Brought Action in His Own Name.

Where the plaintiff died during the pendency of an action for injuries received while in the employ of a carrier, his widow cannot as administratrix amend the complaint more than two years after the cause of action accrued, by pleading the Federal Employers' Liability Act. *Hughes v. New York, O. & W. R. Co.*, 158 App. Div. 443, 143 N. Y. Supp. 603.

#### (d) Averring Existence of Beneficiaries. In General.

A complaint in an action under the Fed-

eral Employers' Liability Act, which does not state that the decedent left surviving any of the beneficiaries designated by the act, cannot be amended at the close of the testimony so as to cure such defect, where the evidence did not show that any person of the designated class was dependent on the deceased. *Illinois C. R. Co. v. Doherty*, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31.

#### (e) Conforming to Proofs.

##### In General.

In an action founded on the Federal Employers' Liability Act for injuries received by a fireman by the negligent starting of an engine with unnecessary violence as he was entering the cab, the declaration may be amended during the arguments to the jury, so as to conform to proof that the engine was motionless when he mounted the step and that it was started while he was in that position. *Southern R. Co. v. Gadd*, 125 C. C. A. 21, 207 Fed. 277, affirmed 233 U. S. 572, 58 L. ed. 1099, 34 Sup. Ct. Rep. 696.

Where neither a state law nor the Federal Employers' Liability Act were pleaded in an action for injuries received by a railway employee, nor was it alleged that the plaintiff or defendant were engaged in interstate commerce at the time of the accident, the former should be permitted at the trial to amend his declaration to conform to proof that he was engaged in such commerce. *Fernette v. Pere Marquette R. Co.*, 175 Mich. 653, 672, 141 N. W. 1084, 144 N. W. 834.

Where there was no allegation in the complaint that the plaintiff was engaged in interstate commerce at the time he was injured or that his cause of action was controlled by the Federal Employers' Liability Act, and the uncontradicted evidence showed that he was employed in such commerce at the time of the accident, the complaint will be treated as amended as of course to conform to the proof, where the defendant's answer charged that both it and the plaintiff were so engaged at the time. *Callaghan v. Chicago & N. W. R. Co.*, 161 Wis. 288, 154 N. W. 449.

#### (f) On Appeal.

##### To Bring Case Within Federal Act.

Where neither the Federal Employers' Liability Act nor a state law were pleaded in an action for injuries to a railway employee, nor was it alleged that the plaintiff or defendant were engaged in interstate commerce at the time of the accident, and the proof at the trial showed that they were, and the declaration was not amended to conform to the proof, the appellate

court will treat the declaration as amended so as to aver the plaintiff's employment in such commerce. *Fernette v. Pere Marquette R. Co.*, 175 Mich. 653, 672, 141 N. W. 1084, 144 N. W. 834.

##### To Show Existence of Beneficiaries.

A state supreme court may under N. C. R. S. 1915, §1545, in an action based on the Federal Employers' Liability Act, permit the amendment of the complaint, in order to conform to the proof at the trial, so as to allege the existence of beneficiaries who had a reasonable expectation of pecuniary benefit from the continuance of the life of a deceased employee. *Kenney v. Seaboard A. L. R. Co.*, 165 N. C. 99, 80 S. E. 1078.

The plaintiff in a common-law action for injuries to an employee, will not be permitted on appeal to amend his declaration by setting up the Federal Employers' Liability Act, where the action was not tried in the lower court, on the theory that he was employed in interstate commerce at the time of his injury. *Carpenter v. Central Vt. R. Co.*, — Vt. —, 90 Atl. 373.

#### (g) Plea or Answer.

##### Setting up Federal Law.

Where a cause of action was alleged under both a state law and the Federal Employers' Liability Act, and the defendant's answer denied that either it or the plaintiff were engaged in interstate commerce at the time of the latter's injury, and on the trial the defendant admitted liability unless the action was defeated by contributory negligence or assumed risk, and the plaintiff was permitted to strike from his complaint the averment as to interstate commerce, and at the close of the case the plaintiff moved to strike out all evidence as to such commerce, the defendant's motion to amend its answer at that time so as to set up the plaintiff's employment in interstate commerce, was properly denied. *Illinois C. R. Co. v. Nelson*, 128 C. C. A. 525, 212 Fed. 69.

The fact that the defendant in an action based on a state law for the death of a railway employee, pleads the general issue and assumed risk, does not prevent the subsequent filing of a plea setting up the Federal Employers' Liability Act, where it was stipulated that at the time of the disaster the decedent was engaged in interstate commerce in the employ of an interstate carrier. *Flanders v. Georgia S. & F. R. Co.*, 68 Fla. 479, 69 So. 68.

In an action in the name of a widow against a railway company for the death of her husband, when the pleadings do not show the employment of either the decedent or the defendant in interstate commerce, the defendant should be permit-

ted, at the close of the plaintiff's case, to amend its answer so as to invoke the Federal Employers' Liability Act by setting up the decedent's employment in such commerce at the time he was killed, even though the verifying affidavit does not show that such fact might have been previously discovered by ordinary diligence. *Central of Ga. R. Co. v. De Loach*, — Ga. App. —, 89 S. E. 433.

### 5. Departure.

#### What constitutes.

Where the declaration in an action for injuries to a railway employee, is based on the common law, a replication setting up the Federal Employers' Liability Act is a departure. *Niles v. Central Vt. R. Co.*, 87 Vt. 356, 89 Atl. 629.

#### Waiver.

Where the plaintiff departs from his declaration by setting up the Federal Employers' Liability Act in his replication, and the defendant's exception to the overruling of a demurrer to the replication is "ordered to lie," by going to trial on the merits, the defendant waives the departure. *Niles v. Central Vt. R. Co.*, 87 Vt. 356, 89 Atl. 629.

Where the petition in a common law action for injuries received by an employee, was amended first by setting up a state law and later by alleging the Federal Employers' Liability Act, the defendant waived the departure from the original pleading by answering to the merits of the action as finally pleaded. *McAdow v. Kansas City W. R. Co.*, — Mo. App. —, 164 S. W. 188, affirmed on other grounds 240 U. S. 51, 60 L. ed. —, 36 Sup. Ct. Rep. 252.

### 6. Pleading Over.

#### On Overruling of Plea in Abatement.

The defendant was properly permitted to plead over in an action based on the Federal Employers' Liability Act, on the overruling of a plea in abatement which raised an issue of law only. *Woodruff v. Yazoo & M. V. R. Co.*, 127 C. C. A. 411, 210 Fed. 849, S. C. 137 C. C. A. 567, 222 Fed. 29.

### 7. Striking Pleadings.

#### In General.

In an action based on the Federal Employers' Liability Act a reply filed when the case was called for trial, setting up the violation of the Hours of Labor Act, was properly stricken when not germane to the original pleadings. *Bjornsen v. Northern P. R. Co.*, 84 Wash. 220, 146 Pac. 575.

### 8. Plea or Answer as Express Aider of Defective Complaint.

See also supra XVI, J, 1. (b), (3).

#### In General.

Where the plaintiff was denied leave to amend his complaint by setting up the Federal Employers' Liability Act, he may, under the doctrine of express aider, help out the defective statements of his complaint by the allegation of the defendant's answer setting up such act. *Vickery v. New London N. R. Co.*, 87 Conn. 634, 89 Atl. 277.

The fact that the plaintiff's petition does not set out a cause of action under the Federal Employers' Liability Act does not affect the applicability of such act where it is set up by the defendant, and the evidence shows that it controls. *Missouri, K. & T. R. Co. v. Lenahan*, 39 Okla. 283, 135 Pac. 383.

## XVII. DAMAGES.

Diminution of damages for contributory negligence, see supra X, C.

Instructions as to diminution of damages for contributory negligence, see infra XIX, E, 5 (h).

Instructions in general as to damages, see infra XIX, E, 6.

#### A. In General.

(No decisions.)

#### B. For Injuries.

##### 1. In General.

#### Measure of Damages in General.

In an action predicated on the Federal Employers' Liability Act, if the jury find that the accident was due entirely to the negligence of the defendant, and the plaintiff in no manner contributed to the accident by any negligence on his part, in estimating damages, the jury are to consider the health and condition of the plaintiff before the injuries complained of as compared with his condition in consequence of his injuries, whether the same are in their nature permanent, how far they are calculated to disable the plaintiff from engaging in those business pursuits for which, in the absence of such injuries, he would have been qualified, and also the physical and mental suffering to which he has been subjected by reason of his injuries, and therefrom to determine what will be a fair and just compensation for the injuries suffered, after deducting the amount paid the plaintiff by the defendant by way of relief. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

### Inability to Follow Other Callings.

In an action under the Federal Employers' Liability Act, an injured employee is entitled to compensation for his inability, because of his injuries, to follow any calling or business in which he otherwise might have engaged. *Chesapeake & O. R. Co. v. Meadows*, — Va. —, 89 S. E. 244.

### 2. Pain and Suffering.

Survival of employee's right of action for, see *supra* XIV, C, 2.

### In General.

In an action founded on the Federal Employers' Liability Act the plaintiff may recover for his sufferings. *Southern R. Co. v. Peters*, — Ala. —, 69 So. 611.

The damages awarded in an action under the Federal Employers' Liability Act include a reasonable sum for the plaintiff's pain and suffering. *Nashville, C. & St. L. R. Co. v. Henry*, 158 Ky. 88, 164 S. W. 310, S. C. 168 Ky. 453, 182 S. W. 651.

Where an employee was struck on the head by a lump of coal that fell from the tender of a rapidly moving engine, and afterwards he complained of a swimming in his head, acting as if his mind was affected, and complaining of his suffering, subsequently becoming insane and dying shortly thereafter, it cannot be said as a matter of law, in an action under the Federal Employers' Liability Act, that all of his suffering was due to insanity and that his administrator could not recover therefor unless such condition was produced by such blow. *Cincinnati, N. O. & T. P. R. Co. v. Claybourn*, — Ky. —, 183 S. W. 903.

### 3. Aggravation of Injury.

#### Second Operation.

Where, as the result of an injury due to a carrier's negligence, an employee was compelled to submit to a second surgical operation, he may, in an action based on the Federal Employers' Liability Act, recover for the additional suffering and shock caused by the operation if it was made necessary as a proximate result of the defendant's negligence and not by the unskillful manner in which the first operation was performed. *Sears v. Atlantic C. L. R. Co.*, 169 N. C. 446, 86 S. E. 176.

#### Second Fracture of Limb.

Where an employee sustained a broken leg through the negligence of a carrier, and while he was going about a hospital on crutches he accidentally fell without negligence on his part and refractured the broken limb, he may recover for the entire injury in an action under the Federal Em-

ployers' Liability Act. *Smith v. Northern P. R. Co.*, 79 Wash. 448, 140 Pac. 685, 5 N. C. C. A. 947.

Where an employee sustained a broken leg as the result of the negligence of his employer, and while going about a hospital on crutches in an intoxicated condition he fell and refractured the limb, he may recover for the entire injury in an action under the Federal Employers' Liability Act, if his fall was not the result of his intoxicated condition. *Smith v. Northern P. R. Co.*, 79 Wash. 448, 140 Pac. 685, 5 N. C. C. A. 947.

### 4. Expenses.

#### Treatment.

Expenses incurred by an injured railway employee for medical attendance and nursing may be considered by the jury in awarding damages in an action under the Federal Employers' Liability Act. *Ferbee v. Norfolk & S. R. Co.*, 167 N. C. 290, 83 S. E. 360, affirmed on other grounds, 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781.

In an action under the Federal Employers' Liability Act the plaintiff may recover for the expenses incurred as the result of his injuries. *Southern R. Co. v. Peters*, — Ala. —, 69 So. 611.

The damages awarded in an action based on the Federal Employers' Liability Act for personal injuries, includes expenses of medical attendance. *Nashville, C. & St. L. R. Co. v. Henry*, 158 Ky. 88, 164 S. W. 310, S. C. 168 Ky. 453, 182 S. W. 651.

### 5. Loss of Time and Earning Power.

#### In General.

In an action under the Federal Employers' Liability Act for personal injuries, the plaintiff may recover for loss of time and diminished earning powers. *Southern R. Co. v. Peters*, — Ala. —, 69 So. 611.

The damages awarded in an action under the Federal Employers' Liability Act includes a reasonable allowance for what the plaintiff would have earned had his injury not occurred. *Nashville, C. & St. L. R. Co. v. Henry*, 158 Ky. 88, 164 S. W. 310, S. C. 168 Ky. 453, 182 S. W. 651.

Where damages for loss of earning power are allowed in an action based on the Federal Employers' Liability Act, as well as for the loss of time of an injured employee, the allowance for the first element should be estimated only from the termination of the period for which the allowance for loss of time is made. *Nashville, C. & St. L. R. Co. v. Henry*, 158 Ky. 88, 164 S. W. 310, S. C. 168 Ky. 453, 182 S. W. 651; *Louisville & N. R. Co. v. Patrick*, 167 Ky. 118, 180 S. W. 55.

### C. For Death.

Survival of employee's right of action for pain and suffering, see *supra* XVI, C, 2.

#### 1. In General.

##### What Law Determines.

The damages in an action under the Federal Employers' Liability Act for the death of an employee are to be awarded under the rule laid down by the Federal Supreme Court, and not that of the state in which the action is brought. *Louisville & N. R. Co. v. Stewart*, 157 Ky. 642, 163 S. W. 755, S. C. 156 Ky. 550, 161 S. W. 557, 163 Ky. 823, 174 S. W. 744, reversed on other grounds, 241 U. S. 261, 60 L. ed. —, 36 Sup. Ct. Rep. 586.

##### Basis of Recovery.

###### — In General.

The action given by the Federal Employers' Liability Act for the death of a railway employee is not for the equal benefit of each of the surviving beneficiaries, and although the judgment may be for a gross amount, the interest of each beneficiary must be measured by his individual pecuniary loss. *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806, reversing — *Tex. Civ. App.* —, 147 S. W. 1188.

In computing damages in an action under the Federal Employers' Liability Act, the relationship between the deceased employee and his beneficiaries is a proper circumstance for consideration. *Norfolk & W. R. Co. v. Holbrook*, 235 U. S. 625, 59 L. ed. 394, 35 Sup. Ct. Rep. 143, 7 N. C. C. A. 814, reversing 131 C. C. A. 621, 666, 215 Fed. 687, 1007.

While the elements making up the total damages, in an action under the Federal Employers' Liability Act for the benefit of a minor child, may be materially different from those where the beneficiary is a spouse or collateral dependent relative, yet in every instance the damages must be based upon money values, which can be ascertained only from the peculiar facts of the case. *Norfolk & W. R. Co. v. Holbrook*, 235 U. S. 625, 59 L. ed. 394, 35 Sup. Ct. Rep. 143, 7 N. C. C. A. 814, reversing 131 C. C. A. 621, 666, 215 Fed. 687, 1007.

###### — Pecuniary Loss.

The damages recoverable under the Federal Employers' Liability Act are limited strictly to the financial loss sustained by the beneficiaries designated in the act from the deprivation of a reasonable expectation of pecuniary benefits from the deceased employee. *American R. Co. v. Didricksen*, 227 U. S. 145, 57 L. ed. 456,

33 Sup. Ct. Rep. 224, reversing 5 Porto Rico Fed. Rep. 401, S. C. 5 id. 427.

The recovery under the Federal Employers' Liability Act must be limited to compensating those persons for whose benefit the action is given, and who are shown to have sustained some pecuniary loss from the death of an employee. *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806, reversing — *Tex. Civ. App.* —, 147 S. W. 1188.

There must be some evidence of pecuniary injury before damages can be awarded under the Federal Employers' Liability Act for wrongful death. *Nashville, C. & St. L. R. Co. v. Anderson*, — *Tenn.* —, 185 S. W. 677.

The damages awarded for wrongful death in an action based on the Federal Employers' Liability Act, should be equivalent to compensation for the deprivation of the reasonable benefits that would have resulted to the dependants from the continuance of the life of the deceased employee. *Chesapeake & O. R. Co. v. Kelly*, 241 U. S. 485, 60 L. ed. —, 36 Sup. Ct. Rep. 630, reversing 160 Ky. 296, 169 S. W. 736, S. C. 161 Ky. 655, 171 S. W. 185.

The Federal Employers' Liability Act was intended only to compensate the designated beneficiaries for the actual pecuniary loss sustained from the death of an employee. *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806, reversing — *Tex. Civ. App.* —, 147 S. W. 1188.

A recovery under the Federal Employers' Liability Act for the death of an employee must be based on the actual pecuniary loss sustained by the beneficiaries mentioned in the act. *Kansas City S. R. Co. v. Leslie*, 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844, reversing 112 Ark. 305, 167 S. W. 83, *Ann. Cas.* 1915 B. 834.

The measure of damages in an action under the Federal Employers' Liability Act is the financial loss sustained by the designated beneficiaries by reason of the death of an employee. *Birch v. American R. Co.*, 5 Porto Rico Fed. Rep. 273, reversed on other grounds 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603.

Compensation for the pecuniary loss sustained by the death of a railway employee is all that can be recovered under the Federal Employers' Liability Act. *Bennett v. Southern R. Co.*, 98 S. C. 42, 79 S. E. 710, affirmed on other grounds 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566, 10 N. C. C. A. 853.

The damages recoverable under the Federal Employers' Liability Act for the death of an employee is the pecuniary loss sustained by the beneficiaries designated

in the act, predicated upon their deprivation by his death of a reasonable expectation of future pecuniary benefits. *Farley v. New York, N. H. & H. R. Co.*, 87 Conn. 328, 87 Atl. 990.

The damages recoverable under the Federal Employers' Liability Act for the death of an employee are limited to the financial loss sustained by his surviving dependents from the deprivation by his wrongful death of a reasonable expectation of pecuniary benefit. *Fogarty v. Northern P. R. Co.*, 85 Wash. 90, 147 Pac. 652, L. R. A., 1916 C. 803, S. C. 74 Wash. 397, 133 Pac. 609, L. R. A. 1916 C. 800.

Under the second Federal Employers' Liability Act as originally adopted, the damages recoverable for the death of an employee were confined to the loss sustained by the designated beneficiaries from the deprivation of such pecuniary benefits as they could reasonably have expected as of legal right or otherwise, from the continuance of the decedent's life, excluding punitive damages, damages from the wounded feelings of the survivors, the loss of the decedent's society, or for his sufferings. *Cain v. Southern R. Co.*, 199 Fed. 211.

The damages recoverable for wrongful death in an action under the Federal Employers' Liability Act are limited strictly to financial loss sustained; and there can be no recovery where there is no reasonable expectation of pecuniary benefits. *Fogarty v. Northern P. R. Co.*, 74 Wash. 397, 133 Pac. 609, L. R. A. 1916 C. 800, S. C. 85 Wash. 90, 147 Pac. 652, L. R. A. 1916 C. 803.

A judgment for the benefit of a widow cannot be sustained under the Federal Employers' Liability Act, where the evidence showed that her husband, who lived with his mother, earned from \$50 to \$60 a month as a brakeman, and it did not appear that he supported his wife or gave her any portion of his earnings. *Goen v. Baltimore & O. S. W. R. Co.*, 179 Ill. App. 566.

#### —Savings.

Where an employee gave his wife his monthly earnings, which she deposited in bank in their joint names, it was held, in an action under the Federal Employers' Liability Act for his death, that in estimating damages the support and maintenance she received from the decedent, as well as one-half of their savings, might be considered. *Louisville & N. R. Co. v. Holloway*, 168 Ky. 262, 181 S. W. 1126, S. C. 163 Ky. 125, 173 S. W. 343.

#### —Future Earnings.

The loss of future earnings cannot be included in the damages awarded for the death of an employee in an action under the Federal Employers' Liability Act.

*Jorgenson v. Grand Rapids & I. R. Co.*, — Mich. —, 155 N. W. 535; *Southern R. Co. v. Hill*, 139 Ga. 549; 77 S. E. 803.

#### —Present Worth of Loss Awarded.

The measure of damages in an action under the Federal Employers' Liability Act, is the present worth of the future benefits of which the dependants are deprived by the death of the employee. *Chesapeake & O. R. Co. v. Kelly*, 241 U. S. 485, 60 L. ed. —, 36 Sup. Ct. Rep. 630, reversing 160 Ky. 296, 169 S. W. 736, S. C. 161 Ky. 655, 171 S. W. 185; *Chesapeake & O. R. Co. v. Gainey, Admr. of Dwyer*, 241 U. S. 494, 60 L. ed. —, 36 Sup. Ct. Rep. 633, reversing 162 Ky. 427, 172 S. W. 918.

#### —Under Act of 1906.

The damages recoverable under the Federal Employers' Liability Act of 1906 for the death of an employee, when not instantaneous, includes not only the loss sustained by his next of kin but also such damages as the decedent might have recovered had he lived. *Wines v. Baltimore & O. R. Co.* (Sup. Ct. D. C.), 37 Wash. L. R. 472.

### 2. Instantaneous Death.

#### Damages for.

When the death of a railway employee is instantaneous his beneficiaries can recover, in an action under the Federal Employers' Liability Act, for their pecuniary loss and nothing more. *Norfolk & W. R. Co. v. Holbrook*, 235 U. S. 625, 59 L. ed. 394, 35 Sup. Ct. Rep. 143, 7 N. C. C. A. 814, reversing 131 C. C. A. 621, 666, 215 Fed. 687, 1007.

An action by an administrator for the death of his intestate by negligence, will lie under the Federal Employers' Liability Act, even though the death followed immediately upon the injury inflicted. *Louisville & N. R. Co. v. Rhoda*, — Fla. —, 71 So. 369, reversed without opinion, 238 U. S. 608, 59 L. ed. 1487, 35 Sup. Ct. Rep. 662.

### 3. Loss to Estate.

#### In General.

The damages recoverable under the Federal Employers' Liability Act are intended to compensate the beneficiaries designated in the act rather than the estate of the deceased employee. *American R. Co. v. Birch*, 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603, reversing 5 Porto Rico Fed. Rep. 273; *McCullough v. Chicago, R. I. & P. R. Co.*, 160 Ia. 524, 142 N. W. 67, 47 L. R. A. (N. S.) 23; *Illinois C. R. Co. v. Doherty*, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31; *Melzner v. Northern P. R. Co.*, 46 Mont. 277, 127 Pac. 1002; *Fogarty v. Northern P. R. Co.*, 85 Wash. 90, 147 Pac. 652, L. R. A. 1916 C. 803, S.

C. 74 Wash. 397, 133 Pac. 609, L. R. A. 1916 C. 800.

The measure of damages in an action under the Federal Employers' Liability Act for the death of an employee, is that sum which will compensate his estate for the destruction of his earning power. *Louisville & N. R. Co. v. Stewart*, 156 Ky. 550, 161 S. W. 557, but see S. C. on rehearing 157 Ky. 642, 163 S. W. 755.

Under the Federal Employers' Liability Act, as amended, the administrator of a deceased employer has the option of suing for the loss to the estate of the intestate generally, or for the particular loss sustained by the special beneficiaries named in the statute. *Louisville & N. R. Co. v. Rhoda*, — Fla. —, 71 So. 369, reversed without opinion, 238 U. S. 608, 59 L. ed. 1487, 35 Sup. Ct. Rep. 662.

#### 4. Loss Sustained by Widow and Children.

##### In General.

In awarding damages, under the Federal Employers' Liability Act, for the benefit of a widow and dependent child, the jury may consider the ordinary probabilities with respect to future pecuniary benefits and support which apply generally to human relations, including reasonable expectation of benefits by gift or inheritance from the decedent. *Sweet v. Chicago & N. W. R. Co.*, 157 Wis. 400, 147 N. W. 1054.

There cannot be a recovery, in an action under the Federal Employers' Liability Act for the benefit of widow and child, of the excess over their pecuniary loss of a deceased employee's earnings for the expectancy of his life. *Southern R. Co. v. Hill*, 139 Ga. 549, 77 S. E. 803.

Nominal damages only can be recovered for the benefit of a widow under the Federal Employers' Liability Act for the death of her husband, when it is not shown that she received support or pecuniary assistance from him or had a reasonable expectation of its future receipt. *Goen v. Baltimore & O. S. W. R. Co.*, 179 Ill. App. 566.

Nominal damages only can be awarded under the Federal Employers' Liability Act for the benefit of a widow and child, where, although the decedent's age, expectancy and earning capacity and the dependency of the widow and child were shown, there was no proof as to the value of the decedent's customary contributions to their support, or to indicate what they might have reasonably expected in the way of such support had he lived. *Nashville, C. & St. L. R. Co. v. Anderson*, — Tenn. —, 185 S. W. 677.

A widow's expectancy of life must be taken into consideration in an action un-

der the Federal Employers' Liability Act, in estimating her damages from the death of her husband. *Nashville, C. & St. L. R. Co. v. Anderson*, — Tenn. —, 185 S. W. 677.

##### Basis of Recovery.

##### — Pecuniary Loss.

There may be a recovery under the Federal Employers' Liability Act for the benefit of a widow or children of a deceased employee on proof of a reasonable expectation of pecuniary benefit instead of actual dependency. *Dooley v. Seaboard A. L. R. Co.*, 163 N. C. 454, 79 S. E. 970.

The damages recoverable under the Federal Employers' Liability Act, for the benefit of a widow on account of the death of her husband, is compensation for the loss of any pecuniary benefit which she would reasonably have derived from her husband's earnings but for his death. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 193, Ann. Cas. 1914 C. 176, reversing 189 Fed. 495.

The measure of damages in an action under the Federal Employers' Liability Act, for the benefit of the widow and children of a deceased railway employee, is the pecuniary loss sustained by them. *Southern R. Co. v. Hill*, 139 Ga. 549, 77 S. E. 803.

The measure of damage for the death of a husband and father, under the Federal Employers' Liability Act, is not what the decedent might have earned had he lived, but what portion of his earning the family might reasonably have expected to receive had he lived. *Nashville, C. & St. L. R. Co. v. Anderson*, — Tenn. —, 185 S. W. 677.

The damages awarded a widow under the Federal Employers' Liability Act, include such sum as she might reasonably have expected to receive from her husband for her support had he survived. *Nashville, C. & St. L. R. Co. v. Anderson*, — Tenn. —, 185 S. W. 677.

A sum equal to the entire amount of the probable earnings of a decedent cannot be awarded his widow and child in an action under the Federal Employers' Liability Act for his death, in the absence of proof of what portion of his earnings the beneficiaries might reasonably have expected to receive had he survived. *Nashville, C. & St. L. R. Co. v. Anderson*, — Tenn. —, 185 S. W. 677.

The measure of damages, in an action under the Federal Employers' Liability Act for the benefit of a widow and children, is such sum as will reasonably compensate them for the loss of such pecuniary benefits as they had a reasonable expectation of receiving from the decedent had he lived. *Chesapeake & O. R. Co. v. Dwyer*, 157 Ky. 590, 163 S. W. 752, reversed

241 U. S. 494, 60 L. ed. —, 36 Sup. Ct. Rep. 633.

The damages, in an action based on the Federal Employers' Liability Act for the benefit of the widow and children of a deceased employee, are such as will compensate them for the pecuniary loss sustained by the decedent's death, instead of the present cash value of the aggregate of the sum which the beneficiaries would have received during their estimated term of dependency, and which would if placed at interest be wholly consumed at the expiration of their dependency. *Chesapeake & O. R. Co. v. Kelly*, 160 Ky. 296, 169 S. W. 736, reversed 241 U. S. 494, 60 L. ed. —, 36 Sup. Ct. Rep. 633.

The measure of damages, in an action based on the Federal Employers' Liability Act for the benefit of a widow, is such sum as will fairly and reasonably compensate her for the pecuniary loss sustained from the death of her husband, taking into consideration the latter's age, habits, business ability, earning capacity and probable duration of life, including her deprivation of support and maintenance, as well as such other pecuniary advantage she would have received but for his death, limiting the award, however, to the period of the expectancy of both their lives. *Chesapeake & O. R. Co. v. Dwyer*, 162 Ky. 427, 172 S. W. 918, reversed 241 U. S. 494, 60 L. ed. —, 36 Sup. Ct. Rep. 633.

In determining the loss sustained by a widow from the wrongful death of her husband, the jury, in an action founded on the Federal Employers' Liability Act, may consider the decedent's earning capacity, age, health, habits, character, occupation, expectancy of life and mental and physical disposition to labor. *Louisville & N. R. Co. v. Holloway*, 168 Ky. 262, 181 S. W. 1126, S. C. 163 Ky. 125, 173 S. W. 343.

#### —Loss Sustained by Minor Children.

The damages awarded for the benefit of dependent children, in an action under the Federal Employers' Liability Act, are for the pecuniary loss sustained by them from the wrongful death of their parent, and in such an amount as the latter would reasonably have been expected in view of all the facts and circumstances of the case, to have contributed towards their maintenance and education. *Kansas City, M. & O. R. Co. v. Roe*, — Okla. —, 150 Pac. 1035.

The basis of a recovery under the Federal Employers' Liability Act is not the number of children surviving, but the pecuniary damages suffered by his family from the death of a railway employee. *Zitnek v. Union P. R. Co.*, 95 Neb. 152, 145 N. W. 344.

The measure of damages in an action under the Federal Employers' Liability Act for the benefit of minor children, first

includes such sum as they might reasonably have expected to receive from the decedent for their support during their minority. *Nashville, C. & St. L. R. Co. v. Anderson*, — Tenn. —, 185 S. W. 677.

The pecuniary loss sustained by minor children from the death of their father must, under the Federal Employers' Liability Act, be limited to their minority. *Nashville, C. & St. L. R. Co. v. Anderson*, — Tenn. —, 185 S. W. 677.

#### — Loss of Parent's Care and Guidance.

The care, attention, instructions, training, advice and guidance which a father might reasonably be expected to give his children may be taken into consideration in an action under the Federal Employers' Liability Act, in awarding damages for the benefit of the minor children of a deceased railway employee, where there was evidence on the subject. *Norfolk & W. R. Co. v. Holbrook*, 235 U. S. 625, 59 L. ed. 394, 35 Sup. Ct. Rep. 143, 7 N. C. C. A. 814, reversing 131 C. C. A. 621, 666, 215 Fed. 687, 1007.

In the absence of evidence as to the personal quality of a deceased employee, and the interest taken by him in his family, the jury cannot, in an action under the Federal Employers' Liability Act, take into consideration his minor children's loss of the care, counsel, training and education they might reasonably have expected to receive from the decedent. *Nashville, C. & St. L. R. Co. v. Anderson*, — Tenn. —, 185 S. W. 677.

#### 5. Loss to Parents.

##### Basis of Recovery.

There may be a recovery under the Federal Employers' Liability Act for the benefit of the parents of a deceased employee on proof of a reasonable expectation of pecuniary benefit rather than of actual dependency. *Dooley v. Seaboard A. L. R. Co.*, 163 N. C. 454, 79 S. E. 970.

In an action under the Federal Employers' Liability Act for the benefit of surviving parents, it is not necessary in order to establish a reasonable expectation of pecuniary benefit from the continuance of the life of a son to prove that he had actually contributed to their support. *Pittsburgh, C. C. & St. L. R. Co. v. Collard*, — Ky. —, 185 S. W. 1108.

The damages, in an action under the Federal Employers' Liability Act for the benefit of the surviving parents of an employee, are limited strictly to the financial loss sustained by them from the death of such employee. *Pittsburgh, C. C. & St. L. R. Co. v. Collard*, — Ky. —, 185 S. W. 1108.

The damages sustained by a father from the death of a minor son hand is, in an action based on the Federal Employ-



ers' Liability Act, to be measured by the reasonable expectation of benefits which would have accrued to the parent, or a dependent, by the continuance of the life of the decedent. *Raines v. Southern R. Co.*, 169 N. C. 189, 85 S. E. 294.

To support a recovery under the Federal Employers' Liability Act for the benefit of the surviving parents of a deceased employee, there must appear some reasonable expectation of pecuniary assistance or support of which they have been deprived. *Pittsburgh, C. C. & St. L. R. Co. v. Collard*, — Ky. —, 185 S. W. 1108.

The measure of damages in an action under the Federal Employers' Liability Act for the benefit of surviving parents, is such an amount as will fairly and reasonably compensate them for the loss of such pecuniary assistance as they might reasonably have received from the decedent had he lived. *Louisville & N. R. Co. v. Thomas*, — Ky. —, 185 S. W. 840.

The damages, in an action founded on the Federal Employers' Liability Act for the benefit of the surviving parents for the death of a son, are such as flow from the deprivation of the pecuniary benefits which the parents might have reasonably received if the decedent had survived. *Pittsburgh, C. C. & St. L. R. Co. v. Collard*, — Ky. —, 185 S. W. 1108.

Evidence that a son, who was killed within a few weeks after entering the employ of a railway company, during that time used a portion of his earnings to discharge the joint debts of his mother and himself, is sufficient to authorize the submission to the jury, in an action under the Federal Employers' Liability Act, of the question of the reasonable expectation of the mother of pecuniary benefit from the continuance of the decedent's life. *Pittsburgh, C. C. & St. L. R. Co. v. Collard*, — Ky. —, 185 S. W. 1108.

## 6. Mental Anguish.

### In General.

Since the damages recoverable for the benefit of those designated by the Federal Employers' Liability Act, for the death of a railway employee, are to be measured by their pecuniary loss, there cannot be a recovery of solatium for mental distress. *Garrett v. Louisville & N. R. Co.*, 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769, affirmed on other grounds 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32.

## 7. Funeral Expenses.

### In General.

The expenses of the funeral of a deceased railway employee cannot be recovered as part of the damages in an action based on the Federal Employers' Liability

Act. *Collins v. Penn. R. Co.*, 163 App. Div. 452, 148 N. Y. Supp. 777.

## 8. Effect of State Laws Limiting Amount of Recovery.

See supra XVI, D, 3, (j).

## D. Mitigation.

Mitigation of damages for contributory negligence, see supra X, C.

## What Considered.

### — Abandonment of Wife and Children.

In an action under the Federal Employers' Liability Act for the benefit of an abandoned wife and child of a deceased employee who was able to furnish them support and assistance, the fact of abandonment was material only in mitigating damages. *Fogarty v. Northern P. R. Co.*, 85 Wash. 90, 147 Pac. 652, L. R. A. 1916 C. 803, S. C. 74 Wash. 397, 133 Pac. 609, L. R. A. 1916 C. 800.

### — Receipt of Insurance Money.

That a parent collected \$2,500 insurance money for the death of a deceased employee cannot be shown by the defendant, in order to reduce the amount of the plaintiff's recovery, in an action for the benefit of the former under the Federal Employers' Liability Act. *Brabham v. Baltimore & O. R. Co.*, 136 C. C. A. 117, 220 Fed. 35.

## Engagement or Remarriage of Widow.

The defendant cannot show, in an action based on the Federal Employers' Liability Act, for the death of a husband and father, that the widow is engaged to remarry. *Jones v. Kansas City S. R. Co.*, 137 La. 178, 68 So. 401, reversed on other grounds 241 U. S. 281, 60 L. ed. —, 36 Sup. Ct. Rep. 513.

The fact that the widow of a deceased employee marries before the trial of an action under the Federal Employers' Liability Act can not be shown in mitigation of damages. *Worthington v. Elmer*, 125 C. C. A. 50, 207 Fed. 306.

## E. Apportionment.

Duty of jury to apportion damages among beneficiaries, see infra XIX, I, 4.

## F. Reasonableness.

### 1. For Personal Injuries.

#### (a) In General.

### Interest on Award Exceeding Earnings.

A verdict, in an action founded on the Federal Employers' Liability Act, is excessive where the interest on the amount

awarded would produce an annual income twice the sum the injured employee was earning. *Neil v. Idaho & N. W. R. R.*, 22 Idaho 74, 125 Pac. 331.

#### When Not Excessive.

A verdict for \$2,000 was not excessive, under the Federal Employers' Liability Act, for injuries sustained by an employee, where he thereafter complained of suffering in his head and worked intermittently for several months, was then laid off, and shortly afterwards he became insane and died five months later. *Cincinnati, N. O. & T. P. R. Co. v. Claybourn*, — Ky. —, 183 S. W. 903.

A verdict for \$7,000 is not excessive, under the Federal Employers' Liability Act, for injuries sustained by an employee 39 years of age, who earned \$1,380 yearly, where he was unable to work for seventeen months previous to the trial, and his injuries produced traumatic neurasthenia which the testimony showed required from eight months to three years for a recovery. *Wesseler v. Great N. R. Co.*, — Wash. —, 155 Pac. 1063.

A verdict for \$12,000, in an action based on the Federal Employers' Liability Act for personal injuries, held not excessive on the record, although leave was given the defendant to apply to the trial court for a reconsideration of such question on newly discovered evidence. *Campbell v. Canadian N. R. Co.*, 124 Minn. 245, 144 N. W. 772.

A judgment for \$15,000 was held not excessive, in an action under the Federal Employers' Liability Act, for injuries which resulted in a neurasthenic condition, impaired sexual power, a ruptured bladder, a fractured pelvis which left one side of the plaintiff's body three-quarters of an inch shorter than the other, where such injuries confined him to a hospital for nine and one-half months and to his home for two and one-half months longer. *Wagner v. Chicago & A. R. Co.*, 180 Ill. App. 196, affirmed 265 Ill. 245, 106 N. E. 809, affirmed 239 U. S. 452, — L. ed. —, 36 Sup. Ct. Rep. 135, Ann. Cas. 1916 A. 778.

#### (b) Injury to or Loss of Members.

##### Loss of Hands and Injury to Leg.

A verdict for \$25,000 is not excessive, in an action founded on the Federal Employers' Liability Act, in favor of an employee 22 years old of excellent health and who earned from \$75 to \$100 monthly, where he lost both hands and one leg was injured so as to leave it 2½ inches shorter than the other. *Moore v. St. Joseph & G. I. R. Co.*, — Mo. —, 186 S. W. 1035.

##### Arms.

A verdict for \$10,000 is not excessive, in

an action under the Federal Employers' Liability Act, for the loss of the right arm of an employee 60 years old who earned \$120 a month. *Knapp v. Great N. R. Co.*, 130 Minn. 405, 153 N. W. 848, affirmed 240 U. S. 464, — L. ed. —, 36 Sup. Ct. Rep. 399.

A verdict for \$13,000, for the loss of the arm by a switchman 23 years of age, who earned from \$110 to \$115 monthly, is not excessive in an action under the Federal Employers' Liability Act, where he was unable to work for a year and then was compelled to take a position paying but \$55 per month, in which there was no chance for advancement. *Grand Trunk W. R. Co. v. Lindsay*, 120 C. C. A. 166, 201 Fed. 836, affirmed 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914 C. 168.

A judgment for \$12,000 is excessive, in an action under the Federal Employers' Liability Act for the loss of the left arm, between the elbow and shoulder, by an employee earning \$2.40 daily; and the judgment was ordered reversed unless the plaintiff remit \$4,000. *Young v. Lusk*, — Mo. —, 187 S. W. 849.

##### Legs.

A verdict for \$10,000, for the loss of a leg within eight inches of the hip, by an employee 28 years old, is not excessive, in an action founded on the Federal Employers' Liability Act, where he endured great physical and mental suffering for a long time, and his earning power was largely impaired. *Norfolk & W. R. Co. v. Thompson*, 161 Ky. 814, 171 S. W. 451.

A verdict for \$10,000, under the Federal Employers' Liability Act, for the loss of a brakeman's leg between the ankle and the knee, is not excessive. *Graber v. Duluth, S. S. & A. R. Co.*, 159 Wis. 414, 150 N. W. 489.

A verdict for \$25,000 under the Federal Employers' Liability Act, for the loss of a leg above the knee by a fireman 32 years old, who was in robust health and earning \$100 per month, and who had no trade or profession but railroading, was not excessive, where a year after the injury his wound had not healed, and during that time he had been unable to do any work or to earn anything. *Chesapeake & O. R. Co. v. Carnahan*, 118 Va. 46, 86 S. E. 863, affirmed on other grounds 241 U. S. 241, 60 L. ed. —, 36 Sup. Ct. Rep. 594.

A verdict for \$30,000, for the loss of both legs by a brakeman who earned from \$60 to \$65 a month, was held excessive in an action founded on the Federal Employers' Liability Act, and a new trial was ordered unless the plaintiff remit all in excess of \$14,000. *Pitts., C. & St. L. R. Co. v. Sheets*, 15 Ohio C. C. Rep. (N. S.)

305, affirmed 87 Ohio St. 476, 102 N. E. 1129.

An award of \$9,000 damages is not excessive under the Federal Employers' Liability Act, for injuries to an employee's leg, where, although the entire use of the limb was not destroyed, the injury was of a permanent nature, and seven different surgical operations under an anæsthetic were made necessary by conditions which confined him in hospitals for many weeks and which caused him intense suffering. *St. Louis, I. M. & S. R. Co. v. Ingram*, — Ark. —, 187 S. W. 452.

#### Feet.

An award of \$12,500 for an injury to the foot of a brakeman 24 years of age, who earned \$1,080 per annum, will not be held excessive in an action under the Federal Employers' Liability Act, where he suffered pain daily and his foot required dressing for six years before the trial, and his injuries left him permanently crippled and unable to follow railroading. *Cincinnati, N. O. & T. P. R. Co. v. Goode*, — Ky. —, 183 S. W. 264, S. C. 153 Ky. 247, 154 S. W. 941, 163 Ky. 60, 173 S. W. 329.

A verdict for \$16,900 was not excessive, under the Federal Employers' Liability Act, for injuries sustained by a brakeman which necessitated the amputation of a portion of one foot and caused a permanent injury to the other, so as to require the plaintiff to use crutches. *St. Louis & S. F. R. Co. v. Brown*, — Okla. —, 144 Pac. 1075, affirmed on other grounds, 241 U. S. 223, 60 L. ed. —, 36 Sup. Ct. Rep. 622.

An award of \$3,000 damages was not excessive in an action under the Federal Employers' Liability Act for injuries to an employee's foot which prevented him from performing labor for nearly a year and a half, and which left him with a running sore on the sole thereof which could be cured only by a further surgical operation. *Cincinnati, N. O. & T. P. R. Co. v. Clarke*, — Ky. —, 185 S. W. 94.

#### Fingers.

A judgment for \$1,300 was held not excessive in an action founded on the Federal Employers' Liability Act for the loss of a portion of the little and third fingers and an injury to the middle finger of an employee's hand. *Opsahl v. Northern P. R. Co.*, 78 Wash. 197, 138 Pac. 681.

#### (c) Broken Bones.

##### Femur.

A verdict for \$9,500 was not excessive, in an action based on the Federal Employers' Liability Act, where an employee 22 years of age and earning \$105 a month, sustained an injury resulting in an impacted fracture of the neck of the femur,

which caused a permanent shortening of an inch or an inch and a half in one leg, and the evidence tended to show that the limb was left permanently stiffened. *Cincinnati, N. O. & T. P. R. Co. v. Nolan*, 167 Ky. 11, 179 S. W. 1046, S. C. 161 Ky. 205, 170 S. W. 650, 10 N. C. C. A. 812.

A verdict for \$13,000 was not excessive under the Federal Employers' Liability Act, for an oblique fracture of the femur from 3 to 6 inches above the knee, which left the limb crooked, weak and shorter than the other, and caused an employee earning \$1,800 per year, great suffering and pain, so as to incapacitate him from following his calling of an engineer. *Callaghan v. Chicago & N. W. R. Co.*, 161 Wis. 288, 154 N. W. 449.

#### Skull.

A verdict for \$2,500 is not excessive, in an action under the Federal Employers' Liability Act, for a fractured skull, which left the plaintiff subject to epileptic fits, and affected his eyesight, hearing, speech and mental condition, and also caused a twitching of the muscles of his face and jaw, and which eventually compelled him to give up work. *Louisville & N. R. Co. v. Winkler*, 162 Ky. 843, 173 S. W. 151, 9 N. C. C. A. 146.

A verdict for \$8,700 is not excessive in an action founded on the Federal Employers' Liability Act, for injuries sustained by a fireman 28 years old, earning \$125 a month, resulting in a fracture of his skull  $4\frac{1}{2}$  inches in length, which incapacitated him for labor for a year, and apparently permanently disabled him unless he was relieved by a surgical operation of uncertain success. *Rowlands v. Chicago & N. W. R. Co.*, 149 Wis. 51, 135 N. W. 156, writ of error dismissed 229 U. S. 627, 57 L. ed. 1357, 33 Sup. Ct. Rep. 771.

#### (d) Loss of Eyes.

##### In General.

A verdict for \$11,500 was not excessive, in an action under the Federal Employers' Liability Act, for the loss of an eye by an engineer 54 years old, who was in robust health, earning \$157 a month, which would have been increased to \$175 within a few months. *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419, 148 N. W. 145, affirmed on other grounds 241 U. S. 470, L. ed. —, 36 Sup. Ct. Rep. 624.

#### (e) Other Permanent Injuries.

##### In General.

A verdict for \$7,520 was not excessive, in an action founded on the Federal Employers' Liability Act, for an employee's severely scalded shoulder and bruised back and spine, as well as for his mental suffering and permanent injuries. *Barker v.*

Kansas City, M. & O. R. Co., 88 Kan. 767, 129 Pac. 1151, 43 L. R. A. (N. S.) 1121.

A judgment for \$9,000, under the Federal Employers' Liability Act, is not excessive, where a conductor, 38 years old, who earned from \$125 to \$130 per month, was incapacitated for two years as the result of an injury, his height reduced 2 inches, and he was left with a curvature and stiffness of the spine and neck which created a permanent stooping posture. *Peery v. Illinois C. R. Co.*, 128 Minn. 119, 150 N. W. 382, S. C. 123 Minn. 119, 150 N. W. 382.

A verdict for \$10,000 was not excessive in an action under the Federal Employers' Liability Act for serious and permanent injuries to the back, spinal column and nervous system of a switchman who was 27 years old. *Cramer v. Chicago, M. & St. P. R. Co.*, — Minn. —, 158 N. W. 796.

An award of \$12,000 to an employee 35 years of age, who earned from \$100 to \$125 per month, was held not excessive in an action under the Federal Employers' Liability Act, where an iron bar was driven through his abdominal cavity so as to cause a serious permanent injury. *Chesapeake & O. R. Co. v. Kornhoff*, 167 Ky. 353, 180 S. W. 523.

An award of \$14,000 was held not excessive in an action founded on the Federal Employers' Liability Act, for injuries causing a permanently stiff knee and curvature of the spine, with some paralysis, so that the plaintiff had to walk with crutches, his injuries leaving him probably permanently helpless, where previously to the accident he earned from \$100 to \$145 a month. *Pelton v. Illinois C. R. Co.*, 171 Ia. 91, 150 N. W. 236, writ of error dismissed 239 U. S. 652, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

A judgment for \$15,000 for the fracture of a leg was excessive, in an action under the Federal Employers' Liability Act, and a new trial was ordered unless the plaintiff remit \$5,000 from his judgment, where his injury resulted in shortening his leg and permanently deforming it, although it did not incapacitate him from following certain avocations which were open to one in his condition. *Smith v. Northern P. R. Co.*, 79 Wash. 448, 140 Pac. 685, 5 N. C. C. A. 947.

## 2. For Death.

### (a) In General

(No decisions.)

### (b) For Death of Husband and Father.

#### In General.

An award of \$4,000 for the benefit of a widow and \$1,000 for a dependent adult daughter, in an action under the Federal

Employers' Liability Act, will not be presumed on appeal to include an allowance for prospective gifts or what might be received by inheritance from the decedent, where there was no evidence pertaining thereto, and the decedent, who was 42 years old, had accumulated a home worth \$2,000, and contributed from \$90 to \$100 a month to the support of such dependents; since the award was less than the value of the support and maintenance of which they were deprived. *Sweet v. Chicago & N. W. R. Co.*, 157 Wis. 400, 147 N. W. 1054.

#### Particular Amounts.

##### — \$7,500.

A verdict for \$7,500 for the death of a sober and industrious brakeman, 43 years old, who was in line for promotion and who earned from \$125 to \$140 a month, was held not excessive in an action under the Federal Employers' Liability Act for the benefit of his widow. *Ft. Worth & D. C. R. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279.

##### — \$9,500.

An award of \$9,500 was held excessive, in an action under the Federal Employers' Liability Act, for the death of a trackman 51 years old, who earned and devoted to his family from \$450 to \$480 yearly; and a new trial was directed unless the plaintiff remit his judgment down to \$7,000. *Zitnek v. Union P. R. Co.*, 95 Neb. 152, 145 N. W. 344.

##### — \$12,000.

A verdict for \$12,000 for the death of a brakeman 39 years old, who left a widow and two minor children, was held, in an action based on the Federal Employers' Liability Act, not to be so large as to show passion and prejudice on the part of the jury. *Thornboro v. Kansas City, M. & O. R. Co.*, 91 Kan. 684, 139 Pac. 410, Ann. Cas. 1916 D. 314.

A verdict for \$12,000, in an action under the Federal Employers' Liability Act, for the benefit of a widow 38 years old, was held not excessive for the death of an employee 45 years of age, who earned from \$125 to \$175 each month, which he turned over to his wife, who, after paying all expenses, saved \$50 monthly therefrom. *Vreeland v. Michigan C. R. Co.*, 189 Fed. 495, reversed on other grounds 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914 C. 176.

##### — \$16,000.

A verdict for \$16,000 for the benefit of a widow 43 years old was held not excessive in an action under the Federal Employers' Liability Act for the death of an employee

45 years of age, earning from \$160 to \$170 monthly, although such amount at 6 per cent interest would yield an annual income greater than the widow would have received had her husband lived. *Chesapeake & O. R. Co. v. Dwyer*, 162 Ky. 427, 172 S. W. 918, reversed on other grounds 241 U. S. 494, 60 L. ed. —, 36 Sup. Ct. Rep. 633.

A verdict for \$16,000, in an action under the Federal Employers' Liability Act on behalf of a widow for the death of a husband who earned \$113 monthly and who had an expectancy of 34 years, the widow being younger, is not so large as to indicate that the verdict was the result of passion or prejudice, nor so clearly excessive as to warrant interference by the court. *Phillips v. Union P. R. Co.*, — Neb. —, 158 N. W. 966.

#### — \$17,000.

A verdict for \$17,000 was held not excessive, under the Federal Employers' Liability Act for the death of a husband and father 53 years old, who earned \$175 per month, where \$5,000 was awarded the widow, \$3,500 to a daughter 7 years old, \$4,000 to a daughter 6 years old, and \$5,000 to a son 2 years old. *Jones v. Kansas City S. R. Co.*, 137 La. 178, 68 So. 401, reversed on other grounds 241 U. S. 281, 60 L. ed. —, 36 Sup. Ct. Rep. 513.

A verdict for \$17,545 was excessive, in an action under the Federal Employers' Liability Act, for the death of an employee 29 years old, with an expectancy of life of 36 years, where one of his lungs was dead, and his monthly contributions to his family averaged but \$34; and a new trial was ordered unless the plaintiff remit the excess above \$6,000. *Duke v. St. Louis & S. F. R. Co.*, 172 Fed. 684, affirmed 112 C. C. A. 564, 192 Fed. 306.

#### — \$18,000.

An award of \$18,000 was held not excessive, under the Federal Employers' Liability Act, for the death of a brakeman 25 years old, with an expectancy of 35 years, who earned \$720 per year, where he left a widow 24 years old, and a baby 5 weeks old. *Kansas City S. R. Co. v. Leslie*, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915 B. 834, reversed on other grounds 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844.

A verdict for \$18,000 for the benefit of the widow and two children of an employee 35 years old, was excessive under the Federal Employers' Liability Act, where the earnings of the decedent for three years previous to his death did not exceed \$70 or \$75 a month, and a new trial was ordered unless the judgment be remitted to \$12,000. *Nash v. Minneapolis & St. L. R. Co.*, 131 Minn. 166, 495, 154 N. W. 957.

#### — \$19,000.

A judgment for \$19,011, for the death of an engineer earning \$192 per month,

with an expectancy of 22 years, was not excessive under the Federal Employers' Liability Act, for the benefit of his surviving widow and five minor children. *Chesapeake & O. R. Co. v. Kelly*, 160 Ky. 296, 169 S. W. 736, reversed on other grounds 211 U. S. 494, 60 L. ed. —, 36 Sup. Ct. Rep. 633.

#### — \$20,000.

A verdict for \$20,000 for the benefit of a widow and infant child of an employee 31 years of age, who earned \$175 per month, was held not excessive in an action under the Federal Employers' Liability Act. *Southern P. Co. v. Vaughn*, — Tex. Civ. App. —, 165 S. W. 885, 7 N. C. C. A. 622.

An award of \$20,000 was held not excessive under the Federal Employers' Liability Act, for the benefit of a widow and three small children, for the death of a brakeman aged 29 years, of exemplary habits, who was devoted to his family, who was in line for promotion and who earned an average of \$100 per month, all of which he expended for the benefit of his family. *Gulf, C. & S. F. R. Co. v. Beezley*, — Tex. Civ. App. —, 153 S. W. 651.

#### — \$25,000.

A verdict for \$25,000 was held not excessive, under the Federal Employers' Liability Act, for the death of an engineer 34 years of age, who earned from \$150 to \$200 per month for the year previous to his death, from which he and his wife, who was 28 years old, had saved about \$1,100 above their expenses. *Louisville & N. R. Co. v. Holloway*, 168 Ky. 262, 181 S. W. 1126, S. C. 163 Ky. 125, 173 S. W. 343.

A verdict for \$25,000 for the death of a brakeman 31 years old, who earned from \$85 to \$100 per month, the remainder of which, after spending from \$15 to \$18 monthly for his own uses, he devoted to his family, was held excessive in an action under the Federal Employers' Liability Act and was ordered reduced to \$18,000. *Hadley v. Union P. R. Co.*, 99 Neb. 349, 156 N. W. 765.

### (c) For Death of Son.

#### In General.

The defendant is entitled to a reversal of an entire judgment, in an action under the Federal Employers' Liability Act for the benefit of surviving parents, where the damages awarded for the benefit of one of them are excessive. *Pittsburgh, C. C. & St. L. R. Co. v. Collard*, — Ky. —, 185 S. W. 1108.

#### Particular Amounts.

##### — \$2,000.

Where a common laborer, aged 23 years, remained with his parents, who were poor

and whom he had been in the habit of assisting, until a few months before he met his death, and from his first earning he sent his father \$10, there was a sufficient showing in an action founded on the Federal Employers' Liability Act, to sustain a judgment for \$2,000 for the parents' benefit. *Lundeen v. Great N. R. Co.*, 128 Minn. 332, 150 N. W. 1088.

—\$3,500.

Evidence that a deceased employee whose sole surviving beneficiary was his father, had contributed to the latter's support and that their relations were affectionate, is sufficient to sustain a judgment for \$3,500 for the parent's benefit, under the Federal Employers' Liability Act. *Saunders v. Southern R. Co.*, 167 N. C. 375, 83 S. E. 573.

A verdict for \$3,500 in favor of a mother 57 years of age, in an action under the Federal Employers' Liability Act, is sufficiently supported by evidence that a young son rendered material assistance on her farm before entering the employ of the defendant, and that during the three weeks he was in the latter's services from his earnings he sent his mother money to discharge their joint obligation. *Pittsburgh, C. C. & St. L. R. Co. v. Collard*, — Ky. —, 185 S. W. 1108.

—\$4,000.

A verdict for \$4,000 is not excessive in an action under the Federal Employers' Liability Act for the death of a son 21 years old, who had accumulated \$300 in personality, and also found an opportunity to and had exhibited a willingness to render assistance in money and labor to his surviving parents, who were both over 61 years of age. *Louisville & N. R. Co. v. Thomas*, — Ky. —, 185 S. W. 840.

—\$5,000.

The fact that an adult son made contributions of some undisclosed amounts to his parents during his lifetime is not sufficient to sustain a judgment for \$5,000 in their favor, in an action under the Federal Employers' Liability Act. *McCullough v. Chicago, R. I. & P. R. Co.*, 160 Ia. 524, 142 N. W. 67, 47 L. R. A. (N. S.) 23.

—\$6,500.

A verdict for \$6,500 in favor of a father, who had an expectancy of life of but 11.48 years, is excessive, in an action under the Federal Employers' Liability Act, for the death of a son who earned about \$100 a month. *Pittsburgh, C. C. & St. L. R. Co. v. Collard*, — Ky. —, 185 S. W. 1108.

—\$8,500.

An award of \$8,500 in favor of a dependent mother was held not excessive in an action under the Federal Employers'

Liability Act for the death of a son who contributed \$75 monthly for the maintenance of the home kept by her for the decedent, and who had expressed the intention of not marrying during her lifetime. *Donaldson v. Great N. R. Co.*, 89 Wash. 161, 154 Pac. 133.

(d) For Conscious Pain and Suffering.

Amounts.

—\$2,000.

A verdict for \$2,000 for the pain and suffering of an employee earning \$75 per month, whose throat was cut in an accident so that he bled to death within a short time, as well as for the pecuniary loss of his widow and children, was not excessive in an action under the Federal Employers' Liability Act. *St. Louis, I. M. & S. R. Co. v. Rodgers*, 118 Ark. 263, 176 S. W. 696.

—\$11,000.

An award of \$11,000 for the conscious pain and suffering of a decedent was held excessive, and the judgment reduced to \$5,000, in an action under the Federal Employers' Liability Act, where he lived but 30 minutes after his injury, and was conscious but a portion of that time. *St. Louis, I. M. & S. R. Co. v. Craft*, 115 Ark. 483, 171 S. W. 1185, affirmed on other grounds 237 U. S. 648, L. R. A. 1916 C. 817, 59 L. ed. 1160, 36 Sup. Ct. Rep. 704.

3. Failure to Deduct for Contributory Negligence.

In General.

A verdict for \$10,000 for the death of an employee, rendered under the Federal Employers' Liability Act, was held excessive where apparently no adequate deduction was made by the jury for his contributory negligence, which clearly appeared, and a new trial was ordered unless the plaintiff remit \$2,500 from his judgment. *Cain v. Southern R. Co.*, 199 Fed. 211.

A verdict for \$12,000, in an action based on the Federal Employers' Liability Act for the death of an employee, will not be set aside where the circumstances might fairly lead to diverse conclusions as to the proportionate degrees of neglect as between the omissions of the decedent and the fault of the carrier. *Ruppell v. New York C. R. Co.*, — App. Div. —, 157 N. Y. Supp. 1095.

G. Curing Excessive Verdict by Remittiture.

In General.

A verdict for the plaintiff for \$6,500 for personal injuries was sustained, in an

action under the Federal Employers' Liability Act, on condition that one-third be remitted because of an error in the instructions as to diminishing damages for contributory negligence, where it was apparent that the jury did not take such negligence into consideration in making up their verdict. *Penn. R. Co. v. Sheeley*, 137 C. C. A. 471, 231 Fed. 901.

Where it appeared from the answers to the interrogatories that the jury, in an action founded on the Federal Employers' Liability Act, failed to diminish the plaintiff's damages because of his contributory negligence, the error cannot, against the objections of the defendant, be cured by a remittance of a portion of the verdict. *Penn. Co. v. Wesson*, 21 Ohio C. R. (N. S.) 481.

#### H. Capacity in Which Fund Held by Personal Representative.

##### As Trustee.

The money recovered by a personal representative under the Federal Employers' Liability Act is held by him in trust for the beneficiaries designated by that act. *Kansas City S. R. Co. v. Leslie*, 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844, reversing 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915 B. 834.

#### I. Disposition of Amount Recovered.

##### 1. In General.

(No decisions.)

##### 2. What Law Governs.

##### Federal or State Law.

The distribution of the proceeds of a recovery under the Federal Employers' Liability Act, for the benefit of the widow of a childless railway employee, is governed by the provisions of that act and not by the intestate laws of the state of his domicile. *Taylor v. Taylor*, 232 U. S. 363, 58 L. ed. 638, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436, reversing 204 N. Y. 135, 97 N. E. 502, Ann. Cas. 1913 D. 276, 144 App. Div. 634, 129 N. Y. Supp. 378.

The distribution of the fund recovered by a personal representative under the Federal Employers' Liability Act is controlled by that act instead of a state law of distribution. *Malone's Estate*, 24 Pa. Dist. Ct. Rep. 246.

##### 3. Conflicting Claims.

##### Widow and Parents.

A widow is entitled to the amount recovered, in an action founded on the Federal Employers' Liability Act, for the

death of a childless husband, to the exclusion of his surviving parents. *Taylor v. Taylor*, 232 U. S. 363, 58 L. ed. 638, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436, reversing 204 N. Y. 135, 97 N. E. 502, Ann. Cas. 1913 D. 276, 144 App. Div. 634, 129 N. Y. Supp. 378; *Goen v. Baltimore & O. R. Co.*, 179 Ill. App. 566.

##### Child of Divorced Mother.

A 16-year-old son of a divorced mother is entitled to share with his father's second wife in the proceeds of a recovery under the Federal Employers' Liability Act for the death of the father. *McGarvey v. McGarvey*, 163 Ky. 242, 173 S. W. 765.

Where an award of damages under the Federal Employers' Liability Act is to be divided between a widow and a son by a divorced wife of the decedent, it should be on the basis of the respective periods during which each will sustain pecuniary loss, that of the son, however, being limited to the period of his minority. *McGarvey v. McGarvey*, 163 Ky. 242, 173 S. W. 765.

### XVIII. EVIDENCE.

#### A. Judicial Notice.

##### Federal Act.

State courts will take judicial notice of the Federal Employers' Liability Act. *Gainesville M. R. v. Vandiver*, 141 Ga. 350, 80 S. E. 997; *Lemon v. Louisville & N. R. Co.*, 137 Ky. 276, 125 S. W. 701; *McDonald v. Railway Trans. Co.*, 121 Minn. 273, 141 N. W. 177; *Sells v. Atchison, T. & S. F. R. Co.*, — Mo. —, 181 S. W. 106; *Erie R. Co. v. Welsh*, 89 Ohio St. 81, 105 N. E. 189; *Findley v. Coal & C. R. Co.*, — W. Va. —, 87 S. E. 198.

Both the Federal and state courts will take judicial notice of the Federal Employers' Liability Act. *Cincinnati, N. O. & T. P. R. Co. v. Tucker*, 168 Ky. 144, 181 S. W. 940.

The law governing an action in a state court for injuries to a railway employee is equally the law of the forum, whether derived from the Federal Employers' Liability Act or from a local law, and must be noticed by the court accordingly. *Kansas City W. R. Co. v. McAdow*, 240 U. S. 51, 60 L. ed. —, 36 Sup. Ct. Rep. 252, affirming — Mo. App. —, 164 S. W. 188.

A court is presumed to be cognizant, in the absence of an averment to that effect, of the enactment of the Federal Employers' Liability Act, and to know that, with respect to the responsibility of interstate railroad carriers for injuries to their employees while engaged in interstate commerce, it superseded all state laws on the

subject. *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914 B. 134, affirming 113 C. C. A. 665, 192 Fed. 919.

A state court will take judicial notice of the Federal Employers' Liability Act, although not specifically pleaded, and apply it where the facts alleged or proven bring a case within its terms. *Rowlands v. Chicago & N. W. R. Co.*, 149 Wis. 51, 135 N. W. 156, writ of error dismissed 229 U. S. 627, 57 L. ed. 1357, 33 Sup. Ct. Rep. 771.

The Federal Employers' Liability Act need not be pleaded or proven in an action in a state court. *Pipes v. Missouri P. R. Co.*, — Mo. —, 184 S. W. 79.

#### Interstate Commerce.

It is not a matter of such general knowledge as to dispense with proof, in an action under the Federal Employers' Liability Act, that any specific portion of the equipment, or any particular employee of a railway, is engaged in interstate rather than intrastate commerce at any precise time or place. *Chicago, R. I. & P. R. Co. v. McBee*, — Okla. —, 145 Pac. 331.

#### Termini of Railroad.

In an action based on the Federal Employers' Liability Act, the courts of Nebraska will take judicial notice of the fact that the "Black Hills" are in South Dakota, and that the terminus of the main line of the Chicago & Northwestern Railway running from Omaha, Nebraska, through the city of Long Pine, Nebraska, is in the Black Hills in South Dakota. *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419, 148 N. W. 145.

#### Makeup and Movement of Trains.

The makeup of trains and the movement of cars are not matters which the court may assume to know without proof, in an action under Federal Employers' Liability Act. *Osborne v. Gray*, 241 U. S. 16, — L. ed. —, 36 Sup. Ct. Rep. 486, affirming 5 Tenn. Civ. App. 519.

#### B. Presumptions.

Instructions as to presumptions, see *infra* XIX, E, 9 (b).

##### 1. In General.

(No decisions.)

##### 2. Exercise of Due Care.

#### In General.

It will be presumed, in an action based on the Federal Employers' Liability Act, that a brakeman who at night was thrown from the top of a box car and killed when

it was suddenly stopped with unusual and unnecessary violence, exercised ordinary care to protect himself from injury from the usual and ordinary stoppage of cars in switching, which he should have anticipated. *Ft. Worth & D. C. R. Co. v. Stalcup*, — Tex. Civ. App. —, 187 S. W. 279.

#### 3. Existence of Beneficiaries.

##### In General.

It cannot be presumed in an action by a personal representative, based on the Federal Employers' Liability Act, that a deceased employee left any surviving beneficiary dependent upon him. *Melzner v. Northern P. R. Co.*, 46 Mont. 277, 127 Pac. 1002.

#### 4. Injury in Discharge of Duties.

##### In Absence of Eyewitnesses to Fatal Accident.

Where there was no eyewitness to an accident in which a car inspector was killed while in a normal state of mind and under circumstances not suggesting suicide, it will be presumed in an action based on the Federal Employers' Liability Act, that at the time of his death the inspector was attempting to perform his duties. *Thornton v. Seaboard A. L. R. Co.*, 96 S. C. 348, 82 S. E. 433, reversed without opinion 238 U. S. 606, 59 L. ed. 1485, 35 Sup. Ct. Rep. 601.

#### 5. Negligence.

##### (a) In General.

##### Of Carrier.

There is no presumption of the negligence of the defendant in an action based on the Federal Employers' Liability Act. *Kansas City S. R. Co. v. Cook*, 100 Ark. 467, 140 S. W. 579; *Charleston & W. C. R. Co. v. Brown*, 13 Ga. App. 744, 79 S. E. 932.

##### In Absence of Eyewitnesses to Fatal Accident.

That a car inspector was killed by the negligence of the defendant may be presumed from the facts proven in an action under the Federal Employers' Liability Act, where there were no eyewitnesses to the disaster. *Thornton v. Seaboard A. L. R. Co.*, 96 S. C. 348, 82 S. E. 433, reversed without opinion, 238 U. S. 606, 59 L. ed. 1485, 35 Sup. Ct. Rep. 601.

##### (b) Res Ipsa Loquitur.

##### In General.

There is no presumption of negligence in an action based on the Federal Employ-



ers' Liability Act, from the mere happening of an accident. *St. Louis & S. F. R. Co. v. Snowden*, — Okla. —, 149 Pac. 1083.

Proof of an injury to an employee raises no presumption of negligence on the part of an employer in an action under the Federal Employers' Liability Act. *Steele v. Atlantic C. L. R. Co.*, — S. C. —, 87 S. E. 639.

While the fact that an employee was injured does not raise a presumption of the employer's negligence, yet the manner of the occurrence and its surroundings may be shown in an action under the Federal Employers' Liability Act for wrongful death, and therefrom the jury may infer, if the inference is reasonable, the manner and cause of the accident. *St. Louis & S. F. R. Co. v. Clampitt*, — Okla. —, 154 Pac. 40.

The doctrine of *res ipsa loquitur* applies to an action based on the Federal Employers' Liability Act for injuries received by a railway employee from the use of an appliance which it was the legal and non-delegable duty of the master to furnish and keep in a reasonably safe condition. *Wiles v. Great N. R. Co.*, 125 Minn. 348, 147 N. W. 427, 5 N. C. C. A. 60, reversed 240 U. S. 444, — L. ed. —, 36 Sup. Ct. Rep. 406.

The pulling out of a drawbar on a freight train affords a proper basis for the application of the doctrine of *res ipsa loquitur* in an action founded on the Federal Employers' Liability Act, where a brakeman was killed in an ensuing collision. *Wiles v. Great N. R. Co.*, 125 Minn. 348, 147 N. W. 427, 5 N. C. C. A. 60, reversed 240 U. S. 444, — L. ed. —, 36 Sup. Ct. Rep. 406.

The doctrine of *res ipsa loquitur* applies to an action under the Federal Employers' Liability Act, where a brakeman was injured when the roof of a freight car on which he was standing, was blown off during a comparatively light wind. *Ridge v. Norfolk S. R. Co.*, 167 N. C. 510, 83 S. E. 762.

The doctrine of *res ipsa loquitur* is applicable to an action under the Federal Employers' Liability Act for the death of an experienced brakeman, who, in the absence of eyewitnesses, was thrown at night from the top of a box car in switching, as the alleged result of an unusually violent and unnecessary jerk of the train, where the accident was one which would not have happened in the ordinary course of events, if those in charge of the train had used proper care; and the occurrence of such an accident in the absence of explanation, affords reasonable evidence that it was due to a want of care. *Ft. Worth & D. C. R. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279.

## 6. Notice of Defects.

### On Part of Defendant.

Where a timber had been maintained for a considerable space of time across a private switch track with a clearance of but 3 feet 4½ inches above the top of an ordinary box car, it was held in an action based on the Federal Employers' Liability Act for the death of a brakeman who was struck by such obstruction, to be presumptive evidence of notice on the part of the defendant. *Kanawha R. v. Kerse*, 239 U. S. 576, — L. ed. —, 36 Sup. Ct. Rep. 174.

The presumption prevails, in an action founded on the Federal Employers' Liability Act, even after proof of a defect that caused injury to an employee, that the defendant was not aware of the existence of the defect, and it is not chargeable with such knowledge until it is shown that the defendant knew or in the exercise of ordinary care, should have known of the defect. *St. Louis, I. M. & S. R. Co. v. Ingram*, — Ark. —, 187 S. W. 452.

## 7. Suppression of Evidence.

### Inference of Movement of Cars in Interstate Commerce.

Where under subpoena a yard clerk failed to produce records of cars moved on the day a brakeman was killed, and he testified that he had no such records and that he was informed that none were kept, there can be no inference in an action under the Federal Employers' Liability Act, of suppression of evidence by the defendant so as to create a presumption that if such records were produced they would show the movement in interstate commerce of the cars which caused the accident. *Hench v. Penn. R. Co.*, 246 Pa. 1, 91 Atl. 1056, L. R. A. 1915 D. 557.

## 8. Use of Empty Cars in Interstate Commerce.

### In General.

That empty freight cars were intended for use in interstate commerce cannot be presumed in an action under the Federal Employers' Liability Act for injuries received by a brakeman, from evidence that in the yard where the accident occurred cars used in both interstate and intrastate commerce were received, stored, shifted and reloaded. *Hench v. Penn. R. Co.*, 246 Pa. 1, 91 Atl. 1056, L. R. A. 1915 D. 557.

## C. Burden of Proof.

Instructions as to burden of proof, see *infra* XIX, E, 9 (b).

### 1. In General.

#### Tolling Statute of Limitation.

In an action based on the Federal Employers' Liability Act for wrongful death, the plaintiff must prove that his action was brought within two years as prescribed by section 6 of the act. *American R. Co. v. Coronas*, 144 C. C. A. 599, 230 Fed. 545.

The plaintiff has the burden, in an action founded on the Federal Employers' Liability Act, of showing by a preponderance of evidence, that his injuries were sustained within two years from the day of bringing his action. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

#### Dependency of Parents.

There must be proof of a reasonable expectancy of future benefit on the part of surviving parents from the continuance of the decedent's life, in order to permit a recovery under the Federal Employers' Liability Act. *Nashville, C. & St. L. R. Co. v. Anderson*, — Tenn. —, 185 S. W. 677.

If it is necessary for the plaintiff, in an action under the Federal Employers' Liability Act for the benefit of surviving parents, to allege their dependency on the decedent, it is also necessary to prove it. *Louisville & N. R. Co. v. Thomas*, — Ky. —, 185 S. W. 840.

### 2. Appointment of Personal Representative.

#### Necessity of Showing.

The appointment of a personal representative as well as that the person claiming to be such representative was the person actually appointed, must be proven by the plaintiff in an action based on the Federal Employers' Liability Act for the death of an employee, in order to support a judgment for the plaintiff. *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144.

### 3. Employment in Interstate Commerce.

#### Carrier.

The plaintiff must affirmatively show, in order to recover under the Federal Employers' Liability Act, that the injury or death of an employee was caused by the negligence of his employer, a carrier engaged in interstate commerce. *Penn. R. Co. v. Knox*, 134 C. C. A. 426, 218 Fed. 748.

The plaintiff must prove, in an action under the Federal Employers' Liability Act, that the defendant is an interstate carrier by rail. *Sells v. Atchison, T. & S. F. R. Co.*, — Mo. —, 181 S. W. 106.

#### Employee.

The plaintiff in an action based on the

Federal Employers' Liability Act, must show that the work in which he was engaged at the time of his injury, was that of interstate commerce. *Knowles v. New York, N. H. & H. R. Co.*, 164 App. Div. 711, 150 N. Y. Supp. 99; *McAuliff v. New York C. & H. R. R. Co.*, 164 App. Div. 846, 150 N. Y. Supp. 512.

The burden of showing that an employee, at the time he was injured, was engaged in interstate commerce, rests on the plaintiff in an action founded on the Federal Employers' Liability Act. *Hench v. Penn. R. Co.*, 246 Pa. 1, 91 Atl. 1056, L. R. A. 1915 D. 557; *Penn. Co. v. Knox*, 134 C. C. A. 426, 218 Fed. 748.

In order to avail himself of the benefit of the Federal Employers' Liability Act an injured employee has the burden of showing that the duties he was performing at the time he was injured were of a character that directly pertained to and were a part of interstate commerce. *Tsmura v. Great N. R. Co.*, 58 Wash. 316, 108 Pac. 774, see 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8.

The plaintiff in an action under the Federal Employers' Liability Act for the death of a switchman, who was killed while crossing a track on the way to his work which was to begin within a few minutes with a switch engine used indiscriminately in shifting both interstate and intrastate commerce, must show that such engine was used exclusively in interstate commerce during the decedent's shift, or that it was to be used therein at the beginning of his labor. *Knowles v. New York, N. H. & H. R. Co.*, 164 App. Div. 711, 150 N. Y. Supp. 99.

An employee has the burden, in an action under the Federal Employers' Liability Act, of showing by a preponderance of evidence that he was employed by the defendant in interstate commerce at the time he sustained an injury. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

In an action founded on a state law for the death of a railway employee, the defendant has the burden of showing the decedent's employment in interstate commerce if it desires to bring the action within the Federal Employers' Liability Act. *Zavitowsky v. Chicago, M. & St. P. R. Co.*, 161 Wis. 461, 154 N. W. 794.

### 4. Occurrence of Accident in Discharge of Duties.

#### Necessity of Showing.

It is incumbent on the plaintiff in an action based on the Federal Employers' Liability Act for the death of an employee who was killed while riding on the pilot of a locomotive in violation of the orders of his employer, to affirmatively show that

the decedent at the time of his injury was performing some duty owing to the defendant. *Hobbs v. Great N. R. Co.*, 80 Wash. 678, 142 Pac. 20, L. R. A. 1915 D. 503.

### 5. Negligence.

#### In General.

An employee has the burden of showing the negligence of the defendant in an action founded on the Federal Employers' Liability Act. *Atchison, T. & S. F. R. Co. v. Pitts*, — Okla. —, 145 Pac. 1148, 9 N. C. C. A. 545.

The burden of showing the negligence of the defendant rests on the plaintiff in an action based on the Federal Employers' Liability Act. *Manson v. Great N. R. Co.*, — S. D. —, 155 N. W. 32.

The burden rests on the plaintiff, in an action under the Federal Employers' Liability Act for the death at night of a brakeman who was struck by a water standpipe alleged to have been placed so close to a track as to endanger employees using the ladders on the sides of freight cars, to show negligence on the part of the employer in locating such pipe. *Fish v. Chicago, R. I. & P. R. Co.*, 263 Mo. 106, 172 S. W. 340, 8 N. C. C. A. 538. *Ann. Cas.* 1916 B. 147.

The burden is on the plaintiff, in an action based on the Federal Employers' Liability Act, to establish the negligence of the defendant by a preponderance of evidence showing that his injury was in whole or in part due to the negligence of the defendant. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

The burden is on the plaintiff in an action based on the Federal Employers' Liability Act for the death of a work train conductor in a collision with a hand-car, to show that the position of such car under the circumstances of the case, represented negligence on the part of the defendant. *Canadian P. R. Co. v. Thompson*, — C. C. A. —, 232 Fed. 353.

In an action under the Federal Employers' Liability Act for injuries to the health of an employee from the use of a paint sprayer or "gun," he has the burden of showing by a preponderance of evidence that the failure of the defendant to provide him with a nose guard was negligence, and that he was injured by reason of such omission. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

#### Freedom of Defendant From Negligence.

Where the evidence shows that an engineer was killed by the derailment of his train at a defective switch, the burden rests on the defendant, in an action under the Federal Employers' Liability Act, to

show freedom from negligence, which it may do by showing the exercise of ordinary care in inspecting the switch and keeping it in proper condition. *Gulf, C. & S. F. R. Co. v. McGinnis*, — Tex. Civ. App. —, 147 S. W. 1188, reversed on other grounds 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806.

#### What Satisfies Burden.

Evidence that an engineer was killed by the derailment of his train at a defective switch, satisfies the burden resting on the plaintiff to show the negligence of the defendant in an action based on the Federal Employers' Liability Act. *Gulf, C. & S. F. R. Co. v. McGinnis*, — Tex. Civ. App. —, 147 S. W. 1188, reversed on other grounds 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806.

### 6. Knowledge of Defects.

#### In General.

The burden rests on the plaintiff, in an action under the Federal Employers' Liability Act for injuries caused by a defect in a car, to show that the master furnished a defective appliance with notice of its condition. *Kansas City S. R. Co. v. Cook*, 100 Ark. 467, 140 S. W. 579.

In an action under the Federal Employers' Liability Act for the loss of an eye from a piece of steel flying from a defective adz which a section hand was using, in order to recover the plaintiff must show his ignorance of the condition of such tool as well as the defendant's knowledge of the defect. *Gekas v. Oregon, W. R. & N. Co.*, 75 Ore. 243, 146 Pac. 970, 8 N. C. C. A. 386.

### 7. Assumed Risk.

#### In General.

The burden of proof as to assumption of risk is on the defendant in an action under the Federal Employers' Liability Act. *Kanawha R. v. Kerse*, 239 U. S. 576, — L. ed. —, 36 Sup. Ct. Rep. 174; *Vickery v. New London N. R. Co.*, 87 Conn. 634, 89 Atl. 277.

Where the evidence in an action founded on the Federal Employers' Liability Act shows negligence on the part of the defendant, the latter has the burden of showing that the plaintiff assumed the risk of injury. *Missouri, K. & T. R. Co. v. Scott*, — Tex. Civ. App. —, 160 S. W. 432.

Where the defendant in an action based on the Federal Employers' Liability Act for injuries received by a brakeman, alleged in its answer assumption of risk inhering in the plaintiff's employment, the burden of establishing such defense was rightfully placed on the defendant in com-

pliance with its requested instruction. *Pelton v. Illinois C. R. Co.*, 171 Ia. 91, 150 N. W. 236, writ of error dismissed 239 U. S. 655, 60 L. ed. —, 36 Sup. Ct. Rep. 166.

Since the plea of assumed risk in an action based on the Federal Employers' Liability Act is affirmative in character, in order to make a prima facie case, the plaintiff need not show that it was not assumed by him. *Kenyon v. Illinois C. R. Co.* — Ia. —, 155 N. W. 810.

Since assumed risk is no longer a defense to an action for injuries received in consequence of a carrier's violation of the Safety Appliance Act, the plaintiff need not prove that at the time of his injury he exercised due care for his protection. *Lucas v. Peoria & E. R. Co.*, 171 Ill. App. 1.

### 8. Contributory Negligence.

#### In General.

The burden of establishing contributory negligence of an employee rests on the defendant in an action in a state court under the Federal Employers' Liability Act, irrespective of the rules of the state law. *Central Vt. R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265. *Ann. Cas.* 1916 B. 252, affirming 87 Vt. 330, 89 Atl. 618.

The burden of proving contributory negligence does not rest on the defendant in an action based on the Federal Employers' Liability Act, where the evidence for the plaintiff proves or tends to prove such negligence. *Culp v. Virginian R. Co.*, — W. Va. —, 87 S. E. 187.

Where the plaintiff's evidence, in an action based on the Federal Employers' Liability Act, shows contributory negligence, the defendant may have the benefit of such proof, notwithstanding the rule that in such an action the burden of establishing such negligence is on the latter. *Holmberg v. Lake Shore & M. S. R. Co.*, — Mich. —, 155 N. W. 504.

### 9. Custom.

#### In General.

Where a custom of a railway company to station a man on the footboard of moving engines to warn trackmen of its approach, is alleged in an action based on the Federal Employers' Liability Act, and it is charged that the negligence of the defendant in not following such custom caused the death of an employee who was cleaning ice and snow from switch points, the plaintiff must establish such custom by a preponderance of the evidence. *Zitnek v. Union P. R. Co.*, 95 Neb. 152, 145 N. W. 344, writ of error dismissed 239 U. S. 650, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

### D. Admissibility of Evidence.

#### 1. In General.

#### Divorce Decree.

A judgment of divorce awarding the possession of a minor son to his mother, is not admissible in evidence in an action for the benefit of his father and mother, based on the Federal Employers' Liability Act, for the death of such son after majority. *Pittsburgh, C. C. & St. L. R. Co. v. Collard*, — Ky. —, 185 S. W. 1108.

#### Health.

In an action under the Federal Employers' Liability Act for injuries to the health of an employee from the use of a paint sprayer or "gun," testimony of the foreman of the paint shop is admissible to the effect that the plaintiff's health was such that the former was afraid to have him about, as he staggered about so that there was danger of his being run over. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

#### Defects.

The abandonment, of a claimed violation of the Federal Safety Appliance Act, in an action under the Federal Employers' Liability Act for injuries sustained by a brakeman of an interstate freight train, when about to make a coupling, in consequence of a violation by the engineer of a signal not to move, does not render inadmissible evidence concerning the defective condition of the coupling apparatus of a car, since it tended to explain the occasion for the plaintiff's presence on the track and to negative negligence on his part. *St. Louis & S. F. R. Co. v. Brown*, 241 U. S. 223, 60 L. ed. —, 36 Sup. Ct. Rep. 602, affirming — Okla. —, 144 Pac. 1075.

#### Curing Erroneous Admission Over Objection.

#### — Admission of Similar Evidence Without Objection.

In an action under the Federal Employers' Liability Act for the killing of an engineer by a boiler explosion as the alleged result of a defective water gauge which did not correctly register the amount of water in the boiler, the admission without objection of evidence that the gauge was defective three months before the accident, cured any error in the admission of similar testimony over the defendant's objection. *Southern P. Co. v. Vaughn*, — Tex. Civ. App. —, 165 S. W. 885, 7 N. C. C. A. 622.

Any error in the exclusion of evidence in an action under the Federal Employers' Liability Act, is cured by the subsequent admission of the identical facts in any

form. *Mulligan v. Atlantic C. L. R. Co.*, — S. C. —, 88 S. E. 445.

### Scope of Issues.

Where the negligence alleged in an action under the Federal Employers' Liability Act, was the failure of a carrier to provide a pump repairman, who fell on ice covered with a coating of snow, with a safe place in which to work, it was unnecessary to also allege that the formation of the ice was due to the negligence of another employee in order to permit it to be shown that instead of forming from natural causes it was caused by the overflowing of a water tank due to the latter's negligence. *Renn v. Seaboard A. L. R.*, 170 N. C. 128, 86 S. E. 964.

Where the declaration in an action based on the Federal Employers' Liability Act for the death of a freight conductor in a rear end collision, when properly construed, amounts to a general charge of negligence, and alleges the negligent violation of a particular rule of a carrier in the operation of trains, the right to recover is not limited solely to negligent infractions of such rule, since the allegations sufficiently charge negligence in the operation of the colliding train so as to admit evidence of actual negligence with respect thereto. *Culp v. Virginian R. Co.* — W. Va. —, 87 S. E. 187.

## 2. Admissions.

### In General.

Admissions made by an employee tending to show that his own negligence contributed to his fatal injury, can not be shown in an action prosecuted under the Federal Employers' Liability Act, by his personal representative for the benefit of a widow and children. *Kansas City, S. R. Co., v. Leslie*, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915 B. 834, reversed on other grounds 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844.

The erroneous exclusion in an action based on the Federal Employers' Liability Act, of admissions by an employee tending to show that his negligence contributed to his fatal injury, is not reversible error where the defendant did not request that such evidence be limited to its legitimate purpose. *Kansas City S. R. Co. v. Leslie*, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915 B. 834, reversed on other grounds 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844.

### By Pleadings.

#### —Employment in Interstate Commerce.

Where it is admitted by the pleadings in an action founded on the Federal Employers' Liability Act, that at the time an employee was killed he was engaged in interstate commerce, they stand as judicial

admissions and need not be proven. *White v. Central Vt. R. Co.*, 87 Vt. 330, 89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 36 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, Ann. Cas. 1916 B. 252.

When the petition, in an action for the injury of an employee, charged that the defendant operated a railway between Missouri and other named states, and such allegation was admitted in the defendant's answer, its character as an interstate carrier was shown. *Young v. Lusk*, — Mo. —, 187 S. W. 849.

### —Pleading Contributory Negligence as Admission of Negligence Charged.

The filing by the defendant of a plea of contributory negligence in an action based on the Federal Employers' Liability Act, is not an admission of the negligence alleged in the plaintiff's complaint. *Nelson v. Northern P. R. Co.*, 50 Mont. 516, 148 Pac. 388.

## 3. Alighting from or Boarding Moving Cars.

### In General.

The plaintiff may show, in an action based on the Federal Employers' Liability Act for the death of a brakeman who was killed while alighting from a moving freight train, that it was impractical to do switching without boarding and leaving trains while in motion. *St. Louis & S. F. R. Co. v. Clampitt*, — Okla. —, 154 Pac. 40.

## 4. Circumstantial Evidence.

### To Show Negligence.

In the absence of eyewitnesses to an accident resulting in the death of a freight brakeman, who fell from a train and was run over, it may be shown by circumstantial evidence, in an action based on the Federal Employers' Liability Act, that negligence of his employer was the proximate cause of his death. *Kansas City S. R. Co. v. Leslie*, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915 B. 834, reversed on other grounds 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844.

While the plaintiff has the burden of proving negligence in an action based on the Federal Employers' Liability Act, the proof may be either direct or circumstantial. *Mulligan v. Atlantic C. L. R. Co.*, — S. C. —, 88 S. E. 445.

It is not essential in establishing liability and proving negligence in an action based on the Federal Employers' Liability Act for wrongful death, that there should have been eyewitnesses to the fact, since it may be shown by either direct or circumstantial evidence. *Mulligan v. Atlantic C. L. R. Co.*, — S. C. —, 88 S. E. 445.

## 5. Conclusions, Opinions and Expert Testimony.

### (a) In General.

#### Value of Income.

An insurance expert may testify from insurance tables, in an action based on the Federal Employers' Liability Act, as to the value of an income such as the plaintiff enjoyed at the time he was injured. *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

#### Effect of Act.

A lay witness cannot express his opinion, in an action under the Federal Employers' Liability Act, as to whether a person standing outside of the heel of the pilot of an engine, with his right hand on the lift lever, and reaching over with his left hand to adjust the knuckle of the coupler, would fall under the wheels of the first truck behind the engine when his foot slipped. *Atlantic C. L. R. Co. v. Whitney*, 65 Fla. 72, 61 So. 179, 3 N. C. C. A. 812, S. C. 62 Fla. 124, 56 So. 937.

### (b) Conclusions.

#### In General.

In an action under the Federal Employers' Liability Act, the question whether a coupler in ordinary repair could be closed with the foot as well as the hand was not objectionable as calling for a conclusion, where there was uncontradicted testimony that the coupler in question was not in a state of ordinary repair. *Grand Trunk W. R. Co. v. Lindsay*, 120 C. C. A. 166, 201 Fed. 836, affirmed 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914 C. 168.

An experienced railroad man may testify in an action based on the Federal Employers' Liability Act for the death of a brakeman, who at night was thrown in some unexplained manner from the top of a box car and killed, that the train "was moving pretty fast" and that it stopped "unusually hard," such testimony not being objectionable as a conclusion of the witness, where he also testified that when the train stopped he heard the decedent's lantern fall and break, and that the latter was run over and killed. *Ft. Worth & D. C. R. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279.

### (c) Opinions.

#### In General.

Testimony of the plaintiff, in an action based on the Federal Employers' Liability Act for injuries received by falling on ice thinly covered with snow, that he walked as carefully as he could, was a statement

of fact and not an expression of an opinion. *Renn v. Seaboard A. L. R. Co.*, 170 N. C. 128, 86 S. E. 964, reversed on other grounds 241 U. S. 290, 60 L. ed. —, 36 Sup. Ct. Rep. 567.

In an action founded on the Federal Employers' Liability Act for injuries sustained by an employee from falling on ice thinly covered with snow, which was formed by water overflowing from a tank, testimony that it was the result of the negligence of the person in charge of the pump was not a mere expression of an opinion, but a statement of the fact that the pump was operated so as to cause the overflow. *Renn v. Seaboard A. L. R. Co.*, 170 N. C. 128, 86 S. E. 964, reversed on other grounds, 241 U. S. 290, 60 L. ed. — 36 Sup. Ct. Rep. 567.

The defendant is not harmed, in an action based on the Federal Employers' Liability Act, by opinion evidence of a layman which was in accord with the testimony and claims of the defendant. *Lynch v. Central Vt. R. Co.*, — Vt. —, 95 Atl. 683.

#### Invading Province of Jury.

Where an engineer was killed in a collision with another engine which was left at night on a crossover track so as not to clear a main track, the employee who left it in such position cannot, in an action under the Federal Employers' Liability Act, express his opinion whether it was proper and in conformity with the rules of the defendant to do so, since that was a question for the jury. *Louisville & N. R. Co. v. Fleming*, — Ala. —, 69 So. 125.

Testimony is not admissible in an action based on the Federal Employers' Liability Act as to whether, taking into consideration a curve in the track and other natural objects at the place where a brakeman who fell asleep beside the track was struck and killed by a train, he could have been seen by those in charge of such train in time to avert the accident, since it was the expression of an opinion as to a fact to be found by the jury. *Gray v. Southern R. Co.*, 167 N. C. 433, 83 S. E. 849, reversed on other grounds 241 U. S. 333, 60 L. ed. —, 36 Sup. Ct. Rep. 558.

### (d) Expert Testimony.

#### Competency.

A freight conductor of many years' experience is qualified to testify in an action under the Federal Employers' Liability Act, as to the duties of an assistant roadmaster in looking after the condition of a car which might cause injury to the track. *Lynch v. Central Vt. R. Co.*, — Vt. —, 95 Atl. 683.

#### Cause of Accident.

In an action founded on the Federal Employers' Liability Act for injuries

caused a freight conductor by the sudden stoppage of a train from an emergency application of the air brakes, which the defendant claimed was due to a latent defect in a valve instead of to the negligence of the engineer, opinion evidence of experts is admissible to show that under the facts disclosed the accident could have been caused only by the act of the engineer. *Owens v. Chicago G. W. R. Co.*, 113 Minn. 49, 128 N. W. 1011, writ of error dismissed 225 U. S. 716, 56 L. ed. 1270, 32 Sup. Ct. Rep. 834.

In an action based on the Federal Employers' Liability Act for the death of a brakeman alleged to have been caused by a violent and unnecessary jerk or lurch of a train, the plaintiff may show by opinion evidence that such unusual movement was caused by the engineer letting off too much steam. *Kansas City S. R. Co. v. Leslie*, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915 B. 834, reversed on other grounds 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844.

#### **Closing Coupler with Foot or Hand.**

A brakeman of several years' experience is qualified to testify as an expert in an action founded on the Federal Employers' Liability Act, as to whether an automatic coupler, when in ordinary repair, may be closed with either the foot or hand. *Grand Trunk W. R. Co. v. Lindsay*, 120 C. C. A. 166, 201 Fed. 836, affirmed 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914 C. 168.

#### **Method of Loading Cars.**

Persons with experience in inspecting loaded cars at junction points under the standard railroad rules, may testify, in an action founded on the Federal Employers' Liability Act for injuries sustained by a brakeman from piles that were improperly loaded on a flat car, as to the correct method for loading them, notwithstanding that the defendant had not adopted such rules. *Michigan C. R. Co. v. Schaffer*, 136 C. C. A. 413, 220 Fed. 809.

#### **Proper Method of Construction.**

Expert evidence is admissible in an action under the Federal Employers' Liability Act, as to the proper construction of cinder pits in a railway yard, into which a brakeman fell at night and was injured. *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

Whether a long or a short derail should have been provided by a carrier at a switch where a train was wrecked and the engineer killed, is an engineering problem which should not be left to the jury to determine from common knowledge, in an action predicated on the Federal Employers' Liability Act. *New York C. &*

*H. R. R. Co. v. Banker*, 140 C. C. A. 37, 224 Fed. 351.

An expert witness, who examined the place where a car was derailed, may, in an action under the Federal Employers' Liability Act, answer a hypothetical question relating to the proper construction of a main track on a curve, without taking into consideration the undisputed fact that a switch track led from the main track at a different curvature. *St. Louis & S. F. R. Co. v. Fithian*, 106 Ark. 491, 155 S. W. 88.

Whether a carrier was negligent in permitting a rail that had become worn and beveled off to remain in the outside of a track at a curve, or in using an engine with rigid pony trucks and flangeless or "bald" front driving wheels, is to be determined, in an action under the Federal Employers' Liability Act, by the conduct of an ordinarily careful and prudent person rather than by the opinion of experts. *Chesapeake & O. R. Co. v. Kelly*, 160 Ky. 296, 169 S. W. 736, reversed on other grounds 241 U. S. 485, 60 L. ed. —, 36 Sup. Ct. Rep. 630.

#### **Speed of Trains.**

Persons who are qualified by experience or observation may testify, in an action founded on the Federal Employers' Liability Act, as to the speed of cars, and describe the condition of the rails at the time of an accident. *Louisville & N. R. Co. v. Johnson*, 161 Ky. 824, 171 S. W. 847.

A person of ordinary understanding and common observation is competent to testify in an action founded on the Federal Employers' Liability Act, as to the speed of a railway train. *St. Louis & S. F. R. Co. v. Fithian*, 106 Ark. 491, 155 S. W. 88.

A person possessing knowledge and skill acquired from the study and operation of trains may express an opinion, in an action based on the Federal Employers' Liability Act, as to the speed of a train where his testimony is based on facts shown to have existed at the time of an accident. *St. Louis & S. F. R. Co. v. Fithian*, 106 Ark. 491, 155 S. W. 88.

### **6. Contributory Negligence.**

#### **In General.**

Evidence of contributory negligence, even though admissible for the purpose of mitigating damages in an action based on the Federal Employers' Liability Act, was properly excluded when such negligence was not pleaded, and the evidence was offered generally as a defense without restricting its intended effect. *Jones v. Kansas City S. R. Co.*, 137 La. 178, 68 So. 401, reversed 241 U. S. 281, 60 L. ed. —, 36 Sup. Ct. Rep. 513.

### 7. Custom.

#### Leaving Main Line Switch Set for Siding.

Evidence in regard to a custom of leaving a main track switch adjusted for a side track, so as to make a block signal system give warning while switching was being done, is not admissible in an action under the Federal Employers' Liability Act, to contradict plain rules and orders of a carrier, where no situation is shown to which evidence of such a custom would attach. *Chadwick v. Oregon-W. R. & N. Co.*, 74 Oreg. 19, 144 Pac. 1165.

#### Jumping from Moving Trains.

Evidence that it was the habitual practice of brakemen in the performance of their duties to alight from moving trains at stations is admissible in an action under the Federal Employers' Liability Act for the death of a brakeman who was thrown under a moving freight train, from which he jumped onto a defective station platform, where it was shown that it was impractical to perform his duties without boarding and alighting from moving trains. *St. Louis & S. F. R. Co. v. Clappitt*, — Okla. —, 154 Pac. 40.

#### Assisting in Work Without Scope of Duties.

Evidence of a long continued practice on the part of employees to leave their particular work and afford relief in case of trouble from some unusual happening is admissible in an action under the Federal Employers' Liability Act for the death of an employee who was killed while assisting another employee, where the former had knowledge of such custom. *Lynch v. Central Vt. R. Co.*, — Vt. —, 95 Atl. 683.

### 8. Damages.

#### (a) In General.

##### On Retrial as to Damages.

Where a new trial was granted by an appellate court under a local rule of practice, as to the measure of damages only in an action based on the Federal Employers' Liability Act, the plaintiff may introduce new testimony on the second trial, which tends to increase the amount of his damage. *Ferbee v. Norfolk & S. R. Co.*, 167 N. C. 290, 83 S. E. 360, affirmed on other grounds 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781.

##### Church Membership.

That a deceased employee was a church member may be shown in an action based on the Federal Employers' Liability Act, as bearing on the pecuniary loss his infant children sustained from his death. *White v. Central Vermont R. Co.*, 87 Vt.

330, 89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 35 Sup. 865, Ann. Cas., 1916 B. 252.

#### (b) Character and Habits.

##### In General.

The age, probable duration of life, habits of industry, means, earnings, health, skill, intelligence and character of a decedent, as well as his reasonable future expectations and other like facts, may be shown in an action founded on the Federal Employers' Liability Act for the benefit of his surviving parents. *Louisville & N. R. Co. v. Fleming*, — Ala. —, 69 So. 125.

In an action planted on the Federal Employers' Liability Act for the death of an employee, his widow may testify that so far as she knew the decedent had no bad habits, since his habits, sobriety and condition of health, as well as the amount contributed to his family, and the probable duration of his life may be considered in estimating damages. *Ft. Worth & D. C. R. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279.

#### (c) Dependency.

##### In General.

A daughter may show, in an action under the Federal Employers' Liability Act for the death of her father, that by reason of curvature of the spine she was not strong, that her strength had never permitted her to care for herself and that the decedent had been attentive to her wants and had provided for her comfort and necessities. *Lynch v. Central Vt. R. Co.*, — Vt. —, 95 Atl. 683.

The youthfulness and inexperience of an employee may be shown in an action based on the Federal Employers' Liability Act for the benefit of his surviving parents, as bearing on the question of his ability to render them pecuniary assistance. *Louisville & N. R. Co. v. Thomas*, — Ky. —, 185 S. W. 840.

Portions of a son's deposition in a divorce proceeding between parents are not admissible in an action for their benefit under the Federal Employers' Liability Act for the death of the son, as tending to show a disposition to support his father. *Pittsburgh, C. C. & St. L. R. Co. v. Col-lard*, — Ky. —, 185 S. W. 1108.

#### (d) Financial Condition.

##### Of Decedent.

As tending to prove dependency it may be shown, in an action under the Federal Employers' Liability Act, that at the time of his death the decedent did not have any property other than his wages, and no in-



surance, with which to support his family, and that neither his widow nor his children had any property of their own. *Dutton v. Atlantic C. L. R. Co.*, — S. C. —, 88 S. E. 263.

A widow may testify, in an action under the Federal Employers' Liability Act for the death of her husband, that he was a good provider, and that at the time of his demise they owned no property but lived in a rented house. *Ft. Worth & D. C. R. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279.

#### (e) Incapacity.

##### To Follow Employment.

In an action based on the Federal Employers' Liability Act for severe injuries sustained by a switchman, he may testify that his condition would preclude him from running a switch engine which he knew how to do. *Texas & P. R. Co. v. Rasmussen*, — Tex. Civ. App. —, 181 S. W. 212.

A switchman may testify, in an action under the Federal Employers' Liability Act, that he had run a switch engine for several years, although not so employed at the time of this injury, and that his injuries incapacitated him from doing so in the future, since such testimony was admissible on the question of damages. *Texas & P. R. Co. v. Rasmussen*, — Tex. Civ. App. —, 181 S. W. 212.

#### (f) Loss of Sense of Taste and Smell.

##### In General.

The admission of evidence of the loss of the plaintiff's senses of taste and smell as the alleged result of an injury was prejudicial to the defendant in an action based on the Federal Employers' Liability Act, when not within the allegations of the plaintiff's petition. *Louisville & N. R. Co. v. Henry*, 167 Ky. 151, 180 S. W. 74.

#### (g) Mental Suffering.

##### In General.

In an action prosecuted under the Federal Employers' Liability Act for severe scalds and burns received by a fireman when pinned under an overturned locomotive, he may testify, as bearing on the question of damages, as to his mental sufferings when he thought he could not escape and that he would be burned to death. *Texas & P. R. Co. v. Rasmussen*, — Tex. Civ. App. —, 181 S. W. 212.

#### (h) Physical Suffering.

##### In General.

In an action under the Federal Employers' Liability Act for the loss of a foot, the plaintiff may show that he suffered great trouble with the stump of his limb

when he tried to use an artificial foot, that his nervous system was shattered, as well as showing other sufferings proximately resulting from his injury. *Atlantic C. L. R. Co. v. Whitney*, 65 Fla. 72, 61 So. 179, 3 N. C. C. A. 812, S. C. 62 Fla. 124, 56 So. 937.

Where the answer to the question as to where an employee's body was found after a collision, was that it was "right up in front of the engine, on the pilot, you might say, seemed to be crowded up there," does not relate to pain and suffering of the deceased which was not pleaded in an action founded on the Federal Employers' Liability Act. *White v. Central Vermont R. Co.*, 87 Vt. 330, 89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865. Ann. Cas. 1916 B. 252.

#### (i) Promotions.

##### In General.

The defendant was not injured, in an action founded on the Federal Employers' Liability Act, by the admission of the evidence of the plaintiff as to promotions in the railway service. *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

It may be shown in an action based on the Federal Employers' Liability Act for the death of a brakeman, that he stood in line for promotion as a conductor, and that the latter received from \$45 to \$50 a month more than a brakeman. *Ft. Worth & D. C. R. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279.

The testimony of an employee that but for his injuries he would soon have been promoted to a position paying higher wages, was not prejudicial to the defendant in an action based on the Federal Employers' Liability Act, where the jury was instructed to disregard such testimony. *Texas & P. R. Co. v. Rasmussen*, — Tex. Civ. App. —, 181 S. W. 212.

Testimony of the plaintiff, in an action founded on the Federal Employers' Liability Act for injuries to a train man, that he had earned from \$80 to \$87 a month, and his answer, in response to the question how long he had been receiving \$80, that he "had been in line for the extra baggage two or three months," does not relate to his prospects for promotion, but means that he had been an extra baggageman for that length of time. *Ferbee v. Norfolk & S. R. Co.*, 167 N. C. 290, 83 S. E. 360, affirmed on other grounds 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781.

#### 9. Dying Declarations.

##### In General.

Dying declarations of an injured employee are not admissible in an action prosecuted under the Federal Employers'

Liability Act. *Hobbs v. Great N. R. Co.*, 80 Wash. 678, 142 Pac. 20, L. R. A. 1915 D. 503.

## 10. Expectancy of Life.

### (a) In General.

#### Evidence of Physician.

A physician cannot be examined, in an action under the Federal Employers' Liability Act, as to the plaintiff's expectation of life, where no foundation was laid for his opinion. *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

### (b) Mortality Tables.

#### In General.

Any standard table of mortality covering the class of persons to which a decedent belongs, is, when reasonably authenticated, admissible on the question of damages in an action under the Federal Employers' Liability Act. *Culp v. Virginian R. Co.*, — W. Va. —, 87 S. E. 187.

Mortality tables are not rendered inadmissible in an action under the Federal Employers' Liability Act, because a deceased conductor while employed in freight service was not insurable in some particular insurance company. *Culp v. Virginian R. Co.*, — W. Va. —, 87 S. E. 187.

In an action under the Federal Employers' Liability Act for the benefit of surviving parents, life table introduced by the defendant to show their expectancy, may be used by the plaintiff for the sole purpose of showing that the expectancy of the deceased son covered that of his parents. *Louisville & N. R. Co. v. Thomas*, — Ky. —, 185 S. W. 840.

#### When Injuries Not Permanent.

It was reversible error to admit the mortality tables in evidence in an action based on the Federal Employers' Liability Act, for injuries not of a permanent nature. *Snyder v. Great N. R. Co.*, 88 Wash. 49, 152 Pac. 703.

It was reversible error to admit the mortality tables in evidence in an action under the Federal Employers' Liability Act, where his injuries merely left the plaintiff in a neurasthenic condition. *Snyder v. Great N. R. Co.*, 88 Wash. 49, 152 Pac. 703.

## 11. Employment in Interstate Commerce.

### In General.

The plaintiff, in an action based on the Federal Employers' Liability Act for injuries sustained while employed on a coal chute owned by an interstate carrier, may show that the train he was preparing to

coal and which was about due to arrive was engaged in interstate commerce. *Southern R. Co. v. Peters*, — Ala. —, 69 So. 611.

Where the evidence, in an action based on the Federal Employers' Liability Act for the death of an engineer, tends to show that the train he was hauling at the time of the fatal accident, contained cars from another state loaded with lumber and oil, it may be shown that most of such products that were moved by the defendant originated in another state and not in the state in which the decedent's run lay. *Southern P. Co. v. Vaughn*, — Tex. Civ. App. —, 165 S. W. 885, 7 N. C. C. A. 622.

### Car Records.

Records showing that the car which caused an injury to an employee was engaged in interstate commerce are admissible in evidence in an action under the Federal Employers' Liability Act, when their correctness is shown. *Trowbridge v. Kansas City & W. B. R. Co.*, — Mo. App. —, 179 S. W. 777.

Carbon copies of conductors' car reports are admissible in an action for the death of an employee brought under a state law, to show that the car that caused his death was being moved in interstate commerce. *Giersch v. Atchison, T. & S. F. R. Co.*, — Okla. —, 158 Pac. 54.

### When Employment in Interstate Commerce Not Pleaded.

Evidence offered by the defendant in an action for the death of a railway employee, to show that he was engaged in interstate commerce at the time he was killed, was properly rejected where such fact was not shown by the pleadings. *Louisville & N. R. Co. v. Barrett*, 143 Ga. 742, 85 S. E. 923.

Evidence tending to bring an action within the Federal Employers' Liability Act was properly excluded, where neither the plaintiff nor the defendant set up or claimed any right or immunity under such act. *Koennecke v. Seaboard A. L. R. Co.*, 101 S. C. 86, 85 S. E. 374, affirmed 239 U. S. 352, — L. ed. —, 36 Sup. Ct. Rep. 126.

Evidence that an employee was engaged in interstate commerce at the time he was injured is properly excluded in an action against a railway company, where such fact was not alleged in the pleadings of either party. *Bradbury v. Chicago, R. I. & P. R. Co.*, 149 Ia. 51, 128 N. W. 1, 40 L. R. A. (N. S.) 684, writ of error dismissed 223 U. S. 711, 56 L. ed. 624, 32 Sup. Ct. Rep. 520.

Where the complaint averred and the facts showed that a railway employee was engaged in intrastate commerce at the time he met his death, and the defendant, even after amending its answer at a second trial,

did not assert the contrary, evidence offered by the latter to show that the decedent was employed in interstate commerce at the time of his death, was properly rejected. *Mims v. Atlantic C. L. R. Co.*, 100 S. C. 375, 85 S. E. 372.

Where the pleadings in a widow's action against a railway company for the death of her husband, discloses a cause of action under a state law only, without reference to his employment in interstate commerce, and merely the truth of the plaintiff's petition was denied in the defendant's answer, evidence offered by the latter to show the decedent's employment in interstate commerce, so as to bring the action within the terms of the Federal Employers' Liability Act, was properly rejected. *Central of Ga. R. Co. v. DeLoach*, — Ga. App. —, 89 S. E. 433.

Evidence that at the time of his death an employee was engaged in interstate commerce, was improperly rejected in an action by a widow against a railway company, brought in her own name under a state law, although the defendant's answer was the general denial, together with an allegation of contributory negligence and assumption of risk. *Giersch v. Atchison, T. & S. F. R. Co.*, — Okla. —, 158 Pac. 54.

## 12. Fellow Servants.

### (a) In General.

(No decisions.)

### (b) Competency.

#### Carefulness.

The reputation of an engineer for carefulness cannot be shown in an action under the Federal Employers' Liability Act for the death of his fireman by the derailment of their engine at a burning trestle. *Bennett v. Southern R. Co.*, 98 S. C. 42, 79 S. E. 710, affirmed on other grounds 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566, 10 N. C. C. A. 853.

#### Habitual Carelessness.

That an engineer was habitually careless in obeying signals cannot be shown in an action under the Federal Employers' Liability Act for injuries received by him through signals wrongfully given by a trainman, where the former promptly stopped his train at the time of the accident. *Arizona & N. M. R. Co. v. Clark*, 125 C. C. A. 305, 207 Fed. 817, affirmed on other grounds 235 U. S. 669, 59 L. ed. 415, 35 Sup. Ct. Rep. 210.

### (c) Negligence.

#### In General.

Where a fireman who at night, at the direction of the engineer, left an engine to

look for a defect, was thrown from the engine by an unnecessarily sudden movement thereof as, with a burning torch in his hand, he was returning to the cab on the engineer's side, it may be shown, in an action under the Federal Employers' Liability Act, as bearing on the question of the attention or want of attention the engineer gave the fireman, that a friend of the former's was riding in the cab in violation of the rules of the company, where the engineer testified that he did not remember seeing the fireman until he was calling for help from the ground. *Southern R. Co. v. Gadd*, 125 C. C. A. 21, 207 Fed. 277, affirmed 233 U. S. 572, 58 L. ed. 1099, 34 Sup. Ct. Rep. 696.

In an action based on the Federal Employers' Liability Act for the death of a brakeman who, while protecting the rear of his train, fell asleep beside a track and was struck and killed by another train, evidence is admissible to show that a curve in the track did not prevent those in charge of such train from seeing the decedent when 38 rails distant from him. *Gray v. Southern R. Co.*, 167 N. C. 433, 83 S. E. 849, reversed on other grounds, 241 U. S. 333, 60 L. ed. —, 36 Sup. Ct. Rep. 558.

## 13. Inspections and Tests.

### Locomotive Boilers.

In an action under the Federal Employers' Liability Act for the death of a brakeman in a rear end collision, due to steam from a leaking cylinder preventing the engineer of the colliding train seeing the signals of the preceding one, evidence that the defendant's locomotives, including that in question, were frequently and had been recently inspected, was properly excluded, since a portion not being admissible the whole was inadmissible. *White v. Central Vermont R. Co.*, 87 Vt. 330, 89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865 Ann. Cas. 1916 B. 252.

Where a large piece of scale, curved in form, was picked up near the place where a locomotive boiler exploded, and in an action under the Federal Employers' Liability Act for the death of the engineer, the negligence alleged was the scale and worn condition of the boiler, and the evidence for the defendant was to the effect that the piece of scale did not fit any curve of the fire boxes of its locomotives, which were of the usual type, and that there was also another type which the scale did not fit, the plaintiff may show that tests made on five engines which were not of the latter type showed that the scale fitted on their crown sheets. *Dungan v. St. Louis & S. F. R. Co.*, 178 Mo. App. 164, 165 S. W. 1116.

#### 14. Medical Testimony.

##### Statutory Prohibition.

A physician cannot be examined by the defendant without the consent of the plaintiff in an action under the Federal Employers' Liability Act, as to the result of a physical examination of the plaintiff made shortly after he was injured, notwithstanding that the latter testified as to his injuries, since *R. S. Ariz. 1901, § 2535, subd. 6*, precludes a physician from testifying with reference to any physical or supposed physical diseases, or to any knowledge obtained by personal examination of a patient, unless the latter voluntarily testifies with reference thereto. *Arizona & N. M. R. Co. v. Clark, 235 U. S. 669, 59 L. ed. 415, 35 Sup. Ct. Rep. 210*, affirming *125 C. C. A. 305, 207 Fed. 817*.

A physician whom an injured employee supposed was acting for him, but who in fact was in the employ of the defendant railway company, cannot testify over the plaintiff's objection, in an action founded on the Federal Employers' Liability Act, as to knowledge acquired from an examination of the plaintiff, where a state statute prohibited physicians or surgeons disclosing, without the consent of the patient, any physical or supposed physical disease, or information obtained by personal examination. *Arizona & N. M. R. Co. v. Clark, 125 C. C. A. 305, 207 Fed. 817*, affirmed *235 U. S. 669, 59 L. ed. 415, 35 Sup. Ct. Rep. 210*.

Where an injured employee consulted a physician concerning his injuries and permitted an examination to be made with the view of engaging the latter's professional services, but declined them on learning that he was employed by the defendant, the physician cannot testify, in violation of a state statute, in an action based on the Federal Employers' Liability Act, as to information gained from such examination. *Kansas City S. R. Co. v. Miller, 117 Ark. 396, 175 S. W. 1164*.

##### Waiver of Privilege.

By bringing an action under the Federal Employers' Liability Act, and becoming a witness and testifying as to his injury, its treatment and the condition resulting therefrom, an employee did not waive the bar of a state law precluding the attending physician from testifying as to the information obtained by his examination and treatment of the plaintiff. *Kansas City S. R. Co. v. Miller, 117 Ark. 396, 175 S. W. 1164*.

In an action under the Federal Employers' Liability Act, the plaintiff, by failing, after a fair opportunity to do so, to object to a question which necessarily calls for testimony which is privileged, waives his right to prevent his physician giving

privileged testimony. *Burke v. Chicago & N. W. R. Co., 131 Minn. 209, 154 N. W. 960*.

When the plaintiff testifies, in an action based on the Federal Employers' Liability Act, as to advice given him by his physician concerning his physical condition and future fitness for work, he waives the statutory privilege against the physician testifying as to information obtained in order to prescribe for the patient. *Blankenbaker v. St. Louis & S. F. R. Co., — Mo. —, 187 S. W. 840*.

##### What Testimony Admissible.

The testimony of a physician who made a physical examination of an injured employee to ascertain his ability to work, was not privileged, in an action based on the Federal Employers' Liability Act, where his information was not obtained for the purpose of treating or acting for the employee. *Cherpeski v. Great N. R. Co., 128 Minn. 360, 150 N. W. 1091*.

A physician may testify in an action under the Federal Employers' Liability Act, as to the condition of the plaintiff's eyes, which he claimed were injured while in the employ of the defendant, where such evidence was based on facts ascertained from an examination of the plaintiff. *Kansas City S. R. Co. v. Miller, 117 Ark. 396, 175 S. W. 1164*.

A medical expert may, in an action under the Federal Employers' Liability Act, indicate an injury on the person of the plaintiff and testify that from its nature it was in his opinion produced apparently by external force. *Ferbee v. Norfolk & S. R. Co., 167 N. C. 290, 83 S. E. 360*, affirmed on other grounds *238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781*.

A physician was properly permitted, in view of other testimony in an action based on the Federal Employers' Liability Act, to testify that if the plaintiff fell from the top of a car and struck his back on a tie or ground or some other hard substance, that the blow would have been sufficient to render him unconscious, cause him to spit blood and would probably result in paralysis. *Texas & P. R. Co. v. Sherer, — Tex. Civ. App. —, 183 S. W. 404*.

Evidence that a physician found the plaintiff run down and weak, with a rather troubled expression, indicating both sorrow and suffering, and that the effect of pain on the general nervous system was for the patient to become nervous, to be unable to sleep, and to begin to go to pieces all over, was held not prejudicial to the defendant in an action under the Federal Employers' Liability Act. *Ferbee v. Norfolk & S. R. Co., 167 N. C. 290, 83 S. E. 360*, affirmed on other grounds *238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781*.

A physician who took a written statement from an employee as to the cause of

his injury, cannot testify, in an action under the Federal Employers' Liability Act for his death, as to a further conversation which was not included in such statement, where the witness had no recollection as to the exact words of the decedent aside from the written statement. *Illinois C. R. Co. v. Porter*, 125 C. C. A. 55, 207 Fed. 311.

A physician may testify in an action based on the Federal Employers' Liability Act, that from an inspection of the plaintiff's injuries he was of the opinion that there was a strong probability of infection such as blood poisoning or erysipelas. *Texas & P. R. Co. v. Rasmussen*, — Tex. Civ. App. —, 181 S. W. 212.

The testimony of a physician in an action founded on the Federal Employers' Liability Act, as to the permanent nature of the plaintiff's injuries, to the effect that "the unexpected can happen" and that if his diagnosis was correct that there was no authentic history of the recovery of any similar case, was admissible, since it was not argumentative nor did it involve extraneous matter. *Texas & P. R. Co. v. Sherer*, — Tex. Civ. App. —, 183 S. W. 404.

Where a physician testified, in an action under the Federal Employers' Liability Act, as to the result of an examination of the plaintiff made for the purpose of ascertaining the presence or absence of sensation, the defendant was not prejudiced by the refusal to permit another physician to testify that the method of examining the plaintiff was not the latest, where the subject had previously been fully covered. *Ferbee v. Norfolk & S. R. Co.*, 167 N. C. 290, 83 S. E. 360, affirmed 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781.

To permit a medical witness produced by the defendant in an action based on the Federal Employers' Liability Act, to be asked by the plaintiff on cross-examination if he wanted to leave the jury under the impression that the plaintiff was "faking" was not an abuse of discretion. *Ferber v. Norfolk & S. R. Co.*, 167 N. C. 290, 83 S. E. 360, affirmed on other grounds 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781.

### Hypothetical Questions.

It was reversible error, in an action under the Federal Employers' Liability Act, to permit a medical expert to base his answer to a hypothetical question on the facts detailed as well as on everything he may have heard about the case. *White v. Missouri P. R. Co.*, — Mo. —, 178 S. W. 83.

### 15. Method of Performing Work.

#### Speed Required in Performing Duties.

A car inspector may testify, in an action under the Federal Employers' Li-

bility Act for injuries sustained by another inspector while disconnecting the steam line of a passenger train when charged with steam, that at a point where engines were changed the work had to be done hurriedly, where those in charge of the train testified that it was their duty to cut off the steam before the train reached the station, and that they did so. *Kansas City S. R. Co. v. Miller*, 117 Ark. 396, 175 S. W. 1164.

### Knowledge of Means for Obviating Danger.

In an action under the Federal Employers' Liability Act for injuries to the health of an employee from the use of a paint sprayer or "gun," evidence is admissible to show that he did not know before he was taken sick, that there was an appliance he might have used that would have protected his health. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

### 16. Parol Evidence.

#### Rules.

Printed rules of a carrier cannot be proven orally on the cross-examination of the plaintiff in an action based on the Federal Employers' Liability Act. *Ferbee v. Norfolk & S. R. Co.*, 167 N. C. 290, 83 S. E. 360, affirmed on other grounds 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781.

The contents of the written rules of a carrier can be shown by parol in an action based on the Federal Employers' Liability Act, where the defendant fails or refuses on notice to produce such rules. *Louisville & N. R. Co. v. Johnson*, 161 Ky. 824, 171 S. W. 847.

#### Train Orders.

The contents of a work order which was received by an engineer may be shown by parol in an action under the Federal Employers' Liability Act for injuries received by him while acting under the order, where the original cannot be found and was not produced by the defendant on proper notice. *Pfeiffer v. Oregon-W. R. & N. Co.*, 74 Oreg. 307, 144 Pac. 762, 7 N. C. C. A. 685.

### 17. Photographs.

#### To Show Injuries.

The extent of the plaintiff's injuries may be shown by photograph in an action founded on the Federal Employers' Liability Act. *Cincinnati, N. O. & T. P. R. Co. v. Nolan*, 161 Ky. 205, 170 S. W. 650, S. C. 167 Ky. 11, 179 S. W. 1046, 10 N. C. C. A. 812.

Photographs of the plaintiff's person displaying his injury are not admissible in

an action based on the Federal Employers' Liability Act, in the absence of evidence showing how they were taken or that it was fairly done. *Cincinnati, N. O. & T. P. R. Co. v. Nolan*, 161 Ky. 205, 170 S. W. 650, S. C. 167 Ky. 11, 179 S. W. 1046, 10 N. C. C. A. 812.

#### **Appliances.**

The fact that a photograph of the tender of an engine of the class of that by which an employee was injured, was not admissible for one purpose in an action under the Federal Employers' Liability Act, does not render it inadmissible for other purposes. *Moore v. St. Joseph & G. I. R. Co.* — Mo. —, 186 S. W. 1035.

#### **X-Ray Photographs.**

X-ray photographs are admissible in an action founded on the Federal Employers' Liability Act, where the fracture of bones is in issue. *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

Where X-ray photographs are admissible in an action based on the Federal Employers' Liability Act, the person who took them may be examined as to the angle of light and other circumstances under which they were taken. *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

An X-ray photograph showing the plaintiff's injuries may be exhibited to the jury in an action based on the Federal Employers' Liability Act, by means of an "illuminator" which brings out the picture more fully and develops it more perfectly so as to give a more accurate view of the object photographed. *Chesapeake & O. R. Co. v. Kornhoff*, 167 Ky. 353, 180 S. W. 523.

### **18. Prior and Subsequent Conditions.**

#### **Previous Conditions.**

##### **— Engine Setting Out Fire.**

It may be shown, in an action under the Federal Employers' Liability Act for the death of a fireman by the derailment of an engine at a burning trestle, that a locomotive which passed over it shortly before the fire was discovered dropped fire at other nearby places. *Bennett v. Southern R. Co.*, 98 S. C. 42, 79 S. E. 710, affirmed on other grounds 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566, 10 N. C. C. A. 853.

##### **— Defective Condition of Water Gauge.**

Where the negligence charged, in an action founded on the Federal Employers' Liability Act for the death of an engineer who was killed by the explosion of a boiler, was the furnishing of a locomotive with a defective water gauge which did not correctly register the amount of water in the boiler, and the evidence showed that the defect had existed for some time, and

that it had been reported to the defendant on several occasions, upon the question of the defendant's notice of the defect, it may be shown that the gauge worked improperly three months before the accident. *Southern P. Co. v. Vaughn*, — Tex. Civ. App. —, 165 S. W. 885, 7 N. C. C. A. 622.

##### **— Improper Operation of Switch.**

Testimony is admissible, in an action founded on the Federal Employers' Liability Act for the death of an engineer, who was killed when his engine ran off a derail switch, as to the defective operation of the switch a year before the accident, since it tended to show whether the switch was defective in construction, or so worn out as not to operate properly at the time of the accident. *Southern R. Co. v. Hill*, 139 Ga. 549, 77 S. E. 803.

#### **Similar Defects in Other Engines.**

When the defendant, in an action under the Federal Employers' Liability Act for injuries sustained by a fireman at night in a railway yard when his head came into contact with a marker which his engine knocked from the caboose of another train that had been left so as to foul a lead track, asserted that the accident would not have happened had the fireman kept a proper lookout, while the latter claimed that a defect in the mechanical stoker of his engine required his attention just before he looked from the cab window, he may show that similar stokers on other engines had the same defect. *Chesapeake & O. R. Co. v. Meadows*, — Va. —, 89 S. E. 244.

#### **Previous Accidents.**

It may be shown in an action founded on the Federal Employers' Liability Act for the death of an engineer by the derailment at a curve of an engine having rigid pony trucks and flangeless or "bald" front driving wheels, that about a year previously the same engine was derailed at another curve under similar circumstances, since such evidence tended to show the defendant's knowledge of the defective conditions of the locomotive. *Chesapeake & O. R. Co. v. Kelly*, 160 Ky. 296, 169 S. W. 736, reversed on other grounds 241 U. S. 485, 60 L. ed. —, 36 Sup. Ct. Rep. 630.

#### **Abandonment of Form of Appliance.**

Where the negligence claimed was the use of an engine with rigid pony trucks and flangeless or "bald" front driving wheels, it may be shown, in an action based on the Federal Employers' Liability Act for the death of an engineer by the derailment of such engine, that for several years previously the defendant had not purchased any locomotives of that character. *Chesapeake & O. R. Co. v. Kelly*, 160 Ky. 296, 169 S. W. 736, reversed on

other grounds 241 U. S. 485, 60 L. ed. —, 36 Sup. Ct. Rep. 630.

### Subsequent Conditions.

#### —Defective Condition of Platform.

Evidence of the condition of a station platform three weeks after an accident in which a brakeman was killed by jumping from a moving freight train onto the alleged defective platform, is admissible in an action under the Federal Employers' Liability Act, when it appeared that no changes had been made therein except the usual wear occasioned by the elements. *St. Louis & S. F. R. Co. v Clappitt*, — Okla. —, 154 Pac. 40.

#### —Health.

When the plaintiff testified, in an action based on the Federal Employers' Liability Act for injuries to his health resulting from the continuous use of a paint sprayer or "gun," that his health was extra good until a certain date when he was taken sick, the admission of other testimony showing his subsequent condition was not erroneous when tending to prove the allegations of his complaint. *Baltimore & O. R. Co. v. Branson*, — Md. —, 89 Atl. 225.

### 9. Engagement or Remarriage of Widow.

#### In General.

In an action founded on the Federal Employers' Liability Act for the benefit of a widow and her minor children for the death of a railway employee, the defendant cannot show that the widow was engaged to remarry. *Jones v. Kansas City S. R. Co.*, 137 La. 178, 68 So. 401, reversed on other grounds 241 U. S. 181, 60 L. ed. —, 36 Sup. Ct. Rep. 513.

The fact that the widow of a deceased employee marries before the trial of an action under the Federal Employers' Liability Act cannot be shown in mitigation of damages. *Worthington v. Elmer*, 125 C. C. A. 50, 207 Fed. 306.

### 20. Res Gestæ.

#### In General.

Statements made by the conductor and engineer of a train within fifteen or twenty minutes after a brakeman was killed at night, to the effect that they saw his light go out, are not admissible as part of the *res gestæ* in an action founded on the Federal Employers' Liability Act. *Chesapeake & O. R. Co. v. Walker*, 159 Ky. 237, 167 S. W. 128.

A statement by a brakeman, made within a few minutes after he was fatally injured by a fall from a train, to the persons who first came to his assistance, that he was thrown by an unexpected jerk of the train,

was a part of the *res gestæ*, while repetitions thereof made by him twenty minutes after the accident were inadmissible, since a narrative of past events and therefore hearsay. *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144.

Statements made by an employee several hours after he was fatally injured, as to why, at the time he was injured, he was riding on the pilot of an engine in violation of the rules of his employer, are not admissible as a part of the *res gestæ* in an action under the Federal Employers' Liability Act. *Hobbs v. Great N. R. Co.*, 80 Wash. 678, 142 Pac. 20, L. R. A. 1915, D. 503.

A statement of a brakeman as to the cause of the accident which resulted in the death of a co-employee, is the narrative of a past event, and not admissible in an action based on the Federal Employers' Liability Act. *Wilson v. Grand Trunk R. Co.*, — N. H. —, 97 Atl. 981.

What statements are admissible as a part of the *res gestæ* in an action under the Federal Employers' Liability Act for wrongful death, must be left to the sound discretion of the trial court. *Mulligan v. Atlantic C. L. R. Co.*, — S. C. —, 88 S. E. 445.

### 21. Rules.

#### In General.

Evidence of a rule of a carrier requiring freight conductors to keep their cabooses clean and all tools and appliances in the proper place and in good order, is not admissible in an action founded on the Federal Employers' Liability Act for injuries caused a conductor by the giving away of a defective step of a caboose, since it was not an appliance within the meaning of such rule. *Cincinnati, N. O. & T. P. R. Co. v. Goldston*, 163 Ky. 42, 173 S. W. 161.

#### Knowledge of.

The admission of evidence in an action predicated on the Federal Employers' Liability Act for wrongful death, of a rule of a carrier from a book which had been superseded before the accident, for the purpose of showing that the decedent understood another rule which was in force and which had been introduced without objection, did not harm the defendant, where the latter's evidence tended to show that the decedent was familiar with the rules. *Lynch v. Central Vt. R. Co.*, — Vt. —, 95 Atl. 683.

In an action under the Federal Employers' Liability Act for the death of a freight conductor in a rear-end collision alleged to have been caused by the negligence of his flagman, the defendant, in order to prove contributory negligence on the part of the decedent, may, in addition to its

printed rules relating to the duty of conductors with respect to protecting their trains by flags, show by its train rules examiner that the decedent was specially instructed as to other rules, customs and practices relating to such duty. *Culp v. Virginian R. Co.*, — Wa. V. —, 87 S. E. 187.

#### Habitual Violation.

The improper admission of evidence as to a custom of disregarding a rule of a carrier was held reversible error, in an action based on the Federal Employers' Liability Act for injuries sustained by an employee, since it directly affected the question of damages by tending to show the plaintiff's freedom from negligence. *Chadwick v. Oregon, W. R. & N. Co.*, 74 Ore. 19, 144 Pac. 1165.

In an action based on the Federal Employers' Liability Act for injuries sustained by a brakeman for slipping from a step on the rear of the pilot beam of a moving engine he attempted to board, for the purpose of contradicting evidence of the defendant that such step was not designed for use of trainmen but only for shopmen, the plaintiff may show a customary violation of a rule forbidding trainmen from riding on the pilots of road engines. *Norfolk & W. R. Co. v. Thompson*, 161 Ky. 814, 171 S. W. 451.

The admission of evidence in an action founded on the Federal Employers' Liability Act, of a long continued violation of a rule of a carrier forbidding firemen to run locomotives in the absence of the engineer, was not erroneous in the absence of a prior amendment of the complaint to allege such violation, where the defendant was not taken by surprise. *Callaghan v. Chicago & N. W. R. Co.*, 161 Wis. 288, 154 N. W. 449.

#### 22. Use of Standard Instrumentalities.

##### Cinder Pits.

That other railways used cinder pits similar to the one into which an employee fell at night and was injured, cannot be shown by the defendant in an action under the Federal Employers' Liability Act. *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

#### 23. Testimony of Surviving Spouse.

##### In General.

A constitutional prohibition against an administrator in an action by or against a personal representative, from testifying against the other party as to transaction with or statement of a decedent, unless called by the opposite party, does not preclude a widow in an action prosecuted by her under the Federal Employers' Liability

Act as administratrix of her deceased husband's estate, from testifying as to contributions made to the support of herself and child by the decedent, since the recovery in such an action is not for the benefit of the estate of the decedent. *St. Louis & S. F. R. Co. v. Fithian*, 106 Ark. 491, 155 S. W. 88.

The widow of a deceased railway employee suing as administratrix under the Federal Employers' Liability Act, is not precluded from testifying as to the amount of contributions made her at various times by her husband, by section 2 of the Arkansas Constitution of 1874, which declares that in actions by administrators in which judgment may go for or against them, neither party may testify as to transactions or statements of the deceased unless called by the opposite party. *St. Louis & S. F. R. Co. v. Conarty*, 106 Ark. 421, 155 S. W. 93, reversed on other grounds 238 U. S. 243, 59 L. ed. 1290, 35 Sup. Ct. Rep. 785.

A state statute prohibiting a survivor from testifying in his own behalf against the personal representative of a decedent as to personal transactions or communications with the decedent, does not prevent a surviving mother from testifying, in an action based on the Federal Employers' Liability Act, as to contributions made her by her son, a deceased railway employee; since, while she was interested in the event of the suit, she was not testifying against the representative of her son. *Irvin v. Southern R. Co.*, 164 N. C. 5, 80 S. E. 78.

#### E. Weight and Sufficiency.

Instructions as to weight and sufficiency of evidence, see *infra* XIX, E, 9 (d).

##### 1. In General.

##### Absence of Knowledge of Danger.

Evidence that a brakeman had no notice that a train running at a higher rate of speed than his own was closely following, tends to prove an allegation, in an action based on the Federal Employers' Liability Act for his death in a rear end collision, that he had no knowledge of his danger. *White v. Central Vt. R. Co.*, 87 Vt. 330, 89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, Ann. Cas. 1916 B. 252.

#### 2. Employment in Interstate Commerce.

##### In General.

The evidence, in an action under the Federal Employers' Liability Act for the death of an engineer, was held sufficient to show that he was engaged in interstate commerce, where at the time of the accident, he was hauling a train containing cars loaded with freight which originated



in another state. *Southern P. Co. v. Vaughn*, — Tex. Civ. App. —, 165 S. W. 885, 7 N. C. C. A. 622.

The uncontradicted testimony of a conductor that a train which a switchman was moving in a railway yard when he was killed, contained some cars destined for points in another state, is sufficient, in an action based on the Federal Employers' Liability Act, to show that the latter was engaged in interstate commerce, notwithstanding that the origin and destination of each car might have been shown by the car records of the defendant. *Devine v. Chicago, R. I. & P. R. Co.*, 266 Ill. 248, 107 N. E. 595, Ann. Cas. 1916 C. 481, affirming 185 Ill. App. 488, affirmed 239 U. S. 52, 60 L. ed. —, 36 Sup. Ct. Rep. 27.

Where a yard clerk while in a railway yard in the performance of his duties for an interstate carrier, was struck and killed by a locomotive, the evidence was sufficient, in an action based on the Federal Employers' Liability Act, to show that he was engaged in interstate commerce, where it was his daily duty to make a record of every car that came into or departed from the yard; and it further appeared that a local shipper that day dispatched a car over the defendant's road for a point in another state, and that it was customary for it to receive at least one car daily from other states. *Pitts., C. & St. L. R. Co. v. Farmers' T. & S. Co.*, 183 Ind. 287, 108 N. E. 103.

Evidence that some of the cars in a freight train were owned by foreign carriers, and that they bore tags indicating movement in interstate commerce, shows prima facie that the train was employed in such commerce so as to permit a recovery under the Federal Employers' Liability Act for injuries received by a brakeman, notwithstanding that the contents of such cars were unknown. *Mattocks v. Chicago & A. R. Co.*, 187 Ill. App. 529.

An inference that a loaded freight train of 52 cars moved from St. Albans, Vt., to White River Junction in the same state, carried in part at least freight in process of interstate transportation, was justified in the absence of positive testimony, in an action under the Federal Employers' Liability Act, by evidence tending to show that a large part of the carrier's traffic came from other states and that at White River Junction it was delivered to connecting carriers for movement into another state. *Lynch v. Central Vt. R. Co.*, — Vt. —, 95 Atl. 683.

### 3. Cause of Accident.

#### In General.

In an action based on the Federal Employers' Liability Act for the death of a

brakeman who at night was thrown from the top of a box car and killed in the absence of eyewitnesses, the evidence was held sufficient to show that the accident was caused by the sudden stopping of the train with unusual and unnecessary violence greater than the occasion required. *Ft. Worth & D. C. R. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279.

The evidence, in an action founded on the Federal Employers' Liability Act for the death of an engineer, was held sufficient to show that it was caused by his head striking the timbers of a narrow bridge as he leaned from the gangway of his engine, which was not equipped with power brakes as required by the Safety Appliance Act, while it was going down a mountain side, in order to see whether the hand brakes on the tender were properly set. *Perkins v. Northern P. R. Co.*, 118 C. C. A. 150, 190 Fed. 712.

### 4. Negligence.

#### Collision of Trains.

Proof of the collision of two trains is prima facie evidence of negligence in an action founded on the Federal Employers' Liability Act, for injuries received by an employee. *Tilghman v. Seaboard A. L. R. Co.*, 167 N. C. 163, 83 S. E. 315, 1090, reversed on other grounds 237 U. S. 499, 59 L. ed. 1069, 35 Sup. Ct. Rep. 653.

#### Defective Appliances.

Where a fireman was killed by falling from his engine as he pushed back a penstock after filling the tank with water, the evidence, in an action based on the Federal Employers' Liability Act, was held sufficient to show that the penstock was defective and that the defendant had notice of its condition. *Kenyon v. Illinois C. R. Co.*, — Ia. —, 155 N. W. 810.

#### Method of Doing Work.

In an action under the Federal Employers' Liability Act, testimony that in order to fasten together two sheets of metal in repairing the boiler of an engine used in interstate commerce, a rivet was placed on end under the overlap of the plates, and a nut put on top of the plates above the rivet and then struck with a hammer so as to drive the rivet through the plates, when a glancing blow struck the nut by a coemployee caused it to fly into the plaintiff's eye, has a tendency to prove negligence, where the usual method of riveting plates was to drill or punch a hole for the rivet. *Law v. Illinois C. R. Co.*, 126 C. C. A. 27, 208 Fed. 869, L. R. A. 1915 C. 17.

#### Obstructions on Roadway.

The evidence in an action founded on the Federal Employers' Liability Act, for injuries received by an employee from stum-

bling on and falling over three large clinkers or two old cross ties overgrown with grass, which were left on a railway road-bed, was held sufficient to show that the accident was due to the negligence of the employees of the defendant who were charged with the duty of keeping its road-bed free from obstructions. *Southern R. Co. v. Puckett*; 16 Ga. App. 551, 85 S. E. 809.

#### Unusual Movement of Train.

##### — In General.

The evidence, in an action based on the Federal Employers' Liability Act for the death of a car inspector who was killed by the sudden movement of a train while he was between cars in the discharge of his duties, was held sufficient to justify an inference of the defendant's negligence. *Dutton v. Atlantic C. L. R. Co.*, — S. C. —, 88 S. E. 263.

##### — Violent and Unusual Movements.

Evidence that a car checker, while crossing a track, was killed by the sudden and unexpected movement of freight cars as the result of other cars being kicked against them with extraordinary violence, is sufficient, in an action under the Federal Employers' Liability Act, to show negligence on the part of the defendant, where there was nothing in the situation to warn the decedent of the unexpected movement of the cars. *Great N. R. Co. v. Mustell*, 138 C. C. A. 305, 222 Fed. 879.

Where a switchman was thrown from the top of a car and killed by an extraordinarily sudden stopping of a train, the evidence in an action founded on the Federal Employers' Liability Act was held sufficient to show that it was due to the negligence of the engineer, although there was conflicting testimony as to whether the decedent gave the engineer the signal to stop. *Devine v. Chicago, R. I. & P. R. Co.*, 266 Ill. 248, 107 N. E. 595, Ann. Cas. 1916 B. 481, affirming 185 Ill. App. 488 affirmed 239 U. S. 52, 60 L. ed. —, 36 Sup. Ct. Rep. 27.

#### 5. To Sustain Particular Findings.

##### In General.

Evidence that upon one freight car of a train there had been written with chalk at some time by some one unknown the name of a station in another state, and that destinations were sometimes indicated in that manner, is not sufficiently probative to warrant a finding in an action under the Federal Employers' Liability Act, that such car was then and there being moved to such station. *Barker v. Kansas City, M. & O. R. Co.*, 88 Kan. 767, 129 Pac. 1151, 43 L. R. A. (N. S.) 1121.

The evidence in an action founded on

the Federal Employers' Liability Act for injuries received on a dark night by a brakeman who was caught between a tender and cars left by a coemployee on a side track so as not to clear the main track, was held sufficient to warrant a finding that the injured employee was justified in relying on the assurance of such coemployee that the cars were in the clear. *Skaggs v. Illinois C. R. Co.*, 124 Minn. 503, 145 N. W. 381, affirmed 240 U. S. 66, 60 L. ed. —, 36 Sup. Ct. Rep. 249.

Evidence that as a hostler descended from a ladder, he sprained his ankle by stepping on a piece of old hose that had been permitted to lie on the floor of a roundhouse for several days, is sufficient to sustain a finding of the defendant's negligence in an action based on the Federal Employers' Liability Act. *Cross v. Chicago, B. & O. R. Co.*, — Mo. App. —, 177 S. W. 1127, S. C. second appeal — Mo. App. —, 186 S. W. 1130.

#### Existence of Widow and Children.

That a deceased railway employee did not leave a surviving widow or children is sufficiently shown, in an action founded on the Federal Employers' Liability Act, by evidence that he was about 21 years of age, that he resided with his parents, that monthly he gave nearly all of his earnings to his mother and spent but little for himself. *Moffett v. Baltimore & O. R. Co.*, 135 C. C. A. 607, 220 Fed. 39.

#### Cause of Accident.

Evidence that a fast freight train traveling under a clearance card, ran into the rear of a slower train in the night and killed a brakeman who was in the caboose, is sufficient to sustain a finding, in an action under the Federal Employers' Liability Act, that the disaster was caused by the negligence of the agents of the railway company, where the deceased was not aware that his train was followed by a faster one with steam leaking from a cylinder of the engine so as to prevent the engineer from seeing the tail lights of the preceding train. *Central Vt. R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A., 265 Ann. Cas. 1916 B. 252, affirming 87 Vt. 330, 89 Atl. 618.

The evidence in an action under the Federal Employers' Liability Act was held sufficient to sustain a finding that a brakeman was killed while between moving cars attempting to operate a defective automatic coupler. *Demerce v. Minneapolis, St. P. & S. S. M. R. Co.*, 122 Minn. 171, 142 N. W. 145.

The evidence, in an action based on the Federal Employers' Liability Act for injuries received by a brakeman who was thrown from the ladder of a freight car,

was held sufficient to sustain a finding that a dent in the sill of the car, which prevented a sufficient foothold, was the proximate cause of the accident. *Pitts., C. & St. L. R. Co. v. Sheets*, 15 Ohio C. Rep. (N. S.) 305, affirmed 87 Ohio St. 476, 102 N. E. 1129.

#### Display of Improper Signals.

A finding by the jury, in an action under the Federal Employers' Liability Act, that the plaintiff's injuries were caused by the failure of the defendant to display a red instead of a green light as a signal, will be sustained when based on conflicting testimony. *Pelton v. Illinois C. R. Co.*, 171 Ia. 91, 150 N. W. 236, writ of error dismissed 239, U. S. 655, 60 L. ed. —, 36 Sup. Ct. Rep. 166.

#### Negligence.

Evidence that an employee who, while engaged in removing a tie from a main track, was struck and killed by a switch engine moving on an adjoining lead track without its bell being rung, as he was turning a tie parallel with the two tracks so that it would not be struck by a train coming from the opposite direction on the main track, is sufficient to sustain a finding of the negligence of the defendant in an action based on the Federal Employers' Liability Act. *Bombolis v. Minneapolis & St. L. R. Co.*, 128 Minn. 112, 150 N. W. 385.

Where a mail crane struck a fireman's head as he was leaning from an engine cab in the discharge of his duties, and the outer plate of his skull was fractured without breaking the inner plate which was but one-sixteenth of an inch from the outer one, evidence that the arm of the crane was one inch lower than the standard prescribed by law was sufficient, in an action under the Federal Employers' Liability Act, to sustain a finding of the negligence of the defendant, regardless of conflicting testimony as to the clearance between the end of the arm and the side of the train. *Rowlands v. Chicago & N. W. R. Co.*, 149 Wis. 51, 135 N. W. 156, writ of error dismissed 229 U. S. 627, 57 L. ed. 1357, 33 Sup. Ct. Rep. 771.

The evidence, in an action founded on the Federal Employers' Liability Act for the death of a brakeman, was held sufficient to warrant a finding that it was due to the negligence of the defendant in causing a violent jerking or lurching of a freight train, which, concurring with its negligence in failing to equip the ends of its cars with ladders and hand-holds caused such employee to fall beneath the cars as he was passing from a tank car to a high car. *Kansas City S. R. Co. v. Leslie*, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915 B. 834, reversed on other grounds 238 U. S. 599, — L. ed. —, 35 Sup. Ct. Rep. 844.

#### Sufficient Inspection.

A finding that a skid used for moving piling, was not inspected by a foreman is warranted, in an action based on the Federal Employers' Liability Act for injuries sustained by an employee from the breaking of the skid, from testimony that the former merely glanced at the skid in passing, as it was lying on the ground. *St. Louis, I. M. & S. R. Co. v. Ingram*, — Ark. —, 187 S. W. 452.

#### Freedom From Contributory Negligence.

A verdict, in an action under the Federal Employers' Liability Act, absolving a brakeman from contributory negligence in going onto the platform of a passenger car at night in the discharge of his duties, where he fell and was injured by reason of the steps of the car having been knocked away without his knowledge, by a box negligently left near the track by the carrier, held sustained by the evidence. *Ferbee v. Norfolk & S. R. Co.*, 163 N. C. 351, 52 L. R. A. (N. S.) 1114, 79 S. E. 685, S. C. 167 N. C. 290, 83 S. E. 360, affirmed on other grounds 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781.

### 6. To Sustain Verdict.

#### In General.

The evidence in an action predicated on the Federal Employers' Liability Act for the death of a fireman in a collision between his engine and freight cars which escaped from a siding, was held sufficient to sustain a verdict for the plaintiff on the ground of the negligence of his fellow servants in failing to block and secure the cars on the siding. *Troxell v. Delaware, L. & W. R. Co.*, 227 U. S. 434, 57 L. ed. 586, 33 Sup. Ct. Rep. 274, reversing 118 C. C. A. 272, 200 Fed. 44, and 105 C. C. A. 593, 183 Fed. 373, S. C. 185 Fed. 540, 180 Fed. 871.

Evidence that an engineer was killed while operating a snow plow, when a bridge fell as the result of some of the timbers of the bridge having been burned, shows negligence on the part of the carrier sufficient to sustain a verdict for the plaintiff in an action based on the Federal Employers' Liability Act. *Copper R. & N. W. R. Co. v. Reed*, 128 C. C. A. 39, 211 Fed. 111.

Where a brakeman, while attempting to raise from the outside the vestibule trap door of a car in his slowly moving train in order to board it, was injured by the fall of the door as the alleged result of a defective fastener, a verdict for the plaintiff was held sustained by the evidence in an action based on the Federal Employers' Liability Act. *McMillan v. Northern P. R. Co.*, 125 Minn. 7, 145 N. W. 613.

Where a switchman was killed while "poling" a freight car, the negligence of his foreman was sufficiently shown to sustain a verdict for the plaintiff in an action founded on the Federal Employers' Liability Act, where the former failed to direct such operation to be performed in the customary and usual manner by stopping the engine when the pole or timber was firmly braced between the car and engine, so as permit the decedent, who was holding the pole, to step aside, and also by omitting to give the engineer a signal to stop when the pole was so braced. *Sweet v. Chicago & N. W. R. Co.*, 157 Wis. 400, 147 N. W. 1054.

#### When Based on Conflicting Testimony.

Where the evidence is conflicting as to whether the explosion of a boiler was due to low water or to the use of button head instead of taper head stay bolts in the crown sheet of an oil burning locomotive, or the lack of fusible plugs and the accumulation of scale on the crown sheet, a verdict for the plaintiff in an action based on the Federal Employers' Liability Act is conclusive. *Donaldson v. Great N. R. Co.*, 89 Wash. 161, 154 Pac. 133.

Where the evidence was conflicting, in an action founded on the Federal Employers' Liability Act for the benefit of an abandoned wife and child of a deceased employee, as to whether the wife had been leading a dissolute life which would, if true, bar a recovery for her benefit, a finding in her favor by the jury which was approved by the trial court on a motion for a new trial, will not be disturbed on appeal. *Fogarty v. Northern P. R. Co.*, 86 Wash. 90, 147 Pac. 652, L. R. A. 1916 C. 803, S. C. 74 Wash. 397, 133 Pac. 609, L. R. A. 1916 C. 800.

#### Preponderance.

The fact that the verdict, in an action under the Federal Employers' Liability Act, may not be in accord with the testimony of a majority of the witnesses does not furnish reasons for setting it aside, since mere numerical superiority of witnesses on one side does not constitute preponderance of proof. *Cincinnati, N. O. & T. P. R. Co. v. Goode*, — Ky. —, 183 S. W. 264, S. C. 153 Ky. 247, 154 S. W. 241, 163 Ky. 60, 173 S. W. 329.

A verdict for the plaintiff may be rendered in an action based on the Federal Employers' Liability Act, although the preponderance of evidence is not in his favor. *Louisville & N. R. Co. v. Thomas*, — Ky. —, 185 S. W. 840.

#### "Scintilla" Rule.

The "scintilla" rule of evidence, when the law of the forum, will be applied in an action based on the Federal Employers'

Liability Act. *Louisville & N. R. Co. v. Holloway*, 163 Ky. 123, 173 S. W. 343, S. C. 168 Ky. 262, 181 S. W. 1126; *Louisville & N. R. Co. v. Johnson*, 161 Ky. 224, 171 S. W. 847; *Dutton v. Atlantic C. L. R. Co.*, — S. C. —, 88 S. E. 263.

#### Absence of Evidence of Negligence.

A judgment for the plaintiff cannot be sustained, in an action under the Federal Employers' Liability Act for the death of a freight brakeman in a rear end collision, where there was no evidence of alleged negligence in dispatching the trains, and it appeared that, had the decedent obeyed the rules of the carrier and protected the rear of his train, the accident would not have happened notwithstanding the negligent operation of the following train, and it did not appear whether the verdict was based on negligence in dispatching the trains or in their operation. *New York, N. H. & H. R. Co. v. Murphy*, 123 C. C. A. 606, 204 Fed. 420.

Where the evidence, in an action based on the Federal Employers' Liability Act for the death of an employee, does not show why at the time of his injury he was riding on the pilot of a locomotive in violation of his employer's orders, and his duties did not require him to do so, a judgment for the plaintiff cannot be upheld. *Hobbs v. Great N. R. Co.*, 80 Wash. 678, 142 Pac. 20, L. R. A. 1915 D. 503.

#### F. Demurrer to Evidence.

##### In General.

A demurrer to the evidence cannot be sustained in an action under the Federal Employers' Liability Act, when such that men might reasonably come to different conclusions as to whether a brakeman was thrown from a car as the result of a violent jerk caused by the negligence of the engineer. *Saar v. Atchison, T. & S. F. R. Co.*, — Kan. —, 155 Pac. 954.

A demurrer to the evidence, in an action under the Federal Employers' Liability Act, was properly overruled where the plaintiff's version as to the happening of the accident in which he was injured was not so contrary to plain physical facts or so at variance with common experience of men, that its acceptance would be shocking to reason. *Delano v. Roberts*, — Mo. App. —, 188 S. W. 771.

#### G. Scope of Issues.

Admissibility under pleadings of evidence to show employment in interstate commerce, see *supra* XIII, D, 11.

See also *supra* XVIII, D, 1.

##### In General.

Evidence of the loss of the plaintiff's sense of taste and smell cannot be shown

in an action under the Federal Employers' Liability Act when not within the pleadings. *Louisville & N. R. Co. v. Henry*, 167 Ky. 151, 180 S. W. 74.

The plaintiff in an action for the death of an employee cannot give proof to bring the case within the terms of the Federal Employers' Liability Act where liability thereunder is not shown by the pleadings. *Rogers v. New York C. & H. R. R. Co.*, — App. Div. —, 157 N. Y. Supp. 83.

When on the trial of an action for the death of an employee the defendant conceded, without waiving the objection that evidence to that effect was not admissible under the pleadings, that it was engaged in interstate commerce, the plaintiff cannot give evidence to bring his action within the Federal Employers' Liability Act where the pleadings did not show liability thereunder. *Rogers v. New York C. & H. R. R. Co.*, — App. Div. —, 157 N. Y. Supp. 83.

#### H. Variance and Failure of Proof.

##### Variance.

Where the negligence charged, in an action under the Federal Employers' Liability Act, was that the engineer, with knowledge that the fireman was descending from the top of the tender, recklessly and negligently backed the engine with great, unusual and unnecessary violence against cars so as to throw the fireman from the coal gate to his injury, proof that the engineer was "sore" because his train was behind time, and that he negligently backed the engine against the cars at 10 miles an hour, was in strict accord with the plaintiff's allegations. *Delano v. Roberts*, — Mo. App. —, 182 S. W. 771.

Where a case within the Federal Employer's Liability Act is proven, although the act was not pleaded, there is not such a departure between pleading and proof as to entitle the defendant to a binding instruction in its favor. *Hogarty v. Phila. & R. R. Co.*, 245 Pa. 443, 91 Atl. 854.

There was a fatal variance between the pleading and proof, in an action based on the Federal Employers' Liability Act, when the petition alleged that the plaintiff while constructing a scaffold on the inside of the wall of a damaged roundhouse, was injured by the falling of the inner course of brick as the result of the negligence of the defendant in moving a heavy locomotive with such great force and violence as to shake the earth, where the evidence merely showed the dangerous condition of the wall and its falling. *Winter v. Chicago, R. I. & P. R. Co.*, — Mo. App. —, 185 S. W. 1172.

##### Failure of Proof.

Where the evidence leaves to conjecture the question whether a brakeman's death was the result of his own fault or of the negligence of his employer, there is a failure of proof which will prevent a recovery under the Federal Employers' Liability Act. *Chesapeake & O. R. Co. v. Walker*, 159 Ky. 237, 167 S. W. 128.

#### I. Credibility and Conduct of Witnesses.

##### Credibility.

###### — Inconsistent Statements.

The testimony of a witness which made the defendant's negligence a question for the jury in an action based on the Federal Employers' Liability Act, was held not to have been so discredited by his prior written statements or his cross-examination as to justify the reversal of a verdict for the plaintiff; since the jury could consider the circumstances under which his statements were given. *Capital Trust Co. v. Great N. R. Co.*, 127 Minn. 144, 149 N. W. 14, S. C. 128 Minn. 537, 150 N. W. 1102.

##### Conduct.

###### — Widow Holding Child While Testifying.

The fact that a widow, while testifying in an action based on the Federal Employers' Liability Act for the death of her husband, held in her lap her six-year-old mentally deficient child, was not prejudicial to the defendant, where the amount of the verdict was not apparently increased by such conduct. *Louisville & N. R. Co. v. Stewart*, 163 Ky. 823, 174 S. W. 744, S. C. 156 Ky. 550, 161 S. W. 557, 157 Ky. 644, 163 S. W. 755, affirmed on other grounds 241 U. S. 261, 60 L. ed. —, 36 Sup. Ct. Rep. 586.

#### J. Examination of Witnesses.

##### Cross-Examination.

###### — In General.

The plaintiff cannot be cross-examined, in an action founded on the Federal Employers' Liability Act for personal injuries, as to the cause of the death of his wife. *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

In an action under the Federal Employers' Liability Act for injuries sustained by an employee as the alleged consequences of a rough place in a track contributing to his injury, a witness produced by the defendant, who testified that there was not a place on the defendant's road rough enough to put a person in danger of losing his hand-hold on a motor car, may be asked on cross-examination whether the track was first class and whether it was unballasted and rough in some places. *Chicago, R. I. & G. R. Co. v. Cosio*, — Tex. Civ. App. —, 182 S. W. 83.

Where a switchman was killed while "poling" a freight car, the negligence of his foreman was sufficiently shown to sustain a verdict for the plaintiff in an action founded on the Federal Employers' Liability Act, where the former failed to direct such operation to be performed in the customary and usual manner by stopping the engine when the pole or timber was firmly braced between the car and engine, so as permit the decedent, who was holding the pole, to step aside, and also by omitting to give the engineer a signal to stop when the pole was so braced. *Sweet v. Chicago & N. W. R. Co.*, 157 Wis. 400, 147 N. W. 1054.

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Where the evidence, in an action based on the Federal Employers' Liability Act for the death of an employee, does not show why at the time of his injury he was riding on the pilot of a locomotive in violation of his employer's orders, and his duties did not require him to do so, a judgment for the plaintiff cannot be upheld. *Hobbs v. Great N. R. Co.*, 80 Wash. 678, 142 Pac. 20, L. R. A. 1915 D. 503.

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##### In General.

A demurrer to the evidence cannot be sustained in an action under the Federal Employers' Liability Act, when such that men might reasonably come to different conclusions as to whether a brakeman was thrown from a car as the result of a violent jerk caused by the negligence of the engineer. *Saar v. Atchison, T. & S. F. R. Co.*, — Kan. —, 155 Pac. 954.

A demurrer to the evidence, in an action under the Federal Employers' Liability Act, was properly overruled where the plaintiff's version as to the happening of the accident in which he was injured was not so contrary to plain physical facts or so at variance with common experience of men, that its acceptance would be shocking to reason. *Delano v. Roberts*, — Mo. App. —, 182 S. W. 771.

#### G. Scope of Issues.

Admissibility under pleadings of evidence to show employment in interstate commerce, see *supra* XIII, D, 11.

See also *supra* XVIII, D, 1.

##### In General.

Evidence of the loss of the plaintiff's sense of taste and smell cannot be shown

in an action under the Federal Employers' Liability Act when not within the pleadings. *Louisville & N. R. Co. v. Henry*, 167 Ky. 151, 180 S. W. 74.

The plaintiff in an action for the death of an employee cannot give proof to bring the case within the terms of the Federal Employers' Liability Act where liability thereunder is not shown by the pleadings. *Rogers v. New York C. & H. R. R. Co.*, — App. Div. —, 157 N. Y. Supp. 83.

When on the trial of an action for the death of an employee the defendant conceded, without waiving the objection that evidence to that effect was not admissible under the pleadings, that it was engaged in interstate commerce, the plaintiff cannot give evidence to bring his action within the Federal Employers' Liability Act where the pleadings did not show liability thereunder. *Rogers v. New York C. & H. R. R. Co.*, — App. Div. —, 157 N. Y. Supp. 83.

#### H. Variance and Failure of Proof.

##### Variance.

Where the negligence charged, in an action under the Federal Employers' Liability Act, was that the engineer, with knowledge that the fireman was descending from the top of the tender, recklessly and negligently backed the engine with great, unusual and unnecessary violence against cars so as to throw the fireman from the coal gate to his injury, proof that the engineer was "sore" because his train was behind time, and that he negligently backed the engine against the cars at 10 miles an hour, was in strict accord with the plaintiff's allegations. *Delano v. Roberts*, — Mo. App. —, 182 S. W. 771.

Where a case within the Federal Employer's Liability Act is proven, although the act was not pleaded, there is not such a departure between pleading and proof as to entitle the defendant to a binding instruction in its favor. *Hogarty v. Phila. & R. R. Co.*, 245 Pa. 443, 91 Atl. 854.

There was a fatal variance between the pleading and proof, in an action based on the Federal Employers' Liability Act, when the petition alleged that the plaintiff while constructing a scaffold on the inside of the wall of a damaged roundhouse, was injured by the falling of the inner course of brick as the result of the negligence of the defendant in moving a heavy locomotive with such great force and violence as to shake the earth, where the evidence merely showed the dangerous condition of the wall and its falling. *Winter v. Chicago, R. I. & P. R. Co.*, — Mo. App. —, 185 S. W. 1172.

##### Failure of Proof.

Where the evidence leaves to conjecture the question whether a brakeman's death was the result of his own fault or of the negligence of his employer, there is a failure of proof which will prevent a recovery under the Federal Employers' Liability Act. *Chesapeake & O. R. Co. v. Walker*, 159 Ky. 237, 167 S. W. 128.

#### I. Credibility and Conduct of Witnesses.

##### Credibility.

###### — Inconsistent Statements.

The testimony of a witness which made the defendant's negligence a question for the jury in an action based on the Federal Employers' Liability Act, was held not to have been so discredited by his prior written statements or his cross-examination as to justify the reversal of a verdict for the plaintiff; since the jury could consider the circumstances under which his statements were given. *Capital Trust Co. v. Great N. R. Co.*, 127 Minn. 144, 149 N. W. 14, S. C. 128 Minn. 537, 150 N. W. 1102.

##### Conduct.

###### — Widow Holding Child While Testifying.

The fact that a widow, while testifying in an action based on the Federal Employers' Liability Act for the death of her husband, held in her lap her six-year-old mentally deficient child, was not prejudicial to the defendant, where the amount of the verdict was not apparently increased by such conduct. *Louisville & N. R. Co. v. Stewart*, 163 Ky. 823, 174 S. W. 744, S. C. 156 Ky. 550, 161 S. W. 557, 157 Ky. 64, 163 S. W. 755, affirmed on other grounds 241 U. S. 261, 60 L. ed. —, 36 Sup. Ct. Rep. 586.

#### J. Examination of Witnesses.

##### Cross-Examination.

###### — In General.

The plaintiff cannot be cross-examined, in an action founded on the Federal Employers' Liability Act for personal injuries, as to the cause of the death of his wife. *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

In an action under the Federal Employers' Liability Act for injuries sustained by an employee as the alleged consequences of a rough place in a track contributing to his injury, a witness produced by the defendant, who testified that there was not a place on the defendant's road rough enough to put a person in danger of losing his hand-hold on a motor car, may be asked on cross-examination whether the track was first class and whether it was unballasted and rough in some places. *Chicago, R. I. & G. R. Co. v. Cosio*, — Tex. Civ. App. —, 182 S. W. 83.

Where, on cross-examination, a witness stated without objection that the defendant's railway track was a little rough all along the line and that some parts of it had to be raised every day, the admission in an action based on the Federal Employers' Liability Act, over objection of testimony that the track was not first class, that it was not ballasted and was rough in some places, was not prejudicial to the defendant. *Chicago, R. I. & G. R. Co. v. Cosio*, — Tex. Civ. App. —, 182 S. W. 83.

A witness produced by the defendant, in an action founded on the Federal Employers' Liability Act for injuries sustained by a servant in pushing a car in order to start the motor, may be cross-examined as to the cost of equipping the motor with a self-starter, although not within the pleadings, where on direct examination he gave a detailed history and description of the various makes of motor cars, together with their construction and operation. *Chicago, R. I. & G. R. Co. v. Cosio*, — Tex. Civ. App. —, 182 S. W. 83.

A witness for the defendant who testified in an action under the Federal Employers' Liability Act for the death of an assistant roadmaster, as to the latter's duties, may be cross-examined as to such duties under various circumstances and situations, although none of them existed in the case. *Lynch v. Central Vt. R. Co.*, — Vt. —, 95 Atl. 683.

#### —Defects in Engine.

Where an engineer testified, in an action founded on the Federal Employers' Liability Act, that an engine which ran into the rear of another train and killed a brakeman was an "A No. 1 engine," it may be shown by his cross-examination that on several occasions preceding the accident the cylinders leaked steam, where escaping steam was alleged to have caused the disaster by preventing the engineer from seeing the signals of the preceding train. *White v. Central Vermont R. Co.*, 87 Vt. 330, 89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, Ann. Cas. 1916 B. 252.

#### —Reports of Accident.

A conductor may be cross-examined in an action under the Federal Employers' Liability Act for the death of a brakeman, with reference to reports of the accident made by him within a day or so after it happened. *Ft. Worth & D. C. R. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279.

#### —Reports Under Boiler Inspection Act.

Notwithstanding that the Federal Boiler Inspection Act prohibits the use for any purpose of reports of Federal inspectors pertaining to explosions of locomotive

boilers, or any part thereof, in any action for damages growing out of any matter mentioned in such report or investigation, in an action founded on the Federal Employers' Liability Act for the death of an engineer as the result of the explosion of a locomotive boiler, the plaintiff's counsel may cross-examine the defendant's superintendent of safety as to portions of such report, where the defendant's counsel in his opening statement said that such reports were available to the plaintiff and could be produced by him if desired. *Donaldson v. Great N. R. Co.*, — Wash. —, 154 Pac. 133.

#### —Relations Between Widow and Decedent.

In an action under the Federal Employers' Liability Act for the death of an employee his widow may be cross-examined by the defendant as to contributions made to her support by her father, as well as to show that the relations between herself and the decedent had been unpleasant for several years, that a divorce had been considered shortly before his death, and that his life insurance was not payable to her. *Farley v. New York, N. H. & H. R. Co.*, 87 Conn. 328, 87 Atl. 990.

### XIX. TRIAL.

#### A. In General.

##### 1. Consolidation of Actions.

#### Common-Law Action and Suit Under Federal Law.

Where, after the commencement of a common-law action for injuries to an employee, a suit under the Federal Employers' Liability Act is begun, the two actions may be consolidated and litigated on their merits. *Tinkham v. Boston & M. R. Co.*, 77 N. H. 111, 88 Atl. 709.

##### 2. Physical Examination of Plaintiff.

#### Second Examination.

Where, in an action founded on the Federal Employers' Liability Act, the defendant's physician in making a physical examination of plaintiff was misled by the latter, it was error not to permit a second examination. *Rief v. Great N. R. Co.*, 126 Minn. 430, 148 N. W. 309.

##### 3. Exhibition of Injuries.

#### Nude Body.

The nude body of the plaintiff should not be exhibited to the jury in an action based on the Federal Employers' Liability Act, in order to show the extent of his injuries, but they should be shown by pho-



tographs. *Cincinnati, N. O. & T. P. R. Co. v. Nolan*, 161 Ky. 205, 170 S. W. 650, S. C. 167 Ky. 11, 179 S. W. 1046, 10 N. C. C. A. 812.

#### 4. Defenses.

(a) **In General.**  
(No decisions.)

(b) **Prior Action.**

#### Under State Law.

Since the remedy given by the Federal Employers' Liability Act for the death of an employee while engaged in interstate commerce is exclusive, it is no defense to an action by a personal representative to show that a surviving parent had previously brought an action under a state law for the death of a son who was killed while employed in interstate commerce. *Cory v. Lake Shore & M. S. Ry. Co.*, 208 Fed. 847.

#### Compulsory Nonsuit.

A plea, in an action in a Federal court under the Federal Employers' Liability Act, of a compulsory nonsuit of the plaintiff in a suit between the same parties for the same cause of action in a state court, is not a bar to the latter action. *Bixler v. Penn. R. Co.*, 201 Fed. 553.

#### (c) Settlement With Illegally Appointed Administrator.

##### In General.

A settlement by the defendant with a special administrator appointed by a probate court without the filing of a petition, of a claim for the death of an employee, is no defense to an action brought under the Federal Employers' Liability Act by a regularly appointed administrator, since such court was without jurisdiction to appoint the special administrator. *Bombolis v. Minneapolis & St. L. R. Co.*, 128 Minn. 112, 150 N. W. 385, affirmed on other grounds 241 U. S. 211, 60 L. ed. —, 36 Sup. Ct. Rep. 591.

#### B. Question for Court.

1. **In General.**  
(No decisions.)

#### 2. Interstate Commerce.

##### In General.

The question whether the person for whose homicide an action is brought, was engaged in interstate or intrastate commerce at the time of his death, is a mixed one of law and fact. *Atkinson v. Bullard*, 14 Ga. App. 69, 80 S. E. 220.

Where the facts are undisputed in an action for injuries received by a railway employee, it is for the court to determine whether the Federal Employers' Liability Act controls. *Pelton v. Illinois C. R. Co.*, 171 Iowa 91, 150 N. W. 236; *Graber v. Duluth, S. S. & A. R. Co.*, 159 Wis. 414, 150 N. W. 489.

Where the facts are undisputed and the inferences therefrom are clear in an action under the Federal Employers' Liability Act, the court may determine, as a matter of law, whether an employee at the time he was injured, was employed in interstate commerce. *Peery v. Illinois C. R. Co.*, 123 Minn. 264, 143 N. W. 724 S. C. 128 Minn. 119, 150 N. W. 382.

Whether a particular service or engagement is of an interstate character is a question of law in an action founded on the Federal Employers' Liability Act. *Graber v. Duluth, S. S. & A. R. Co.*, 159 Wis. 414, 150 N. W. 489.

Whether a person was employed in interstate or intrastate commerce, as well as what law controls an action for personal injuries, is a question for the court, where a servant who was employed in repairing the roadbed and track of a railway extending into another state, was injured while starting a motor car used for carrying men and tools to their work. *Chicago, R. I. & G. R. Co. v. Cosio*, — Tex. Civ. App. —, 182 S. W. 82.

When the facts, in an action founded on the Federal Employers' Liability Act, are conceded or established by proof so conclusive that there can be no reasonable difference of opinion, the question whether an employee was engaged in interstate commerce is for the court. *Bolch v. Chicago, M. & St. P. R. Co.*, — Wash. —, 155 Pac. 422.

Whether a person who, under a contract, unloaded coal and wood at a coal chute and placed it on engines and cars as directed by an interstate carrier, was an employee of the latter or an independent contractor is a question of law for the court in an action under the Federal Employers' Liability Act. *Chicago, R. I. & P. R. Co. v. Bond*, — Okla. —, 148 Pac. 103, reversed 240 U. S. 449, — L. ed. —, 36 Sup. Ct. Rep. 403.

#### 3. Assumed Risk.

##### In General.

Where the evidence is undisputed in an action under the Federal Employers' Liability Act, that an employee's injuries were not caused by any violation of a statute enacted for the protection of employees, the question of assumption of risk is one of law. *St. Louis & S. F. R. Co. v. Snowden*, — Okla. —, 149 Pac. 1083.

#### 4. Contributory Negligence.

##### In General.

The court cannot declare as a matter of law, in an action under the Federal Employers' Liability Act, that an employee was guilty of contributory negligence unless from the evidence but one conclusion can be reasonably drawn, which is that the plaintiff was at fault and that his conduct thereby contributed to his injury. *Pfeiffer v. Oregon, W. R. & N. Co.*, 74 Oreg. 307, 144 Pac. 762, 7 N. C. C. A. 685, writ of error dismissed 239 U. S. 658, — L. ed. —, 36 Sup. Ct. Rep. 222.

#### 5. Construction of Rules and Orders.

##### Rules.

The construction of the printed rules of a carrier is for the court and not the jury, in an action based on the Federal Employers' Liability Act. *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

The construction of the written rules of a carrier is a question for the court in an action under the Federal Employers' Liability Act, unaided by expert testimony except to explain railroad terms and principles. *White v. Central Vermont R. Co.*, 87 Vt. 330, 89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, Ann. Cas. 1916 B. 252.

##### Orders.

The construction of a written train order is for the court in an action based on the Federal Employers' Liability Act, where a state statute places such duty on the court. *Chadwick v. Oregon, W. R. & N. Co.*, 74 Oreg. 19, 144 Pac. 1165.

#### C. Submitting Case or Questions to Jury.

##### 1. In General.

(No decisions.)

##### 2. Sufficiency of Evidence.

###### (a) In General.

(No decisions.)

###### (b) To Take Case to Jury.

##### In General.

The scintilla of evidence doctrine of the forum is applicable to an action in a state court based on the Federal Employers' Liability Act. *Dutton v. Atlantic C. L. R. Co.*, — S. C. —, 88 S. E. 263; *Louisville & N. R. Co. v. Johnson*, 161 Ky. 824, 171 S. W. 847; *Louisville & N. R. Co. v. Holloway*, 163 Ky. 125, 173 S. W. 343, S. C. 168 Ky. 262, 181 S. W. 1126.

An action under the Federal Employers' Liability Act should be submitted to the

jury when there is any competent evidence tending to sustain the plaintiff's allegations. *Bennett v. Southern R.*, 98 S. C. 42, 79 S. E. 710, affirmed on other grounds 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566.

If the evidence in an action in a state court under the Federal Employers' Liability Act would be sufficient to take the case to the jury and support a verdict if brought under a state law, it will be sufficient for the same purpose under the Federal Act. *Louisville & N. R. Co. v. Johnson*, 161 Ky. 824, 171 S. W. 847.

An action in a state court, based on the Federal Employers' Liability Act, should be submitted to the jury under a local rule of practice, where the evidence is conducive to support the averments of the petition relied on for a recovery, although the weight of the evidence, both numerically and in probative value, may be with the defendant. *Louisville & N. R. Co. v. Johnson*, 161 Ky. 824, 171 S. W. 847.

An action in a state court under the Federal Employers' Liability Act may be submitted to the jury if there is any evidence conducing to support the averments of the petition, although its weight, both numerically and in probative value, may be with the defendant. *Louisville & N. R. Co. v. Winkler*, 162 Ky. 843, 173 S. W. 151, 9 N. C. C. A. 146.

Evidence, in an action under the Federal Employers' Liability Act for the death of a brakeman who was thrown under a moving train from which in the course of his duties he alighted at a station, tending to show that the platform was out of repair, that nails protruded above its surface, that there were holes in some of the boards, that others were rotten next to the track, while others would spring when stepped on, is sufficient to take the case to the jury. *St. Louis & S. F. R. Co. v. Clappitt*, — Okla. —, 154 Pac. 40.

In an action founded on the Federal Employers' Liability Act against two corporations for injuries received by an employee of one of them when he fell through an opening in a platform on which he was at work repairing a railway tunnel owned by the other defendant, the accident being the result of a failure to provide adequate lights, the evidence was held sufficient to take the case to the jury, where it appeared that both defendants were in fact acting as common carriers, although one of them was not a railway company. *Copper R. & N. W. R. Co. v. Heney*, 128 C. C. A. 131, 211 Fed. 450.

##### (c) To Take Particular Questions to Jury. Employment in Interstate Commerce.

The question whether a brakeman was engaged in interstate commerce was held to have been properly left to the jury in

an action under the Federal Employers' Liability Act, where the evidence tended to show that at the time he was injured he was making up a freight train for a point in another state. *St. Louis & S. F. R. Co. v. Brown*, — Okla. —, 144 Pac. 1075, affirmed 241 U. S. 223, 60 L. ed. —, 36 Sup. Ct. Rep. 602.

#### **Dependency.**

Evidence that the beneficiaries although orphan children of the half-blood, were of tender years and without estate of their own, is sufficient to take to the jury the question of their dependency in an action under the Federal Employers' Liability Act for the death of an illegitimate son of their mother. *Kenney v. Seaboard A. L. R. Co.*, 167 N. C. 14, 82 S. E. 968, affirmed 240 U. S. 489, 60 L. ed. —, 36 Sup. Ct. Rep. 458.

#### **Cause of Accident.**

The evidence in an action based on the Federal Employers' Liability Act for the death of a switchman, who was jarred from the narrow rim of the pilot of a road engine used for switching purposes instead of an engine with a foot board, was held sufficient to take to the jury the question whether the uneven condition of a recently repaired and unballasted switch track caused a lurch of the engine which threw the switchman from the pilot. *Louisville & N. R. Co. v. Lankford*, 126 C. C. A. 247, 209 Fed. 321.

#### **Conscious Suffering.**

Testimony in an action based on the Federal Employers' Liability Act, that the plaintiff's intestate breathed and moaned for ten minutes after his fatal injury, justifies the submission to the jury of the question of the survival of his cause of action. *Capital Trust Co. v. Great N. R. Co.*, 127 Minn. 144, 149 N. W. 14, S. C. 128 Minn. 537, 150 N. W. 1102.

#### **Display of Improper Signals.**

Where an engineer was killed by the wrecking of his train at a derail switch, a question for the jury was presented in an action based on the Federal Employers' Liability Act, by evidence tending to show that he might have been misled by the safety signals as displayed by a towerman. *New York C. & H. R. R. Co. v. Banker*, 40 C. C. A. 37, 224 Fed. 351.

#### **Negligence.**

##### **— In General.**

Where it appeared that a carpenter was injured when a subforeman directed that a portion of an addition to a building which would not fit into place be raised 60 feet from the ground, and the latter, with knowledge of that fact, directed an-

other employee to prize it into place, and while it was being done the plaintiff was injured, such showing was sufficient to take to the jury the question of the defendant's negligence in an action founded on the Federal Employers' Liability Act. *Thompson v. Cincinnati, N. O. & T. P. R. Co.*, 165 Ky. 256, 176 S. W. 1006.

Where a freight conductor was injured as the result of pulling out of a drawbar on a car which a brakeman, with knowledge that the coupler was hanging down at least an inch, put into a train and the evidence was conflicting as to whether this condition indicated that the fastenings were insecure, such testimony amounted to more than a scintilla, and was sufficient to take to the jury, in an action under the Federal Employers' Liability Act, the question of the defendant's negligence in failing to exercise ordinary care to have and to keep the drawbar, together with its attachments, in a reasonably safe condition. *Louisville & N. R. Co. v. Winkler*, 162 Ky. 843, 173 S. W. 151, 9 N. C. C. A. 146.

In an action under the Federal Employers' Liability Act for injuries sustained by a brakeman when he went between cars, where all evidence as to defects in the coupler was withdrawn, it was held that the evidence warranted the submission to the jury of the question of negligence, and the denial of a motion to direct a verdict for the defendant on account of the contributory negligence of the plaintiff. *St. Louis & S. F. R. Co. v. Brown*, — Okla. —, 144 Pac. 1075, affirmed on other grounds 241 U. S. 223, 60 L. ed. —, 36 Sup. Ct. Rep. 602.

When the evidence, in an action under the Federal Employers' Liability Act, shows that a work train conductor was killed by a collision of his train with a hand-car, which presumptively should not have been on a main track, and which was presumptively left there by a working crew employed by the defendant, such evidence is sufficient to take to the jury the question of the defendant's negligence. *Canadian P. R. Co. v. Thompson*, — C. C. A. —, 232 Fed. 353.

##### **— Failure to Promulgate Rules.**

Evidence that a carrier had not promulgated a rule requiring warning to be given of the movement of cars in a railway yard, does not warrant the submission to the jury, in an action under the Federal Employers' Liability Act, of the question whether the failure to do so was negligence, where it did not appear that compliance with such a rule would have been practicable, or that other carriers had found it practicable to make and enforce such a rule, or that the situation in the defendant's yards and the conduct of its business was such as to obviously require

the adoption and enforcement of such a rule. *Swartwood v. Lehigh V. R. Co.*, — App. Div. —, 155 N. Y. Supp. 778.

#### — Failure to Stop Engine on Signal.

Where the engineer of a switch engine failed to observe a switchman's signal to stop when the engine was some feet from a car to which a coupling was to be made, and the latter saw that this signal was not going to be obeyed and that the couplers of the car and the engine would not meet, and he was injured when he attempted to kick the coupler of the engine into position, evidence that the engine could have been stopped in time had the engineer noticed the signal was sufficient to take to the jury the question of his negligence in an action under the Federal Employers' Liability Act. *Trowbridge v. Kansas City & W. B. R. Co.*, — Mo. App. —, 179 S. W. 777.

#### — Failure to Stop Train After Discovering Employee's Peril.

The question of the defendant's negligence was for the jury in an action founded on the Federal Employers' Liability Act for the death of an employee in a railway yard, who was struck by a backing train, running at excessive speed in violation of a municipal ordinance, where there was evidence reasonably tending to show that the train could have been stopped by those in charge after discovering the peril of the decedent, in time to avert the accident. *Chicago, R. I. & P. R. Co. v. Bond*, — Okla. —, 148 Pac. 103, reversed on other grounds 240 U. S. 449. — L. ed. —, 36 Sup. Ct. Rep. 405.

The question whether an engineer failed to apply the air brakes after discovering the peril of an employee who was struck and killed while crossing the tracks in a railway yard, was for the jury in an action under the Federal Employers' Liability Act, where the evidence tended to prove that the train could have been stopped in a shorter distance than it was had the brakes been promptly applied. *Chicago, R. I. & P. R. Co. v. Bond*, — Okla. —, 148 Pac. 103, reversed on other grounds 240 U. S. 449, — L. ed. —, 36 Sup. Ct. Rep. 405.

#### — Standpipe Near Track.

Evidence that a brakeman was killed on a dark night by being struck, while on the side ladder of a box car in the discharge of his duties, by a water standpipe which was but 22 inches from the side of the car, was sufficient to take to the jury the question of the employers' negligence, in an action founded on the Federal Employers' Liability Act, where there was conflicting testimony as to whether proper practice did not require that the standpipe should have been placed further from the

track. *Fish v. Chicago, R. I. & P. R. Co.*, 263 Mo. 106, 172 S. W. 340, 8 N. C. C. A. 538, Ann. Cas. 1916 B. 147.

### 3. Questions for Jury.

#### (a) In General.

##### Conduct of Injured Employee.

Whether an employee, who was struck and killed by a rapidly moving train, left the track and then stepped back in front of the train, or whether he remained on the track during all of the time the train was approaching, was held a question for the jury in an action under the Federal Employers' Liability Act. *Newkirk v. Pryor*, — Mo. App. —, 183 S. W. 682.

When the evidence is conflicting as to what occurred at the time an employee was injured, the question of negligence is for the jury in an action founded on the Federal Employers' Liability Act. *Phila. B. & W. R. Co. v. McConnell*, 142 C. C. A. 555, 228 Fed. 263.

##### Negligence.

#### — In General.

When the existence of facts constituting negligence is not free from doubt on the evidence, the question is for the jury in an action based on the Federal Employers' Liability Act. *Thompson v. Minneapolis & St. L. R. Co.*, — Minn. —, 158 N. W. 42.

Evidence that the plaintiff's intestate, while engaged in repairing a trestle on an interstate railway, was injured when the end of an unfastened cross-tie caused him to fall, is sufficient to take to the jury the question of the defendant's negligence in an action based on the Federal Employers' Liability Act. *Brooks v. Yazoo & M. V. R. Co.*, — Miss. —, 72 So. 227.

#### — Unballasted Switch Ties.

Whether it was negligence to leave two ties between which a switchrod ran, unballasted to a depth of 8 or 10 inches, is a question for the jury in an action under the Federal Employers' Liability Act for injuries sustained by an employee whose foot caught in such open space, where it was customary to fill such places up to the switchrod so as to render them less dangerous. *Chesapeake & O. R. Co. v. Shaw*, 168 Ky. 537, 182 S. W. 653.

##### Reasonableness of Time for Leaving Employer's Premises on Completion of Work.

What constitutes a reasonable time for a brakeman to wash himself and change his clothing in the caboose of an interstate freight train after its arrival at its destination, is generally a question for the jury in an action under the Federal Em-

employers' Liability Act for injuries sustained by him while crossing a railway yard on the way to his boarding place. *Easter v. Virginian R. Co.*, — W. Va. —, 86 S. E. 37.

Where a freight brakeman, on the arrival of an interstate train at its destination at 10:30 a. m., after obtaining a necessary supply of oil to fill the lamps and lanterns, sat down in the caboose to read and fell asleep, awakening about 2:30 p. m., then filling the lamps and sweeping the caboose, which took about an hour, and while on his way from his work through the yard, he was struck and injured by a backing locomotive, the question whether he was within the protection of the Federal Employers' Liability Act was for the jury. *Davis v. Chicago, R. I. & P. R. Co.*, — Minn. —, 158 N. W. 911.

#### (b) What Law Governs.

##### In General.

When it is a question of fact whether a carrier and an employee were engaged in interstate or intrastate commerce at the time the latter was injured, the court should, in an action based on the Federal Employers' Liability Act, instruct as to both and let the jury determine from the facts found whether the state or Federal law controls. *Camp v. Atlanta & C. A. L. R. Co.*, 100 S. C. 294, 84 S. E. 825.

Where the evidence shows that an employee was injured while engaged in interstate commerce, it is error to submit to the jury the question whether the common law or a state Employers' Liability Act controls. *Oberlin v. Oregon-W. R. & N. Co.*, 71 Oreg. 177, 142 Pac. 554.

Where an action for injuries to a railway employee was predicated on a state law and was tried on the theory of liability thereunder, it was reversible error to submit to the jury the question of liability under the Federal Employers' Liability Act. *Creteau v. Chicago & N. W. R. Co.*, 113 Minn. 418, 129 N. W. 855.

#### (c) Assumed Risk.

##### In General.

When the testimony as to assumption of risk is conflicting in an action based on the Federal Employers' Liability Act, it becomes a question for the jury. *Lorick v. Seaboard A. L. R. Co.*, 102 S. C. 276, 86 S. E. 675.

The question of assumption of risk was properly left to the jury, in an action founded on the Federal Employers' Liability Act for injuries received by a brakeman while riding on an engine, where the defendant set up in its answer assumption of risk inhering in the plaintiff's employ-

ment. *Pelton v. Illinois C. R. Co.*, 171 Ia. 91, 150 N. W. 236, writ of error dismissed 239 U. S. 655, 60 L. ed. —, 36 Sup. Ct. Rep. 166.

The submission to the jury of the question of assumed risk was not erroneous in an action under the Federal Employers' Liability Act for injuries sustained by a brakeman who was thrown from a freight car by an alleged violent and unnecessary jerk of a train moving at high speed, where the jury was instructed that the plaintiff assumed all the obvious and open risks of his employment in the ordinary operation of the train on which he worked, and also other risks of which he had been informed, including those ordinary ones obvious to a brakeman who is required to pass over the tops of moving cars in the discharge of his usual duties. *Hartman v. Western Md. R. Co.*, 246 Pa. 460, 92 Atl. 698.

##### Obedying Command.

Where a track hand, on the approach of a train at high speed in violation of cautionary signals, attempted at the order of his foreman to remove a jack from the track and on his inability to do so, instead of remaining where he was, there being but little space between the track and a bluff, attempted to cross the track in front of the train and was killed, the question of assumed risk is for the jury in an action under the Federal Employers' Liability Act. *Cincinnati, N. O. & T. P. R. Co. v. Jones*, — Ky. —, 186 S. W. 897.

##### Knowledge of Dangerous Conditions.

A fireman's previous knowledge of the condition in a railway yard and of the fact that cars were sometimes negligently left so as not to clear a lead track, is for the jury, in an action under the Federal Employers' Liability Act, in determining whether the plaintiff assumed the risk of injury from being struck at night by the marker of a caboose of a train which did not clear such track. *Chesapeake & O. R. Co. v. Meadows*, — Va. —, 89 S. E. 244.

##### Boarding Moving Engine.

Whether a brakeman assumed the risk of injury from attempting to board the engine of a train that was coming directly towards him at the rate of 12 miles an hour, is a question for the jury in an action founded on the Federal Employers' Liability Act. *Chesapeake & O. R. Co. v. De Atley*, 241 U. S. 310, 60 L. ed. —, 36 Sup. Ct. Rep. 564, reversing 159 Ky. 687, 167 S. W. 933.

##### Failure to Provide Proper Tools.

Whether a car repairer assumed the risk of injury from the failure of a carrier to provide a lifting jack is a question for the

jury, in an action under the Federal Employers' Liability Act for injuries received when the former attempted to lift into place, on an interstate car, a coupling that had fallen below standard height, where it appeared that he had frequently requested the yard foreman to furnish a jack for such work, which the latter had promised to do, the last occasion having been within three weeks prior to the accident. *Lorick v. Seaboard A. L. R. Co.*, 102 S. C. 276, 86 S. E. 675.

#### **Moving Ties with Insufficient Number of Men and Defective Appliances.**

Where the evidence is conflicting, in an action based on the Federal Employers' Liability Act for injuries received by an inexperienced section hand while assisting at the direction of his foreman in carrying a heavy switch tie with improper tools and with an insufficient number of men, the question of assumed risk is for the jury when it could be said that the danger was not obvious. *Missouri, K. & T. R. Co. v. Scott*, — Tex. Civ. App. —, 160 S. W. 432.

#### **Going in Front of Moving Cars.**

Whether a car checker assumed the risk of injury from the unexpected movement of cars while he was crossing a track is a question for the jury in an action under the Federal Employers' Liability Act, where there was nothing in the surrounding circumstances to warn him that cars were about to be kicked with extraordinary and unusual violence against the opposite end of the standing cars. *Great N. R. Co. v. Mustell*, 138 C. C. A. 305, 222 Fed. 879.

#### **Using Road Engine for Switching.**

Whether a switchman assumed the risk of injury from being jarred from the narrow rim of the pilot of a road engine used for switching purposes instead of one with a footboard, is a question for the jury in an action under the Federal Employers' Liability Act. *Louisville & N. R. Co. v. Lankford*, 126 C. C. A. 247, 209 Fed. 321.

#### **Defective Appliances and Tools.**

##### **— Car Vestibule Fastening.**

Where a brakeman, while attempting to raise from the outside a vestibule trap door of a car in his slowly moving train in order to board it, was injured by the fall of the door as the result of an alleged defective fastener, the question whether he assumed the risk of injury is for the jury in an action founded on the Federal Employers' Liability Act. *McMillan v. Northern P. R. Co.*, 125 Minn. 7, 145 N. W. 613.

##### **— Gauge Glasses.**

Whether a locomotive engineer assumed the risk of injury from the explosion of a glass lubricator indicator tube is a question for the jury, in an action under the Federal Employers' Liability Act, where the tube exploded under a steam pressure of but 145 pounds, when it should have been capable of withstanding a pressure of 300 pounds, and the fact that the tube was defective could not be discovered from an inspection by the engineer. *Woodruff v. Yazoo & M. V. R. Co.*, 127 C. C. A. 411, 210 Fed. 849, S. C. 137 C. C. A. 567, 222 Fed. 29.

##### **— Crack in Car Wheel.**

Where the evidence is conflicting as to whether an old "chilled" crack or a fresh crack caused the breaking of the flange of a car wheel which resulted in an injury to an employee, a question for the jury is presented in an action under the Federal Employers' Liability Act. *Blankenbaker v. St. Louis & S. F. R. Co.*, — Mo. —, 187 S. W. 840.

##### **— Adz.**

Where the testimony was conflicting as to whether a section man selected a defective adz with which to cut brush, as well as whether it was a proper tool to use for such purpose, the question of assumed risk from a piece of steel flying from the defective adz was for the jury in an action based on the Federal Employers' Liability Act. *Gekas v. Oregon-W. R. & N. Co.*, 75 Oreg. 243, 146 Pac. 970, 8 N. C. A. 386.

##### **— Chisels.**

Whether a railway employee assumed the risk of injury from slivers of steel flying from an imperfect chisel used in cutting rails, is a question for the jury in an action under the Federal Employers' Liability Act, where he continued to use such tool after complaining of its character to a foreman who assured him that it was safe, and that he could either use it or go home. *New York, N. H. & H. R. Co. v. Vizvari*, 126 C. C. A. 632, 210 Fed. 118, L. R. A. 1915 C 9.

#### **Defective Ways and Premises.**

##### **— Mail Crane Near Track.**

When the plaintiff who was struck and injured by a mail crane while he was firing a passenger engine, had no previous knowledge of the location of the crane, having never before passed it in the daytime on a mail train, the question of assumption of risk was for the jury, in an action based on the Federal Employers' Liability Act, where he had previously run past the crane on freight engines when it was turned away from the

track. *Rowlands v. Chicago & N. W. R. Co.*, 149 Wis. 51, 135 N. W. 156, writ of error dismissed 229 U. S. 627, 57 L. ed. 1357, 33 Sup. Ct. Rep. 771.

#### — Low Bridge.

Whether a switchman assumed the risk of injury was a question for the jury in an action based on the Federal Employers' Liability Act, where on a dark night in moving cars in a yard under orders, he was knocked from the top of a tall box car when it passed under a low overhead bridge. *Portland Term. Co. v. Jarvis*, 141 C. C. A. 584, 227 Fed. 8.

#### — Telltale Too Near Bridge.

Whether a brakeman assumed the risk of injury from the location of a "telltale" within 247 feet from a low overhead bridge is a question for the jury in an action based on the Federal Employers' Liability Act for his death by being knocked from the top of a car, where he had passed over the road but a few times and had never before gone beneath the bridge when on the roof of a car. *Marus v. Central R. of N. J.*, 170 App. Div. 158, 155 N. Y. Supp. 586.

#### — Obstruction Above Track.

The question of assumption of risk was properly left to the jury, in an action based on the Federal Employers' Liability Act for the death of a brakeman who was knocked from the top of a box car by a timber maintained over a private side track with a clearance of but 3 feet 4½ inches above the top of an ordinary box car, where the evidence as to his knowledge of the obstruction was conflicting. *Kanawha R. v. Kerse*, 239 U. S. 576, — L. ed. —, 36 Sup. Ct. Rep. 174.

#### — Insufficiently Lighted Yard.

Whether a switchman, after discovering the insufficiency of the electric lights in a railway yard, assumed the risk of injury by undertaking to perform his duties at night near and around tracks in too close proximity to each other, is a question for the jury in an action under the Federal Employers' Liability Act, depending in part on how long the insufficiency had existed before the accident, when discovery was or could have been made by the plaintiff, his position at the time the lights failed, and whether, under the exigencies of the situation, it was possible for him to remove himself from the zone of danger to a place of safety, or whether he was so engrossed in the efficient and proper discharge of his duties as to render him oblivious to a partial failure of the lights. *Kirbo v. Southern R. Co.*, 16 Ga. App. 49, 84 S. E. 491, S. C. second appeal — Ga. App. —, 895, E. 179.

#### — Snow Drift in Yard.

Where a brakeman while attempting to mount a moving car in a railway yard, was injured as the result of his foot catching in a hard, crusted snowdrift beside a track, the question of assumed risk was for the jury, in an action founded on the Federal Employers' Liability Act, when, although he might have seen the snowdrift had he looked, he did not in fact observe it, nor was he aware of its condition. *Burdick v. Chicago & N. W. R. Co.*, 123 Minn. 105, 143 N. W. 115.

#### (d) Capacity to Execute Release.

##### In General.

Where there is room for a difference of opinion as to the mental capacity of an injured employee to execute a release of liability for his injuries, it becomes a question for the jury in an action predicated on the Federal Employers' Liability Act. *Louisville & N. R. Co. v. Winkler*, 162 Ky. 843, 173 S. W. 151, 9 N. C. C. A. 146.

#### (e) Cause of Injury.

##### In General.

Where a section hand was injured, either by falling or jumping from a moving hand-car when an extra train was met in a curved cut, and his companions had time to remove the car and avert a collision, the question whether he was thrown from the car by its sudden stoppage or jumped in excusable, although needless, alarm, was for the jury when the testimony was conflicting in an action based on the Federal Employers' Liability Act. *Papoutsikis v. Spokane, P. & S. R. Co.*, 89 Wash. 1, 153 Pac. 1053.

Where the evidence is conflicting as to whether an employee's injury resulted from a carrier's negligence or was of long standing, it is a question of fact in an action under the Federal Employers' Liability Act. *Delano v. Roberts*, — Mo. App. —, 182 S. W. 771.

Where there was conflicting evidence as to whether a fireman's hold was broken and he was thrown from the coal gate of a tender as he was descending, as the result of the negligence of the engineer in making a coupling with unusual and unnecessary violence, or whether the former jumped from the tender and was injured by striking a lump of coal on the floor of the cab, a question for the jury arises in an action based on the Federal Employers' Liability Act. *Delano v. Roberts*, — Mo. App. —, 182 S. W. 771.

Whether an employee's injuries were caused by falling from a car or were the result of a predisposing cause, is a question for the jury in an action under the Federal Employers' Liability Act, when

resting on conflicting medical testimony, *Bolch v. Chicago, M. & St. P. R. Co.*, — Wash. —, 155 Pac. 422.

Where an engineer was injured by jumping from his engine when it was derailed at a switch, it was a question for the jury, when the testimony was conflicting, whether the accident was due to the leaving on the switch of a padlock which could not be locked, or the falling of a brakeblock from the engine the defective condition of which would have been discovered by the engineer had he properly inspected his engine. *Snyder v. Great N. R. Co.*, 88 Wash. 49, 152 Pac. 703.

### (f) Contributory Negligence.

#### In General.

Contributory negligence is a question for the jury in an action based on the Federal Employers' Liability Act. *Sandidge v. Archison T. & S. F. R. Co.*, 113 C. C. A. 653, 193 Fed. 867; *Byram v. Illinois C. R. Co.*, — Ia. —, 154 N. W. 1006; *Bombolis v. Minneapolis & St. L. R. Co.*, 128 Minn. 112, 150 N. W. 385.

Since contributory negligence is only a partial defense to an action based on the Federal Employers' Liability Act, it is necessary, in a case otherwise proper, to submit to the jury the question of such negligence in order that it may be compared with the negligence of the defendant and the damages apportioned and diminished as the negligence of each caused the injury. *Pfeiffer v. Oregon, W. R. & N. Co.*, 74 Oreg. 307, 144 Pac. 762, 7 N. C. C. A. 685, writ of error dismissed 239 U. S. 658, — L. ed. —, 36 Sup. Ct. Rep. 222.

The issue as to contributory negligence need not be submitted to the jury, in an action based on the Federal Employers' Liability Act, separate and apart from the general issue of damages. *Lloyd v. Southern R. Co.*, 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489, affirmed on other grounds 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210.

#### Violating of Safety Appliance Act.

The submission of the question of contributory negligence to the jury in an action based on the Federal Employers' Liability Act for injuries sustained in consequence of a carrier's violation of the Safety Appliance Act, is not prejudicial to the defendant, since favorable to the defendant. *Clark v. Erie R. Co.*, 230 Fed. 478.

#### Fireman Standing on Parallel Track Beside Engine.

The question of the plaintiff's contributory negligence was for the jury, in an action based on the Federal Employers'

Liability Act, when, while standing on a parallel track straightening a flue-auger between the driving wheels of his engine, the plaintiff was struck by cars against which other cars were kicked without warning, where there was nothing in the situation to indicate that the stationary cars would be struck or moved during the few minutes necessary to straighten the auger. *Alabama G. S. R. Co. v. Skotzy*, — Ala. —, 71 So. 335.

#### Manner of Riding Car.

Whether it was contributory negligence for a switchman to ride a flat car with his feet in the stirrup and in a bending position to hold to a cleat on the floor with his hand, is a question for the jury in an action founded on the Federal Employers' Liability Act. *Bolch v. Chicago, M. & St. P. R. Co.*, — Wash. —, 155 Pac. 422.

#### Employee Struck by Train While on Way to or From Work.

The question of contributory negligence is for the jury, in an action under the Federal Employers' Liability Act for injuries sustained by an engineer who was struck by a passenger train running on schedule time, as he was on his way by the customary route through a railway yard to a roundhouse to take out his engine, where the accident happened after he had stood close to a track for several minutes waiting to speak to another employee. *Missouri, K. & T. R. Co. v. Rentz*, — Tex. Civ. App. —, 162 S. W. 599.

Where an engineer while on his way through a railway yard to take his engine to another station in order to haul an interstate train, when at a point where the smoke and steam from a roundhouse and engines were so dense that objects could not be seen 2 feet away, was struck and killed by an engine running backwards at excessive speed without lookout, warning or signal, the question of contributory negligence was for the jury in an action based on the Federal Employers' Liability Act. *Huxoll v. Union P. R. Co.*, 99 Neb. 170, 155 N. W. 900.

#### Going into Insufficiently Lighted Place.

Whether a night assistant roundhouse foreman, who was injured by falling over a small jackscrew negligently left by a member of the day shift on the floor between two engine stalls in violation of the rules of his employer, was guilty of contributory negligence in going between the stalls which were insufficiently lighted without a lantern, was a question for the jury, where the light from a lantern would not have sufficiently lighted the floor so as to have permitted the discovery of so small an object as the jackscrew. *Hawkins v. St. Louis & S. F. R. Co.*, 189 Mo. App. 201, 174 S. W. 129.



### Removing Hand-Car From Track to Prevent Collision.

Whether a section foreman was negligent in attempting with his crew to remove a hand-car from a track in order to prevent a collision with a rapidly approaching passenger train, was a question for the jury in an action based on the Federal Employers' Liability Act. *Nelson v. Northern P. R. Co.*, 50 Mont. 516, 148 Pac. 388.

### Violation of Rules.

#### — Leaving Engine While Switching.

Where at night an engineer ran his engine 200 feet beyond a switch from which he was ordered to take a disabled engine that he was informed could not move under its own power, and while he was on the ground beside his engine cooling a hot box the other engine, without warning or having its headlight burning, ran under its own steam from a passing track to the main track without stopping on a brakeman's signal, and ran past a fixed danger signal so as to collide with the other engine and injure the engineer thereof, it was held, in an action under the Federal Employers' Liability Act, that it was for the jury to determine whether the injured engineer was negligent in leaving his engine in violation of a rule requiring firemen and engineers to remain on their engines while switching, and if he was negligent, to what extent it contributed to his injury. *Pfeiffer v. Oregon, W. R. & N. Co.*, 74 Oreg. 307, 144 Pac. 762, 7 N. C. C. A. 685, writ of error dismissed 239 U. S. 658, — L. ed. —, 36 Sup. Ct. Rep. 222.

#### — Working About Cars Without Displaying Signals.

In an action under the Federal Employers' Liability Act, it is for the jury to say whether it was contributory negligence for a car inspector to go between cars without first displaying the signals required by the rules of his employer, where it was customary not to display such signals, and he was injured by a movement of the cars by a switch crew without giving the usual warnings when they knew or should have known the inspector's position. *Texarkana & Ft. S. R. Co. v. Casey*, — Tex. Civ. App. — 172 S. W. 729.

### Knowledge of Danger.

#### — Mail Crane Near Track.

Where the plaintiff who was struck and injured by a mail crane while he was firing a passenger engine, had no previous knowledge of the location of the crane, having never before passed it in the daytime on a mail train, the question of his contributory negligence was for the jury, in an action based on the Federal Employers' Liability Act, where he had previously run on freight engines past the

crane when it was turned away from the track. *Rowlands v. Chicago & N. W. R. Co.*, 149 Wis. 51, 135 N. W. 136, writ of error dismissed 229 U. S. 627, 57 L. ed. 1357, 33 Sup. Ct. Rep. 771.

#### — Defect in Engine.

The question of the contributory negligence of a caretaker or watchman in riding on a dead engine moving in interstate commerce, after having called the attention of the conductor of the train in which it was being transported, to its defective condition, is for the jury in an action based on the Federal Employers' Liability Act. *Atlantic C. L. R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 963, reversed on other grounds — Ala. —, 67 So. 256.

#### — Liability of Coal Bucket to Slip.

The question of contributory negligence is for the jury, in an action under the Federal Employers' Liability Act for the death of a coal chute employee, who was crushed by the slipping backwards of a loaded coal bucket as he was removing an obstruction from an elevator pit, where he was familiar with the machinery and knew that buckets frequently slipped. *Brizendine v. Union P. R. Co.*, 96 Kan. 691, 153 Pac. 495.

### (g) Custom.

#### In General.

Where a brakeman, while attempting to raise from the outside a vestibule trap-door of a car of his slowly moving train in order to board it, was injured by the fall of the door as the result of an alleged defective fastener, the question whether he followed the usual custom in attempting to board the train in such manner was for the jury in an action under the Federal Employers' Liability Act. *McMillan v. Northern P. R. Co.*, 125 Minn. 7, 145 N. W. 613.

Where a custom of a railway company to station a man on the footboard of moving engines to warn trackmen of its approach, is alleged in an action based on the Federal Employers' Liability Act, and it is charged that the negligence of the defendant in not following such custom caused the death of an employee while cleaning ice and snow from switch points, the question whether such custom actually existed was for the jury. *Zitnek v. Union P. R. Co.*, 95 Neb. 152, 145 N. W. 344.

### (h) Damages.

#### In General.

When the evidence as to the pecuniary loss sustained by surviving parents is conflicting in an action founded on the Fed-

eral Employers' Liability Act, such question is for the jury. *American R. Co. v. Coronas*, 144 C. C. A. 599, 230 Fed. 545.

#### **Diminution for Contributory Negligence.**

The extent to which an employee's contributory negligence should reduce his recovery in an action under the Federal Employers' Liability Act, is a question for the jury. *Louisville & N. R. Co. v. Fleming*, — Ala. —, 69 So. 125.

Since contributory negligence goes only to diminish damages in an action under the Federal Employers' Liability Act, it is for the jury to apportion such damages. *Hackney v. Missouri, K. & T. R. Co.*, 96 Kan. 30, 149 Pac. 421.

Where the plaintiff, in an action under the Federal Employers' Liability Act, was guilty of contributory negligence, it was particularly within the province of the jury to compare his negligence with that of the defendant, and after ascertaining the full amount of damages to award the plaintiff such proportionate part as the negligence attributable to the defendant bore to the entire negligence attributable to both of them. *Norfolk & W. R. Co. v. Thompson*, 161 Ky. 814, 171 S. W. 451.

It is for the jury, in an action under the Federal Employers' Liability Act, to apportion the negligence of the employer and the injured employee, and to render a verdict for such an amount as shall appear to them to fairly represent the true apportionment. *Fogarty v. Northern P. R. Co.*, 74 Wash. 397, 133 Pac. 609, L. R. A. 1916 C. 800, S. C. 85 Wash. 90, 147 Pac. 652, L. R. A. 1916 C. 803.

#### **(i) Defective Appliances and Tools.**

##### **Locomotives.**

##### **—Breaking of Side Bar.**

In an action under the Federal Employers' Liability Act for the death of a brakeman caused by the breaking of the sidebar of an engine on which he was riding, the question of the defendant's negligence is for the jury, where the evidence, although not showing the immediate cause of the accident, showed that the engine was old and out of repair, that its wheels and bushings were badly worn and that it rattled and pounded when at work. *McCullough v. Chicago, R. I. & P. R. Co.*, 160 Ia. 524, 142 N. W. 67, 47 L. R. A. (N. S.) 23.

##### **—Explosion of Boiler.**

The question whether the explosion of a boiler was due to the negligence of an engineer in permitting the water to get too low, or whether it was caused by the scaly and worn condition of the boiler and its want of repair, were for the jury when the testimony was conflicting in an action

under the Federal Employers' Liability Act for his death. *Dungan v. St. Louis & S. F. R. Co.*, 178 Mo. App. 164, 165 S. W. 1116.

##### **—Defective Ash Pan Lever.**

Whether the defendant knew or should have known of a defect in the ash pan lever of a locomotive before it left a shop where it had been for repairs, was a question for the jury, in an action founded on the Federal Employers' Liability Act for injuries received by an engineer from such defect while he was inspecting the engine preparatory to taking it on a trial run. *Lloyd v. Southern R. Co.*, 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489, affirmed on other grounds 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210.

##### **—Defective Crown Sheet Bolts.**

Whether it was negligence to use button head instead of taper head stay bolts in the crown sheet of an oil burning locomotive is a question for the jury, in an action based on the Federal Employers' Liability Act for the death of an engineer as a result of the explosion of such boiler, where it appeared that button head bolts had a tendency to become overheated by an oil flame so as to allow the crown sheet to give. *Donaldson v. Great N. R. Co.*, 89 Wash. 161, 154 Pac. 133.

##### **—Defective Gauge Glass.**

The question of the negligence of a carrier in furnishing a glass lubricator indicator tube for a locomotive, which exploded under a steam pressure of but 150 pounds when it should have been of sufficient tensile strength to withstand a steam pressure of 300 pounds, was for the jury in an action founded on the Federal Employers' Liability Act for injuries received by an engineer from such explosion. *Woodruff v. Yazoo & M. V. R. Co.*, 127 C. C. A. 411, 210 Fed. 849, S. C. 137 C. C. A. 567, 222 Fed. 29.

The question of the defendant's negligence was properly left to the jury, in an action based on the Federal Employers' Liability Act for the loss of an engineer's eye from the explosion of a lubricator glass of a type which the defendant knew frequently broke under steam pressure, and which for three years it had been displacing by one which was absolutely safe. *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419, 148 N. W. 145, affirmed 241 U. S. 470, 60 L. ed. —, 36 Sup. Ct. Rep. 624.

##### **—Leaking Steam so as to Obscure Signals.**

Where a brakeman was killed in a rear end collision which was due to an engine leaking steam in such quantities as to obscure the signals of the preceding train, the question of the defendant's negligence

was for the jury in an action under the Federal Employers' Liability Act, where the employer had received notice on several occasions, in the preceding month, of the condition of such engine. *White v. Central Vt. R. Co.*, 87 Vt. 330, 89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, Ann. Cas. 1916 B. 252.

#### Cars.

##### — Defective Vestibule Trap Door Fastening.

Where a brakeman, while attempting to raise from the outside a vestibule trap door of a car in his slowly moving train, in order to board it, was injured by the fall of the door as the result of an alleged defective fastening device, the questions whether it was defective, as well as of the defendant's negligence in permitting it to remain out of repair, are for the jury in an action under the Federal Employers' Liability Act. *McMillan v. Northern P. R. Co.*, 125 Minn. 7, 145 N. W. 613.

#### Motor Car.

Whether the defendant used ordinary care in furnishing an employee with a motor car which required pushing to start the motor was a question for the jury, in an action under the Federal Employers' Liability Act for injuries sustained by the latter while starting the car in that manner. *Chicago, R. I. & G. R. Co. v. Cosio*, — Tex. Civ. App. —, 182 S. W. 83.

#### Telltale.

Where a brakeman, while sitting at the side of the roof of a box car with his feet hanging off, was knocked therefrom by a low overhead bridge and killed, the question whether the telltale provided by the defendant to warn employees of the close proximity of the bridge was sufficient under the circumstances, was for the jury in an action based on the Federal Employers' Liability Act, where the telltale, although of a style approved by a state railroad commission, and sufficient when erected to warn employees occupying the position assumed by the decedent, had become insufficient by reason of the increased width of freight cars. *Boston & M. R. Co. v. Brown*, 134 C. C. A. 383, 218 Fed. 625.

#### Tools.

##### — Adz.

Where, when an adz was sharpened by an experienced workman in the defendant's shop a defect might have been discovered, and a section man was injured by a sliver of steel which flew from the adz as he was using it, it was for the jury to say, in an action based on the Federal Employers' Liability Act, whether the defendant used due care in furnishing such tool for

the plaintiff's use. *Gekas v. Oregon, W. R. & N. Co.*, 75 Oreg. 243, 146 Pac. 970, 8 N. C. C. A. 386.

##### — Bolt Cutter.

In an action under the Federal Employers' Liability Act for injuries sustained by a shop employee from a piece of steel that flew from a hammer or chisel with which he was cutting bolts, the question whether bolt clippers provided by the employer were in repair and in condition for use at the time of the accident, should have been submitted to the jury, where the negligence charged was the furnishing of a defective hammer and chisel, and the failure of the defendant to adopt and cause to be used a reasonably safe method of doing such work, and to provide and cause to be used proper, suitable and reasonably safe tools. *Missouri, K. & T. R. Co. v. Denahy*, — Tex. Civ. App. —, 165 S. W. 529.

##### — Sufficiency of Inspection.

The question whether an employee discharged his duty where he failed to inspect a timber used as a skid for moving piling, is for the jury in an action based on the Federal Employers' Liability Act for injuries sustained by another employee from the breaking of the skid, which the evidence showed was an old bridge timber that had been exposed for a long time to the action and effect of the weather, and it also appeared that a sound timber of its size should have sustained several times the weight to which it was subjected. *St. Louis, I. M. & S. R. Co. v. Ingram*, — Ark. —, 187 S. W. 452.

#### (j) Defective Ways and Premises.

##### Tracks.

##### — Telltale Too Near Bridge.

The question whether it was negligence to locate a "telltale" within 247 feet from a low overhead bridge is a question for the jury in an action based on the Federal Employers' Liability Act for the death of a brakeman who at night was knocked from the top of a car by such bridge. *Marus v. Central R. of N. J.*, 170 App. Div. 158, 155 N. Y. Supp. 586.

Where it was alleged that by reason of a defective "telltale" near an overhead bridge and the negligence of the engineer of a freight train in failing to give warning with the whistle at night, a brakeman was knocked from the top of a car and killed, the question of the defendant's negligence was for the jury in an action based on the Federal Employers' Liability Act, where the decedent was last seen alive on the car in the discharge of his duties when the train was near the bridge and shortly afterwards his body was found beneath the bridge with a wound on the head.

*Marus v. Central R. of N. J.*, 170 App. Div. 158, 155 N. Y. Supp. 586.

**—Leaving Engine on Crossover at Night.**

Whether it was negligence to leave an engine standing on a crossover track at night so that it did not clear the main track is a question for the jury, in an action under the Federal Employers' Liability Act for the death of an engineer in a resulting collision while running an engine at high speed on the main track. *Louisville & N. R. Co. v. Fleming*, — Ala. —, 69 So. 125.

**Roadbeds.**

**—Cross Ties Overgrown with Grass.**

Whether the presence on a railway roadbed of three large clinkers, over which an employee stumbled and fell, constitutes negligence on the part of a carrier, is a question for the jury in an action based on the Federal Employers' Liability Act. *Southern R. Co. v. Puckett*, 16 Ga. App. 551, 85 S. E. 809.

Whether the presence on a railway roadbed of two old cross ties overgrown with grass, over which an employee stumbled and fell, constituted negligence on the part of a carrier, is a question for the jury in an action founded on the Federal Employers' Liability Act. *Southern R. Co. v. Puckett*, 16 Ga. App. 551, 85 S. E. 809.

**Yards.**

**—Cinder Pile.**

Whether a cinder pile beside a track in a railway yard constituted a defect or insufficiency in the tracks or roadbed of a carrier is a question for the jury, under proper instructions, in an action founded on the Federal Employers' Liability Act for injuries sustained by an employee engaged in interstate commerce by falling on such obstruction. *Southern R. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99, affirmed on other grounds 241 U. S. 229, 60 L. ed. —, 36 Sup. Ct. Rep. 588.

**Snow Drifts.**

Where a brakeman while attempting to mount a moving car in a railway yard, was injured as the result of his foot catching in a hard, crusted snowdrift beside a track, the question of the negligence of the defendant in failing to remove the snow drift was for the jury, in an action based on the Federal Employers' Liability Act, where such obstruction, which was formed by drifting snow and snow removed from the tracks, had existed for some time. *Burdick v. Chicago & N. W. R. Co.*, 123 Minn. 105, 143 N. W. 115.

**Defective Buildings.**

**—Unlighted Roundhouse.**

Where an engineer employed on an interstate run was killed in the night by

falling into a pit in a dark roundhouse where his engine was stored, and which was lighted only by torches, the question of the defendant's negligence is for the jury, in an action based on the Federal Employers' Liability Act, where his engine, in and out of which hostlers and their helpers were required to climb, was left with its step over an open pit ten feet deep. *Padgett v. Seaboard A. L. R.*, 99 S. C. 364, 83 S. E. 633, affirmed 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481.

**—Obstructions on Floor.**

Where the evidence in an action under the Federal Employers' Liability Act tends to show that a small jackscrew over which an assistant night foreman fell and was injured, was left on the floor between two engine stalls by a workman of the preceding day shift in violation of the rules of his employer, and it was no part of the foreman's duty to inspect the floor for obstructions, it was for the jury to say whether the jackscrew had remained in such position a sufficient time for the employer, in the exercise of reasonable care, to have discovered and removed it before the accident. *Hawkins v. St. Louis & S. F. R. Co.*, 189 Mo. App. 201, 174 S. W. 129.

**(k) Dependency.**

**In General.**

Whether a married woman was dependent on her son for support is a question for the jury in an action under the Federal Employers' Liability Act for his death, where, although she lived with a husband who was able and willing to support her, the evidence showed that the decedent gave her the larger portion of his earnings. *Moffatt v. Baltimore & O. R. Co.*, 135 C. C. A. 607, 220 Fed. 39.

**(l) Due Care.**

**In General.**

Where the evidence, in an action based on the Federal Employers' Liability Act for the death of an engineer in a collision with a work train, is conflicting as to whether the flagman of the latter train gave the proper signals to the decedent so as to indicate the presence of the work train on the main track, and also as to whether the decedent was keeping a proper lookout at the time, such questions should be submitted to the jury. *Louisville & N. R. Co. v. Holloway*, 163 Ky. 125, 173 S. W. 343, S. C. 168 Ky. 262, 181 S. W. 1126.

Whether an engineer exercised due care is a question for the jury, in an action based on the Federal Employers' Liability Act for the death of a signal repair man

who, as he stepped from the track on which he was working in order to avoid an approaching train, was struck and killed by a train which came from the opposite direction on a parallel track, where the engineer or such train might have given the decedent warning in time for him to have escaped injury. *Glunt v. Penn. R. Co.*, 249 Pa. 522, 95 Atl. 109.

Where a section hand either fell or jumped from a hand-car when a slowly moving extra train was met in a curved cut, although his companions had time to remove the car and avert a collision, it was for the jury to say, in an action based on the Federal Employers' Liability Act, whether the foreman in charge of the section men exercised due caution in view of a rule of the employer requiring hand-cars to approach curved cuts with great caution and on the lookout for extra trains. *Papoutsikis v. Spokane, P. & S. R. Co.*, 89 Wash. 1, 153 Pac. 1053.

In an action under the Federal Employers' Liability Act for injuries sustained by an engineer in jumping from his engine in order to escape a collision with a switch engine on a curved track in a railway yard, if a rule was in force requiring him to have his engine under absolute control, its observance was the measure of his care for his own safety, and it was improper to leave to the jury the question whether he exercised ordinary care in running his engine at the time of the accident. *St. Louis, I. M. & S. R. Co. v. Stewart*, — Ark. —, 187 S. W. 920.

#### (m) Interstate Commerce.

##### In General.

Where the evidence tending to show whether a train was moving in interstate commerce is circumstantial, a question of fact arises in an action based on the Federal Employers' Liability Act. *Lynch v. Central Vt. R. Co.*, — Vt. —, 95 Atl. 683.

When the evidence tending to show whether an employee was engaged in interstate commerce at the time of his injury is conflicting, it is a question for the jury in an action founded on the Federal Employers' Liability Act. *Chicago, R. I. & P. R. Co. v. Felder*, — Okla. —, 155 Pac. 529.

Where the evidence as to whether an employee was engaged in interstate commerce is conflicting, it is a question for the jury in an action based on the Federal Employers' Liability Act. *Howell v. Atlantic C. L. R. Co.*, 99 S. C. 417, 83 S. E. 639.

Where the facts in an action based on the Federal Employers' Liability Act are in dispute, the jury may determine the nature of the employment of an injured servant, although the legal conclusion to

be drawn therefrom is for the court. *Grabber v. Duluth, S. S. & A. R. Co.*, 159 Wis. 414, 150 N. W. 489.

When the facts in an action predicated on the Federal Employers' Liability Act are not conceded or established by proof so conclusive that there can be no reasonable difference of opinion, the question whether an employee was engaged in interstate commerce at the time of his injury, is for the jury. *Bolch v. Chicago, M. & St. P. R. Co.*, — Wash. —, 155 Pac. 422.

Whether an employee was engaged in interstate commerce or original construction work at the time he was injured, is a question for the jury in an action based on the Federal Employers' Liability Act, where the track on which he was distributing gravel at the time of an accident, although extending into another state, had not been opened for general traffic, but had been used on at least two occasions for the storage over night of trains employed in interstate commerce. *Clark v. Chicago G. W. R. Co.*, 170 Ia. 452, 152 N. W. 635.

Where the court in an action based on the Federal Employers' Liability Act might have found as a matter of law that an employee was engaged in interstate commerce at the time he was injured, the defendant was not prejudiced by the submission of such question to the jury. *Grabber v. Duluth, S. S. & A. R. Co.*, 159 Wis. 414, 150 N. W. 489.

Where it appeared from undisputed facts that an employee was engaged in interstate commerce at the time he was injured, the defendant was not injured, in an action under the Federal Employers' Liability Act, by the submission of that question to the jury. *Pelton v. Illinois C. R. Co.*, 171 Ia. 91, 150 N. W. 236, writ of error dismissed 239 U. S. 655, 60 L. ed. —, 36 Sup. Ct. Rep. 166.

Evidence that a yard track, on which an employee was injured by the negligent movement of cars about which he was working, was used almost exclusively for cars moved in interstate commerce, and that the cars in question bore tags indicating that they were to be moved out of the state, is sufficient to take to the jury, in an action under the Federal Employers' Liability Act, the question whether the plaintiff and the defendant were engaged in such commerce at the time of the accident. *Young v. Lusk*, — Mo. —, 187 S. W. 849.

##### Roadmaster Inspecting Repaired Car.

Whether an assistant roadmaster was engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act, is a question for the jury, where he was killed while inspecting the repair of a broken brakebeam of a caboose

of an interstate freight train on which he was riding, which could not proceed until repairs were made, without endangering the safety of the train or the track over which he had control. *Lynch v. Central Vt. R. Co.*, — Vt. —, 95 Atl. 685.

#### **Employee on Tug Boat.**

Whether an employee and the defendant were engaged in interstate commerce at the time of an accident is a question for the jury in an action under the Federal Employers' Liability Act, which occurred while the plaintiff was employed on a tug boat owned by an interstate railroad company, and used in continuing or completing interstate traffic, where the evidence for the plaintiff tended to show that the accident occurred as the boat was backing into its home dock after having moved traffic from one state to another, on account of the tow which was expected to be moved immediately by the tug boat in such commerce not being ready, while the testimony for the defendant was to the effect that in the absence of further orders the boat was tying up at its home dock. *Erie R. Co. v. Jacobus*, 137 C. C. A. 151, 221 Fed. 335.

#### **Engineer on Way to Inspect Engine.**

Where an engineer employed on an interstate run was killed by falling at night into a pit in a dark roundhouse in which his engine was housed, it is a question for the jury, in an action founded on the Federal Employers' Liability Act, whether he was engaged in interstate commerce at the time of his injury, where, although he was not required by the rules of the defendant to enter the roundhouse, it might be inferred that he was on his way to make a necessary inspection of his engine before starting on his run. *Padgett v. Seaboard A. L. R.*, 99 S. C. 364, 83 S. E. 633, affirmed 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481.

#### **Loading Old Rails.**

Where a section foreman, while assisting in removing rails from the main line of an interstate carrier, was injured while loading the old rails onto a near by flat car, the question whether he was engaged in interstate commerce at the time of the accident was properly left to the jury in an action founded on the Federal Employers' Liability Act. *Cherpeski v. Great N. R. Co.*, 128 Minn. 360, 150 N. W. 1091.

#### **Moving Empty Cars.**

Where a brakeman was injured while removing two empty freight cars from a private side track in order to place thereon cars containing interstate shipments, the question whether he was engaged in interstate commerce within the meaning of the

Federal Employers' Liability Act was properly left to the jury. *Penn. Co. v. Donat*, 239 U. S. 50, — L. ed. —, 36 Sup. Ct. Rep. 4, affirming 139 C. C. A. 511, 224 Fed. 1021.

#### **(n) Knowledge of Injured Person's Danger.**

##### **Fireman Boarding Engine.**

Where the sudden movement of a locomotive at night threw the fireman from the step as, with a torch in his hand, he was entering the cab on the engineer's side after making an inspection of the engine at the direction of the latter, it was held, in an action founded on the Federal Employers' Liability Act, that it was a question for the jury whether the engineer, at the time he started the engine, was aware of the fireman's position. *Southern R. Co. v. Gadd*, 125 C. C. A. 21, 207 Fed. 277, affirmed 233 U. S. 572, 58 L. ed. 1099, 34 Sup. Ct. Rep. 696.

##### **Section Hand Cleaning Snow from Track.**

Evidence that a section man with a lighted lantern, while cleaning snow and ice from the switches at a station on a stormy night when lights were visible from 900 to 1,000 feet away, was struck and killed by a train running at high speed without ringing the bell or sounding the whistle except at the whistle post, presents a question for the jury, in an action under the Federal Employers' Liability Act, as to whether those in charge of the train actually saw the decedent and could have observed in time to have given him warning, that he was oblivious to his danger, where they were aware that on such a night section men would be working about the switches at stations. *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328.

#### **(o) Manner of Loading Cars.**

##### **In General.**

In an action under the Federal Employers' Liability Act for injuries sustained by a brakeman from the improper loading on a flat car of piles 30 feet in length and from 10 to 15 inches in diameter at the butts, it is for the jury to say whether they should have been loaded with the precautions generally taken in loading telegraph poles, where the piles were loaded in the manner customarily adopted for saw logs. *Michigan C. R. Co. v. Schaffer*, 136 C. C. A. 413, 220 Fed. 809.

#### **(p) Method of Performing Work.**

##### **In General.**

Where a switchman, while assisting in "pushing" cars, was injured by falling be-

tween two cars which separated because not coupled, when he attempted to step from one to the other, the question of the defendant's negligence was for the jury in an action under the Federal Employers' Liability Act, where there was evidence of a well established custom to couple the cars before moving them in such manner. *Denoyer v. Railway Trans. Co.*, 121 Minn. 269, 141 N. W. 175.

#### **Employee Adopting Improper Method of Work.**

In an action based on the Federal Employers' Liability Act for injuries sustained by a shop employee from a piece of steel that flew from a hammer or chisel with which he was cutting bolts, the question whether the plaintiff chose the method he would use, or whether the injury was the result of an accident, should have been submitted to the jury, where the negligence charged was the failure of the defendant to adopt and cause to be used reasonably safe methods of doing such work and to provide and cause to be used proper, suitable and reasonably safe tools. *Missouri, K. & T. R. Co. v. Denahy*, — Tex. Civ. App. —, 165 S. W. 529.

#### **Using Road Engine for Switching.**

The question of the negligence of the defendant is for the jury, in an action based on the Federal Employers' Liability Act, where a switchman's death was attributable to the use for switching purposes of a road engine having a pilot instead of a foot board, when one might have been attached in a short time. *Louisville & N. R. Co. v. Lankford*, 126 C. C. A. 247, 209 Fed. 321.

#### **Improper Handling of Pile Driver.**

The question of the negligence of the defendant was properly submitted to the jury in an action based on the Federal Employers' Liability Act for injuries sustained by an employee through the improper handling of a pile by the engineer of a pile driver, where the evidence with respect thereto was conflicting. *Smith v. Northern P. R. Co.*, 79 Wash. 448, 140 Pac. 685, 5 N. C. C. A. 947.

#### **Manner of Riding Car.**

Whether it was inherently dangerous for a switchman to ride a flat car with his feet in the stirrup, and in a bending position to hold with his hand to cleat on the floor, is a question for the jury in an action under the Federal Employers' Liability Act. *Bolch v. Chicago, M. & St. P. R. Co.*, — Wash. —, 155 Pac. 422.

#### **(q) Negligence of Fellow Servants. In General.**

The question whether an inexperienced

car inspector was thrown from the top of a freight car as the result of the negligence of a person who was detailed to instruct him in his duties, was properly left to the jury, in an action based on the Federal Employers' Liability Act, under conflicting evidence as to whether he was sent to the top of the car by his instructor without being warned of the danger from sudden movements of the car in switching. *Boston & M. R. Co. v. Benson*, 124 C. C. A. 68, 205 Fed. 876.

Where a section foreman was injured by the fall of one end of a rail which was being loaded on a flat car, after removal from the main line of an interstate carrier, it is for the jury to say, in an action under the Federal Employers' Liability Act, whether the accident was caused by the negligence of his fellow servants in raising one end of the rail without waiting for the customary signal. *Cherpeski v. Great N. R. Co.*, 128 Minn. 360, 150 N. W. 1091.

In an action under the Federal Employers' Liability Act for the death of a field man in a railway yard, who was struck by cars which were shunted onto the wrong track, the question whose negligent act caused the accident was for the jury under conflicting evidence as to whether it was that of the decedent or a member of the switch crew. *Walsh v. Lake Shore & M. S. R. Co.*, 185 Mich. 177, 151 N. W. 754.

Where a person working in a cinder pit was killed as he came from a manhole, by the movement of an engine that was started from the pit without warning, it is a question of fact whether it was negligence for a fellow employee to call the decedent from the pit without first ascertaining whether the engine was about to be moved. *Grybowski v. Erie R. Co.*, — N. J. —, 95 Atl. 764.

#### **Ordering Diversion of Runaway Car.**

In an action founded on the Federal Employers' Liability Act for the death of a trainman, it was a question for the jury whether a train dispatcher negligently ordered a heavily loaded runaway freight car diverted from the main line to a branch, where it was derailed and the trainman who was on the car, was killed, and before giving such orders the dispatcher did not ascertain whether there was any one on the car, which might have been stopped within a short distance had it remained on the main line without endangering other trains. *Sandidge v. Atchison, T. & S. F. R. Co.*, 113 C. C. A. 653, 193 Fed. 867.

#### **Failure to Avert Collision.**

In an action founded on the Federal Employers' Liability Act, for the death of a flagman in a rear end collision which occurred on a night when a severe snow

storm was raging, it is for the jury to determine whether the engineer of the following train was negligent, where the evidence was conflicting as to whether the speed of his train was excessive; and he was aware of the proximity of the preceding train, both of which had common orders to meet another train at the same point; and the collision occurred at a time when the preceding train had not entirely cleared the main track, by reason of the storm having delayed the opening of a switch. *New York C. & St. L. R. Co. v. Niebel*, 131 C. C. A. 248, 214 Fed. 952.

Where an engineer negligently ran his engine around a curved switch track at a point where he was unable to see that the switch was turned until too late to avoid a collision with another engine running on the main track, in which he was injured, and the engineer of the latter engine negligently failed to have his engine under control as required by the rules of his employer, as he approached the "home" signal which suddenly indicated the presence of the plaintiff's engine on the switch track, the question of the latter's negligence was for the jury in an action under the Federal Employers' Liability Act. *Chadwick v. Oregon, W. R. & N. Co.*, 74 Oreg. 19, 144 Pac. 1165.

Where an engineer's negligence contributed to his death in a collision with another train at a meeting point, and the conductor of his train was also negligent in failing to comply with a rule of the carrier and applying the air brakes when he was aware that the engineer was not going to stop at the meeting place, the question of the conductor's negligence was, under the evidence, for the jury in an action based on the Federal Employers' Liability Act. *Louisville & N. R. Co. v. Heinig*, 162 Ky. 14, 171 S. W. 853.

#### **Failure to Give Warning of Movement of Cars.**

Where a car repairer while working on a repair track was killed when a coemployee who had exclusive control of the key to the switch leading to such track, permitted cars to be backed onto the repair track without warning or notice to the decedent, the question of the defendant's negligence was for the jury in an action based on the Federal Employers' Liability Act. *Evans v. Detroit, G. H. & M. R. Co.*, 181 Mich. 413, 148 N. W. 490.

#### **Coupling with Unnecessary Violence.**

Where a fireman testified that as he was climbing down the coal gate of a tender his hold was broken and he was thrown to the floor of the cab and injured as the result of the negligence of the engineer in making a coupling with unusual and unnecessary violence, which the engineer

denied, the question of the latter's negligence was for the jury in an action under the Federal Employers' Liability Act. *Delano v. Roberts*, — Mo. App. —, 182 S. W. 771.

#### **Foreman's Failure to Warn of Train's Approach.**

Where a person employed in repairing a pumping plant used in interstate commerce, was struck and killed by a train, the question of the negligence of the engineer in not giving warning of the approach of his train at high speed, or of the decedent's foreman in failing to notify the decedent that such train was past due, or in neglecting to keep a lookout therefor and in failing to warn the decedent of its approach, are for the jury in an action based on the Federal Employers' Liability Act. *Newkirk v. Pryor*, — Mo. App. —, 183 S. W. 682.

Where a member of a gang engaged in repairing a pumping plant, while walking on a track in obedience to an order of his foreman, was struck and killed by a rapidly moving train which came from the rear, the question of the foreman's negligence was for the jury, in an action under the Federal Employers' Liability Act, where the track afforded the only practical way for the decedent to take, and it was the foreman's duty to know the time of passing trains and to keep a lookout for them, and he failed to warn the deceased that the train was overdue or to take any precautions to see whether the train was approaching. *Newkirk v. Pryor*, — Mo. App. —, 183 S. W. 682.

#### **(r) Rules.**

##### **Promulgation.**

The question whether a carrier has made and established rules for the guidance and control of its employees should not be left to the jury, in an action founded on the Federal Employers' Liability Act, where both the plaintiff and defendant introduced certain rules in evidence. *Seaboard A. L. R. Co. v. McMichael*, 143 Ga. 689, 85 S. E. 891.

##### **Sufficiency to Protect Employees.**

Whether a carrier's rule providing that at certain places all trains and engines might work within yard limits regardless of extra trains, that such trains must approach such points under control and that the responsibility for accidents should rest upon the crew of extra trains, constituted a sufficient means for protecting the crew of incoming trains from collision is a question for the jury in an action based on the Federal Employers' Liability Act for the death of an engineer who, by reason of unfamiliarity with the run, was unable on a dark night to tell when the yard



limit was reached, and at high speed collided with a switch engine. *Pyles v. Atchison, T. & S. F. R. Co.*, — Kan. —, 155 Pac. 788.

#### **Violation.**

##### **— Having Train Under Control.**

In an action under the Federal Employers' Liability Act for injuries sustained by an engineer in jumping from an engine in order to escape a collision with a switch engine on a curve in a yard track, it was for the jury to say whether he was negligent in failing to have his engine under control, as required by the rules of his employer, when he approached the curve. *St. Louis, I. M. & S. R. Co. v. Stewart*, — Ark. —, 187 S. W. 920.

##### **— Exceeding Speed Limit.**

In an action under the Federal Employers' Liability Act for injuries sustained by an engineer in jumping from his engine in order to avoid a collision with a switch engine on a curved track in a railway yard, it was for the jury to say whether at the time of the accident his engine was exceeding the speed limit prescribed by the rules of his employer. *St. Louis, I. M. & S. R. Co. v. Stewart*, — Ark. —, 187 S. W. 920.

##### **— Cars Not In Clear.**

The question of a carrier's negligence was for the jury, in an action based on the Federal Employers' Liability Act for the death of an engineer who was killed, without his fault, by the collision of his engine with cars on a sidetack, which, in violation of a rule of a carrier, were not left in the clear. *Yazoo & M. V. R. Co. v. Wright*, 125 C. C. A. 25, 207 Fed. 281. (Affirming 197 Fed. 94), affirmed 235 U. S. 376, 59 L. ed. 277, 35 Sup. Ct. Rep. 130.

##### **— Leaving Cars on Grade.**

Whether it was negligence to permit a heavily loaded freight car to run by gravity onto a main track in violation of a rule prohibiting both the taking of cars onto such track at grade unless the trainmen were assured that the brakes were in order, and the leaving of cars on the main line at grades, is a question for the jury in an action under the Federal Employers' Liability Act for the death of a trainman by the wrecking of the car when it escaped from his control, where the brakes were not defective but merely insufficient to hold the overloaded car. *Sandidge v. Atchison, T. & S. F. R. Co.*, 113 C. C. A. 653, 193 Fed. 867.

#### **Abrogation.**

Whether the testimony is sufficient to show such frequent and repeated violations of a carrier's rule as to amount to a

waiver thereof, is a question for the jury in an action under the Federal Employers' Liability Act. *Dutton v. Atlantic C. L. R. Co.*, — S. C. —, 88 S. E. 263.

Whether a rule forbidding the movement of trains in a railway yard in excess of 10 miles an hour was in force, or had to any extent been abrogated, is a question for the jury in an action under the Federal Employers' Liability Act. *St. Louis, I. M. & S. R. Co. v. Stewart*, — Ark. —, 187 S. W. 920.

Whether a rule prohibiting the movement of trains in a railway yard in excess of 10 miles an hour, had been abrogated by the conduct of a yardmaster, and whether an engineer was proceeding within the modified rule at the time of a collision with a switch engine, is a question for the jury in an action based on the Federal Employers' Liability Act. *St. Louis, I. M. & S. R. Co. v. Stewart*, — Ark. —, 187 S. W. 920.

#### **(s) Unavoidable Accident.**

##### **In General.**

In an action predicated on the Federal Employers' Liability Act for injuries sustained by a shop employee from a piece of steel flying from a hammer or chisel with which he was cutting bolts, the question whether the injury was the result of an accident occurring without the fault of any person should have been submitted to the jury. *Missouri, K. & T. R. Co. v. Denahy*, — Tex. Civ. App. —, 165 S. W. 529.

#### **(t) Proximate Cause.**

##### **In General.**

Where a brakeman was crushed between the end timbers of two freight cars when he reached over the couplers and turned the angle-cock of the air hose, which, by reason of the engineer's having left the controlling lever in the wrong position, released the brakes and permitted the rear cars to move suddenly down a slight incline in the track, it was held in an action under the Federal Employers' Liability Act that it was for the jury to say whether the proximate cause of the accident was the negligence of the engineer in leaving such lever in the running instead of in the lap position, as it should have been in order to prevent the release of the brakes. *Union P. R. Co. v. Fuller*, 122 C. C. A. 359, 204 Fed. 45.

Whether three large clinkers on a railway roadbed, over which an employee stumbled, or two old cross ties overgrown with grass, on which he next stumbled and fell, were the proximate cause of his injury is a question for the jury in an action under the Federal Employers' Liability Act,

where he testified that he would not have fallen had it not been for the presence of the ties. *Southern R. Co. v. Puckett*, 16 Ga. App. 551, 85 S. E. 809.

In an action under the Federal Employers' Liability Act for injuries sustained by a brakeman while boarding the engine of a moving train, the question whether its excessive speed was the proximate cause of the accident was for the jury, where the plaintiff testified that his foot slipped from the step and that his weight and the speed of the train caused him to fall. *Chesapeake & O. R. Co. v. De Atley*, 159 Ky. 687, 167 S. W. 933, affirmed 241 U. S. 310, 60 L. ed. —, Sup. Ct. Rep. 564.

The negligence of a brakeman in failing to protect the rear of his train when a defective drawbar broke, cannot, in an action under the Federal Employers' Liability Act, be held to have been the sole proximate cause of his death in an ensuing rear end collision, where the defendant was negligent in providing a car having a defective drawbar, since it was for the jury to determine whether the negligence of the decedent was the sole proximate cause of his death or whether his negligence concurred with that of the defendant so that the rule of comparative negligence established by the Federal act applied. *Wiles v. Great N. R. Co.*, 125 Minn. 348, 147 N. W. 427, 5 N. C. C. A. 60, reversed 240 U. S. 444, — L. ed. —, 36 Sup. Ct. Rep. 406.

#### (u) Scope of Employment.

##### **Roadmaster Inspecting Repaired Car.**

Whether an assistant roadmaster acted within the scope of his employment in inspecting the repairs of a broken brake-beam on the caboose of a train on which he was riding, is a question for the jury, in an action based on the Federal Employers' Liability Act, where, although there was testimony that it was no part of his duty to make such inspection, there was no established rules defining his duties which were largely discretionary, and the train could not proceed without repairs without doing probable injury to the track which was under his control. *Lynch v. Central Vt. R. Co.*, — Vt. —, 95 Atl. 683.

#### (v) Violent and Unusual Movement of Cars.

##### **Violent Stoppage of Train.**

Whether an engineer was negligent in stopping a gravel train on a signal to slow down, with such violence as to throw an employee from a car, is a question for the jury in an action founded on the Federal Employers' Liability Act. *Clark v. Chicago G. W. R. Co.*, 170 Ia. 452, 152 N. W. 635.

Whether an engineer was negligent in making an emergency application of the air brakes when there was no necessity for doing so, is a question for the jury in an action based on the Federal Employers' Liability Act for injuries sustained, as the result, by a brakeman. *La Mere v. Railway Transfer Co.*, 125 Minn. 159, 145 N. W. 1068, Ann. Cas. 1915 C. 664, writ of error dismissed 239 U. S. 651, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

In an action founded on the Federal Employers' Liability Act for injuries caused a freight conductor from the sudden stoppage of a train by an emergency application of the air brakes, the question of the defendant's liability was for the jury, where there was conflicting evidence as to whether the accident was due to the negligence of the engineer or a latent defect in a valve of the brake mechanism. *Owens v. Chicago G. W. R. Co.*, 113 Minn. 49, 128 N. W. 1011, writ of error dismissed 225 U. S. 716, 56 L. ed. 1270, 32 Sup. Ct. Rep. 834.

#### **Jerks and Bumps.**

The cause of, as well as whether there was a violent and unusual jerk or lurch of a freight train, are questions for the jury in an action based on the Federal Employers' Liability Act for the death of a brakeman. *Kansas City S. R. Co. v. Leslie*, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915 B. 834, reversed on other grounds 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844.

Whether the death of a brakeman was due to the negligence of the defendant is a question for the jury in an action under the Federal Employers' Liability Act, where it was alleged that the failure of the defendant to place ladders and hand-holds on the ends of its cars, together with the negligence of an engineer in giving a freight train a violent and unusual jerk or lurch, was the cause of the accident. *Kansas City S. R. Co. v. Leslie*, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915 B. 834, reversed on other grounds 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844.

Where the evidence showed that a brakeman, on a night when cars were covered with icy sleet, was thrown from the roof of a car in switching when there were some unusual jerks, the question of the negligence of the defendant was for the jury in an action based on the Federal Employers' Liability Act. *Saar v. Atchison, T. & S. F. R. Co.*, — Kan. —, 155 Pac. 954.

#### (w) Warning of Danger.

##### **Backing Cars Without Signals.**

The negligence of the defendant was a question for the jury in an action founded

on the Federal Employers' Liability Act for the death of a switchman who, on a dark night, was struck by cars that were backed on a main track, without displaying a light, at a time when a freight train was passing on an adjoining track with much noise. *Hughes v. Delaware, L. & W. R. Co.*, 233 Fed. 118.

#### Minor Employee Transferred to Hazardous Work.

Where a section hand under 15 years of age, was directed by his foreman to work on a gravel train, the dangers and risks of which were greater than those attending work on the section, and the former fell between the cars and was killed, in an action under the Federal Employers' Liability Act, in view of the decedent's age and lack of experience, the question of the defendant's negligence in transferring him to a place of increased danger without adequate warning and instructions, was for the jury. *Maijala v. Great N. R. Co.*, — Minn. —, 158 N. W. 430.

#### Of Approach of Trains.

Where an employee, while engaged in removing ties from a main track, was struck and killed by a switch engine on an adjoining lead track as he was turning a tie parallel with the two tracks so that it would not be struck by a train on the main track coming from the opposite direction, it is for the jury to determine, in an action under the Federal Employers' Liability Act, whether the failure to ring the bell of the switch engine was negligence. *Bombolis v. Minneapolis & St. L. R. Co.*, 128 Minn. 112, 160 N. W. 385, affirmed on other grounds 241 U. S. 211, 60 L. ed. —, 36 Sup. Ct. Rep. 591.

Where, on a stormy night when lights could be seen 900 or 1,000 feet away, a section hand with a lighted lantern, while cleaning snow and ice from the switches at a station, was struck and killed in the absence of an eyewitness, by a train running at a high rate of speed, with headlight burning, although the bell was not rung or the whistle sounded except at the whistle post, whether he was struck without warning is a question for the jury in an action under the Federal Employers' Liability Act, where the evidence was sufficient to sustain a finding that he was struck as he straightened up from his work too late to avoid injury. *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328.

Where a track laborer while cleaning ice and snow from switch points on a day when the temperature was below zero, a strong wind blowing and snow drifting, with his head bundled in a muffler and his work requiring close attention and compelling him to work in a stooping posture,

it was, by reason of the circumstances, a position of increased and peculiar danger, so that the question whether the defendant was negligent in failing to use reasonable care to give warning of the approach of an engine was properly left to the jury in an action under the Federal Employers' Liability Act for his death. *Zitnek v. Union P. R. Co.*, 95 Neb. 152, 145 N. W. 344, writ of error dismissed 239 U. S. 650, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

#### Of Movement of Kicked Cars.

Whether the failure of a carrier to detail a man to watch for moving cars while a switch was being repaired at night constitutes negligence is a question for the jury in an action founded on the Federal Employers' Liability Act for the death of a trackwalker who was struck by cars negligently kicked down the track on which he was working. *Colasurdo v. Central R. of N. J.*, 180 Fed. 852, affirmed 113 C. C. A. 379, 192 Fed. 901, writ of error dismissed 226 U. S. 617, 57 L. ed. 383, 33 Sup. Ct. Rep. 111.

Where a brakeman was thrown from a cut of cars and killed when, without warning, in order to give added momentum to their movement, an engine was driven violently against them, and it was customary to give warning before so doing, it was for the jury to say, in an action based on the Federal Employers' Liability Act, when the testimony was conflicting, whether warning was actually given. *St. Louis, S. F. & T. R. Co. v. Geer*, — Tex. Civ. App. —, 149 S. W. 1178.

Where a brakeman was thrown from a cut of cars and killed when, in order to give added momentum to their movement, an engine was driven violently against them without warning in violation of a custom to give warning, it was not error, in an action under the Federal Employers' Liability Act, to submit the issue of the failure to give warning, since the jury might find that such conduct was negligence and the proximate cause of the accident. *St. Louis, S. F. & T. R. Co. v. Geer*, — Tex. Civ. App. —, 149 S. W. 1178.

The question of the defendant's negligence was for the jury in an action under the Federal Employers' Liability Act, where a fireman, while standing beside his engine, was struck and injured by cars on a parallel track, against which other cars were kicked without warning, where it could be inferred from the evidence that the person responsible for the movement of the cars either saw or might have seen the plaintiff's danger. *Alabama G. S. R. Co. v. Skotzy*, — Ala. —, 71 So. 335.

#### Of Proximity of Low Overhead Bridge.

Where at night a switchman was thrown from the top of a tall box car

when he came into contact with a low overhead bridge, the question whether his employer should have anticipated his presence on top of the car and warned him of the danger before directing him to take a train beneath the bridge, was for the jury in an action based on the Federal Employers' Liability Act. *Portland Term. Co. v. Jarvis*, 141 C. C. A. 562, 227 Fed. 8.

The question whether a brakeman who was struck and killed by a low overhead bridge could rely on the engineer of a freight train giving warning with the whistle of the proximity of the bridge, was erroneously submitted to the jury in an action under the Federal Employers' Liability Act, where it appeared that although the engineer sometimes gave such warning when he was aware that a trainman was on the roof of a car it was not customary to do so, nor did any rule of the defendant require it. *Marus v. Central R. of N. J.*, 170 App. Div. 158, 155 N. Y. Sup. 586.

#### (x) Weight of Testimony.

##### In General.

Where the evidence is conflicting in an action based on the Federal Employers' Liability Act, it is particularly within the province of the jury, under proper instructions, to determine the weight to be given to the testimony, to reconcile it and to find from it the true facts. *Cincinnati, N. O. & T. P. R. Co. v. Goldston*, 163 Ky. 42, 173 S. W. 161, S. C. 156 Ky. 410, 161 S. W. 246.

When there is a great conflict of testimony as to whether an employee's health could have been injured by the inhalation of mist and spray thrown out by a paint sprayer or "gun," it was for the jury to pass on the credibility and weight of the testimony in an action founded on the Federal Employers' Liability Act. *Baltimore & O. R. Co., v. Branson*, — Md. —, 98 Atl. 225.

#### D. View by Jury.

##### Of Engine or Cars Causing Accident.

The question of permitting the jury to view a locomotive by which the plaintiff was injured, is discretionary with the trial court in an action based on the Federal Employers' Liability Act. *Atlantic C. L. R. Co. v. Whitney*, 65 Fla. 72, 61 So. 179, 3 N. C. C. A. 812, S. C. 62 Fla. 124, 56 So. 937.

The motion of the defendant, in an action founded on the Federal Employers' Liability Act for the death of a motorman by the derailment of an interstate street car at a curve, to permit the jury to inspect the trucks of the car, was erroneously denied, where the plaintiff alleged that the wheels were old and defective, while the

defendant asserted that they were practically new. *South Covington & C. St. R. Co. v. Finan*, 153 Ky. 340, 155 S. W. 742.

Since the question of permitting the jury to view the locomotive by which the plaintiff was injured is discretionary with the trial court, in an action founded on the Federal Employers' Liability Act, an appellate court will not interfere with the exercise of such discretion unless the appellant was thereby injured. *Atlantic C. L. R. Co. v. Whitney*, 65 Fla. 72, 61 So. 179, 3 N. C. C. A. 812, S. C. 62 Fla. 124, 56 So. 937.

#### E. Instructions.

##### 1. In General.

##### Reading Pleadings to Jury.

It was error, in an action under the Federal Employers' Liability Act, when some of the averments of negligence were not sustained by proof, for the court, instead of stating the issues of fact to the jury in a succinct form, to read the several counts of the plaintiff's declaration, and to direct them to find for the plaintiff if the greater weight of evidence was on his side. *Nashville, C. & St. L. R. Co. v. Anderson*, — Tenn. —, 185 S. W. 677.

##### Limitations.

The jury was correctly instructed, in an action under the Federal Employers' Liability Act, that in order to recover the plaintiff must prove by a preponderance of evidence, that he suffered the injury of which he complains, within two years before the day his action was brought. *Baltimore & O. R. Co., v. Branson*, — Md. —, 98 Atl. 225.

##### Plaintiff's Negligence Cause of Injury.

The jury was correctly instructed, in an action founded on the Federal Employers' Liability Act, that even if they should find that the plaintiff was injured in the course of his employment, their verdict must be for the defendant if they should believe that the injury was caused solely by the negligence of the plaintiff and not by any negligence on the part of the defendant. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

##### When Instruction as to Federal Law Given.

Instructions based on the Federal Employers' Liability Act are properly refused in an action for injuries to an employee, where the evidence does not bring the case within such statute. *Vandalia R. Co. v. Stringer*, 182 Ind. 676, 106 N. E. 865, rehearing denied 182 Ind. 684, 107 N. E. 673.

When the complaint in an action for injuries to an employee fails to show that

with respect to the transaction causing his injury, either he or the carrier was engaged in interstate commerce, it is improper to instruct the jury to the effect that the plaintiff could recover under the Federal Employers' Liability Act, regardless of the existence of such elements. *Cincinnati, H. & D. R. Co. v. Gross*, — Ind. —, 111 N. E. 653.

Where the evidence that an employee was injured while engaged in interstate commerce is undisputed, and the defendant pleads contributory negligence, it is erroneous to so instruct the jury as to permit them to determine whether the state law or the Federal Employers' Liability Act governs the action. *Atchison, T. & S. F. R. Co. v. Pitts*, — Okla. —, 145 Pac. 1148, 9 N. C. C. A. 545.

### Combining More than One Ground of Recovery.

In an action for injuries sustained by a brakeman who was thrown from the caboose of a moving freight train he was boarding, as the alleged result of the defective condition of a step, combined with a violent, unusual and unnecessary jerk of the train after it pulled out from a siding, it was erroneous to instruct the jury as to the liability of the defendant for starting the train in such manner, as well as for the engineer's disobedience of orders in starting the train without a signal. *Cincinnati, N. O. & T. P. R. Co. v. Goldston*, 156 Ky. 410, 161 S. W. 246, S. C. 163 Ky. 42, 173 S. W. 161.

In an action under the Federal Employers' Liability Act for the death of a brakeman who was thrown from a freight train, an instruction permitting a recovery if a defective step on the caboose or an unusual jerk of the train caused the accident, should not have been given in that form, where a previous instruction submitted the question of the defendant's liability if the jerk of the train was violent, unusual and unnecessary, since the criticized instruction should have been limited to liability for furnishing a defective step, as the combining of the two elements tended to confuse the jury. *Cincinnati, N. O. & T. P. R. Co. v. Goldston*, 156 Ky. 410, 161 S. W. 246, S. C. 163 Ky. 42, 173 S. W. 161.

### Cautionary Instructions.

#### — Opinion Evidence.

Where the opinion of an expert witness, in an action founded on the Federal Employers' Liability Act, was based upon hypothetical questions as well as upon his own knowledge of the conditions attending an accident, the refusal to give an instruction cautioning the jury to reject such opinion if the facts stated in the hypo-

thetical question were rejected, was not prejudicial to the defendant. *St. Louis & S. F. R. Co. v. Fithian*, 106 Ark. 491, 155 S. W. 88.

### 2. Assumed Risk.

#### (a) In General.

#### When Instruction as to Assumed Risk Must Be Given.

When assumption of risk is pleaded in an action under the Federal Employers' Liability Act, and supported by the evidence, the court must instruct the jury with reference thereto. *Barker v. Kansas City, M. & O. R. Co.*, 88 Kan. 767, 129 Pac. 1151, 43 L. R. A. (N. S.) 1121.

A failure to instruct the jury as to assumption of risk as prescribed in section 4 of the Federal Employers' Liability Act, is not erroneous, where neither the case of the plaintiff nor the defendant depended on such defense. *Devine v. Chicago, R. I. & P. R. Co.*, 266 Ill. 248, 107 N. E. 595, Ann. Cas. 1916 B. 481, affirming 185 Ill. App. 488, affirmed 239 U. S. 52, 60 L. ed. —, 36 Sup. Ct. Rep. 27.

An instruction as to the assumption of risk, requested by the defendant, was properly denied in an action under the Federal Employers' Liability Act, when couched in general and sweeping terms calculated to give the jury an inaccurate understanding of the law, without directing attention to the particular phase of the case to which it was deemed applicable. *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914 C. 172.

The refusal of a requested instruction as to assumed risk, which correctly stated the law, was not prejudicial to the defendant, in an action founded on the Federal Employers' Liability Act, where the jury expressly negated the hypothesis on which the instruction was based. *Kanawha R. v. Kerse*, 239 U. S. 576, — L. ed. —, 36 Sup. Ct. Rep. 174.

#### Failure to Request Instruction.

The fact that the first instruction given for the plaintiff in an action based on the Federal Employers' Liability Act, ignored the defense of assumed risk, was not prejudicial to the defendant, where no instruction on the subject was requested by the latter, and such defense was covered by another portion of the charge. *Hawkins v. St. Louis & S. F. R. Co.*, 189 Mo. App. 201, 174 S. W. 129.

Where the defendant, in an action founded on the Federal Employers' Liability Act, does not in its requests for instructions refer to the assumption by the plaintiff of the risk of injury from a misplaced, unlighted switch, it cannot com-

plain, of the failure of the court to submit such question to the jury. *Campbell v. Canadian N. R. Co.*, 124 Minn. 245, 144 N. W. 772.

#### **Harmless Instruction.**

An instruction as to assumption of risk was not erroneous in an action based on the Federal Employers' Liability Act for the death of an employee who was killed by falling in the night into a deep pit in a roundhouse which was alleged to have been insufficiently lighted, where the instruction could not have misled the jury. *Seaboard A. L. R. Co. v. Padgett*, 238 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481, affirming 99 S. C. 364, 83 S. E. 633.

#### **(b) Risks of Employment.**

##### **In General.**

An instruction requested in an action founded on the Federal Employers' Liability Act for injuries sustained by a brakeman in boarding the engine of a moving train, as to the ordinary hazards of his occupation, was properly refused, where the instruction did not define the ordinary risks and hazards, and the negligence relied on was an unusual and extraordinary hazard caused by the movement of the train at an unduly high rate of speed. *Chesapeake & O. R. Co. v. De Atley*, 241 U. S. 310, 60 L. ed. —, 36 Sup. Ct. Rep. 564, reversing 159 Ky. 687, 167 S. W. 933.

An instruction should have been given, in an action under the Federal Employers' Liability Act, that the plaintiff assumed the risk of the ordinary dangers of his occupation as well as of those that were known to him, or so clearly observable that he would be presumed to know them; and that he could not recover for injuries resulting from the dangers of the ordinary duties of his occupation; or if he voluntarily placed himself in a place of danger which was known to him, or which was or should have been clearly observable by him with the exercise of ordinary care. *Dayton & U. R. Co. v. Bunger*, 19 Oh. C. C. Rep. (N. S.) 531, reversing 14 id. 467.

An instruction to the effect that a brakeman assumed the risks ordinarily incident to his occupation, but not those attendant on the negligence of his fellow employees, was held proper in an action under the Federal Employers' Liability Act. *St. Louis & S. F. R. Co. v. Brown*, — Okla. —, 144 Pac. 1075.

Where a train porter, who left a train in obedience to an order of a conductor, was injured by alighting at night on the unfloored side of a trestle, of the existence of which he was unaware, the jury, in an action under the Federal Employers' Liability Act, was properly instructed that

the plaintiff assumed all risks ordinarily incident to his employment except those arising from the negligence of his employer, and that the verdict should be for the defendant if the jury did not believe that the accident happened as alleged, since the effect of the instruction was that the plaintiff could not recover if the accident was due to a risk ordinarily incident to his employment, as it was assumed by him. *Missouri, K. & T. R. Co. v. Bunkley*, — Tex. Civ. App. —, 153 S. W. 937.

An instruction was erroneous, in an action founded on the Federal Employers' Liability Act, to the effect that an employee assumed none of the risks incident to his employment if his employer was guilty of any kind of negligence which contributed to the former's injury. *Columbia & P. S. R. Co. v. Sauter*, 139 C. C. A. 150, 223 Fed. 604.

#### **Emergency Application of Brakes.**

In an action under the Federal Employers' Liability Act for the death of an engineer in consequence of an emergency application by a brakeman of the air brakes to a backing freight train, the jury was correctly instructed to the effect that the decedent assumed the risks incident to his employment, and that if the application of the brakes was made upon a reasonable belief that it was necessary in order to avoid injury to property, the jury should find for the defendant unless the emergency was brought about by the negligent operation of the train by the defendant's servants before the application of the brakes, where it appeared that the negligence of the conductor in the management of the train necessitated the application of the brakes. *Louisville & N. R. Co. v. Stewart*, 241 U. S. 261, 60 L. ed. —, 36 Sup. Ct. Rep. 586, affirming 163 Ky. 823, 174 S. W. 744, S. C. 156 Ky. 550, 161 S. W. 557, 157 Ky. 642, 163 S. W. 755.

#### **(c) Extraordinary Risks.**

##### **In General.**

An instruction that an employee did not assume the risk of extrahazardous work unless he was warned and instructed therein by his employer, and continued at such work after warning, was proper in an action under the Federal Employers' Liability Act for injuries sustained by a section hand while moving a crooked rail at a wreck, which was more dangerous than handling a straight one. *Missouri, K. & T. R. Co. v. Mooney*, — Tex. Civ. App. —, 181 S. W. 543.

In an action under the Federal Employers' Liability Act, an instruction that the decedent assumed "those unusual and extraordinary risks that were plainly observable to the eyes of an ordinarily prudent

man" was properly refused, where there was no evidence of any such danger, and the jury was correctly instructed as to the assumption of the ordinary and usual risks of the decedent's employment. *St. Louis, I. M. & S. R. R. Co. v. Rodgers*, 118 Ark. 263, 176 S. W. 696.

Where an inexperienced brakeman, 19 years of age, was injured while attempting in the course of his employment to board the moving engine of his train, after having gone ahead, at the direction of the engineer, to obtain orders, an instruction as to the assumption of the extraordinary risk of injury from the movement of the train at a dangerous rate of speed was properly refused, in an action under the Federal Employers' Liability Act, where the brakeman was facing the train and could not judge its speed until the engine passed him; since under such circumstances he could rely on the assumption that its speed would be reasonable. *Chesapeake & O. R. Co. v. De Atley*, 159 Ky. 687, 167 S. W. 933, reversed 241 U. S. 310, 60 L. ed. —, 36 Sup. Ct. Rep. 564.

#### (d) Negligence of Employer.

##### In General.

An instruction that an employee did not assume the risk of injury from the negligence of his employer was properly given in an action founded on the Federal Employers' Liability Act. *Hawkins v. St. Louis & S. F. R. Co.*, 189 Mo. App. 201, 174 S. W. 129.

An instruction that since the passage of the Federal Employers' Liability Act the risks assumed by an employee were the ordinary dangers incident to his employment, which did not include those caused by the negligence of the officers, agents or other employees of the master, was properly refused in an action for injuries received by a switchman from the negligent running of cars over a hump in a railway yard against those between which he was working, where the movement of cars in such manner was of almost daily occurrence and the danger therefrom was obvious to him. *Boldt v. Penn. R. Co.*, 134 C. C. A. 175, 218 Fed. 367.

Where an employee was injured as the result of the failure of a carrier to provide him with a reasonably safe place to work, the defendant's request for an instruction as to assumption of risk was properly refused, in an action under the Federal Employers' Liability Act. *Chesapeake & O. R. Co. v. Shaw*, 168 Ky. 537, 182 S. W. 653.

#### (e) Negligence of Fellow-Servants.

##### In General.

An instruction to the effect that a brake-

man did not assume the risk of injury from the negligence of his fellow servants, although he assumed the risks ordinarily incident to his employment, was properly given in an action under the Federal Employers' Liability Act. *St. Louis & S. F. R. Co. v. Brown*, — Okla. —, 144 Pac. 1075, affirmed 241 U. S. 223, 60 L. ed. —, 36 Sup. Ct. Rep. 602.

#### (f) Knowledge of Danger or Defects.

##### In General.

The jury was correctly instructed, in an action based on the Federal Employers' Liability Act for the death of a brakeman who jumped from a moving freight train at a station and was killed as the alleged result of defects in a platform, that if he knew, or by the use of ordinary care should have known, of the risks and hazards that resulted in his injury or death, or if they were caused from the ordinary dangers of his occupation, there could be no recovery in the action, as he assumed such risks, although he did not assume any peril due to the negligence or carelessness of the defendant of which he could not learn by the use of ordinary care. *St. Louis & S. F. R. Co. v. Clappitt*, — Okla. —, 154 Pac. 40.

An instruction should have been given, in an action based on the Federal Employers' Liability Act, to the effect that the plaintiff could not recover if he was aware of the existence of the defect which caused his injury, no matter how negligent the defendant may have been, as the risk was assumed. *Dayton & Union R. Co. v. Bunker*, 19 Oh. C. C. Rep. (N. S.) 531, reversing 14 id. 487.

An instruction to the effect that if the jury believed from the evidence that the plaintiff knew of the existence of a pile of cinders beside a track in a railway yard, or had worked near it for more than a year, and knew that cinders had been piled at the same place for many years, but failed to make complaint or objection thereto, that he thereby assumed the risk of injury therefrom, should have been given in an action under the Federal Employers' Liability Act for injuries sustained by a trainman while shifting cars engaged in interstate commerce. *Southern R. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99, affirmed 241 U. S. 229, 60 L. ed. —, 36 Sup. Ct. Rep. 588.

An instruction as to assumed risk was held as favorable as the defendant could demand in an action under the Federal Employers' Liability Act for injuries sustained by a blacksmith while using a power grindstone which to his knowledge had a hole in the grinding surface that made its use dangerous. *Opsahl v. Northern P. R. Co.*, 78 Wash. 197, 138 Pac. 681.

A failure to instruct the jury as to the assumption of risk is not erroneous, in an action predicated on the Federal Employers' Liability Act for the death of a brakeman who was killed in the night in a rear end collision, where he was unaware that a faster train, which caused the collision, had been improperly given a clearance card, or that the leaking cylinders of its engine would prevent the engineer from seeing the tail lights of the preceding train. *Central Vt. R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, Ann. Cas. 1916 B. 252, affirming 87 Vt. 330, 89 Atl. 618.

The refusal of a requested instruction to the effect that there could be no recovery under the Federal Employers' Liability Act for the death of a brakeman who was knocked from the top of a box-car by a timber maintained across a private switch track, with a clearance of but 3 feet 4½ inches above the top of an ordinary box-car, if the decedent, with knowledge of such obstruction, remained in the defendant's employ when his duties required him to pass under such obstruction, since he assumed the risk of injury, was not prejudicial to the defendant where the jury expressly found that the decedent did not know of the presence of the timber. *Kanawha R. v. Kerse*, 239 U. S. 576, — L. ed. —, 38 Sup. Ct. Rep. 174.

### Obvious Dangers.

In an action under the Federal Employers' Liability Act, it was error to instruct that the defense of assumption of risk, with respect to a particular task, can be established only by showing that its danger was so glaring that a person of ordinary prudence would not have attempted it. *Spinden v. Atchison, T. & S. F. R. Co.*, 95 Kan. 441, 148 Pac. 747.

In an action under the Federal Employers' Liability Act for injuries received by an employee, where assumption of risk is set up as a defense, it was error to instruct the jury that even if they found that the plaintiff had assumed the risk it would not constitute a defense unless they further found that the dangers were so glaring that an ordinarily prudent person would not have encountered them. *Barker v. Kansas City, M. & O. R. Co.*, 94 Kan. 176, 146 Pac. 358.

In an action under the Federal Employers' Liability Act for the impairment of an employee's health by the use of a paint spray or "gun," the jury was correctly instructed that if they found from the evidence that the danger and risk of injury to the health of the operator of the "gun," from its use without a respirator, was so open and obvious that an ordinarily prudent person would have observed and ap-

preciated such danger and risk, that the plaintiff assumed the risk, and that they should find for the defendant. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

### (g) Violent and Unusual Movement of Cars.

#### In General.

An instruction as to assumed risk should be given, in an action based on the Federal Employers' Liability Act, where, although there was evidence tending to show that the death of the plaintiff's intestate was caused by an unusual, unnecessary and violent jerk of a freight train, there was a greater weight of evidence tending to show that the jerk was only the usual and ordinary one necessarily accompanying the movement of a heavy freight train. *Cincinnati, N. O. & T. P. R. Co. v. Goldston*, 156 Ky. 410, 161 S. W. 246, S. C., 163 Ky. 42, 173 S. W. 161.

### (h) Violation of Safety Statutes.

See in general Safety Appliance Act.

### 3. Assuming Facts.

#### In General.

The trial court cannot charge the jury in an action founded on the Federal Employers' Liability Act that certain facts constitute negligence, without invading their province. *Dutton v. Atlantic C. L. R. Co.*, — S. C. —, 88 S. E. 263.

The instructions given for the plaintiff in an action under the Federal Employers' Liability Act should not assume the fact of the negligence of the defendant as proven. *Culp v. Virginian R. Co.*, — W. Va. —, 87 S. E. 187.

Where the alleged negligence of a fellow servant is a controverted fact in an action under the Federal Employers' Liability Act, the question of his conduct should be submitted to the jury without instructing them that such fact was established. *Culp v. Virginian R. Co.*, — W. Va. —, 87 S. E. 187.

### 4. Contracts Against Liability.

#### In General.

It was proper to instruct the jury that under the Federal Employers' Liability Act any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable a common carrier to exempt itself from liability, is to that extent void. *St. Louis & S. F. R. Co. v. Clappitt*, — Okla. —, 154 Pac. 40.



## 5. Contributory Negligence.

### (a) In General.

#### Necessity for Instructions.

When the contributory negligence of an employee is shown in an action based on the Federal Employers' Liability Act, it is reversible error to ignore it in instructing the jury. *Hall v. Vandalia R. Co.*, 169 Ill. App. 12.

Where the undisputed evidence in an action based on the Federal Employers' Liability Act shows that the plaintiff was guilty of negligence causing or contributing to his injury, the jury should be so instructed before submitting the question of the defendant's negligence and the apportionment of damages. *Holmberg v. Lake Shore & M. S. R. Co.*, — Mich. —, 155 N. W. 504.

#### In Absence of Evidence of Contributory Negligence.

Although contributory negligence is pleaded by the defendant in an action founded on the Federal Employers' Liability Act, the jury should not be instructed thereto when there is a total absence of evidence as to such negligence. *Chesapeake & O. R. Co. v. Cooper*, 168 Ky. 137, 181 S. W. 933.

An erroneous instruction as to contributory negligence was not prejudicial to the defendant, in an action based on the Federal Employers' Liability Act, where there was a total absence of evidence of such negligence. *Chesapeake & O. R. Co. v. Cooper*, 168 Ky. 137, 187 S. W. 933.

An instruction as to contributory negligence was properly refused, in an action founded on the Federal Employers' Liability Act for the death of a brakeman who at night was thrown from the top of a box car when it was suddenly stopped with unusual and unnecessary violence, where there was no evidence of negligence on the part of the decedent. *Ft. Worth & D. C. R. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279.

#### Instruction Approved by Federal Supreme Court to be Given.

The instructions as to contributory negligence given in an action in a state court under the Federal Employers' Liability Act should be those approved by the Supreme Court of the United States. *Cincinnati, N. O. & T. P. R. Co. v. Nolan*, 161 Ky. 205, 170 S. W. 650, S. C. 167 Ky. 11, 179 S. W. 1046.

#### On New Trial as to Measure of Damages Only.

Where under a local rule of practice an appellate court sends back an action,

founded on the Federal Employers' Liability Act, for a new trial as to the measure of damages only, no error being found on the issues of the defendant's negligence or the plaintiff's contributory negligence, instructions pertaining to contributory negligence were properly refused at the second trial. *Ferbee v. Norfolk & S. Ry. Co.*, 167 N. C. 290, 83 S. E. 360, affirmed 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781.

#### Negligence of Fellow Servant Concurring Cause.

When the negligence of an employee contributed to his injury, an action under the Federal Employers' Liability Act should be submitted to the jury under proper instructions, where the negligence of a coemployee was also a proximate cause of the accident. *Cincinnati, N. O. & T. P. R. Co. v. Goode*, 163 Ky. 60, 173 S. W. 329.

#### Failure to Request Instructions.

Contributory negligence is, under the Federal Employers' Liability Act, a matter as to which, when relied on, the defendant should request an instruction. *Carpenter v. Kansas City S. R. Co.*, 189 Mo. App. 164, 175 S. W. 234.

#### Ignoring Proximate Cause.

In an action under the Federal Employers' Liability Act, an instruction that if the jury believed the evidence, the plaintiff was guilty of contributory negligence, was properly refused, since it did not refer to the fact that the plaintiff's negligence must have proximately contributed to his injury. *Alabama G. S. R. Co. v. Skotzy*, — Ala. —, 71 So. 335.

### (b) Acting in Emergency.

#### Adopting Hazardous Course.

An instruction was correctly given, in an action based on the Federal Employers' Liability Act for the death of an engineer in a collision, to the effect that if the defendant negligently placed the decedent in a position of peril, and the latter believed, or had good reason to believe, that there were two or more possible means of escape open to him, the fact that he adopted the more hazardous one and was killed would not charge him with contributory negligence, although the jury might believe that he would not have lost his life had he acted differently, where he believed, and had reasonable grounds to believe, that under the circumstances he chose the safest course. *Louisville & N. R. Co. v. Holloway*, 163 Ky. 125, 173 S. W. 343, S. C. 168 Ky. 262, 181 S. W. 1126.

## (c) Due Care.

**Care to Avoid Injury.****—To Avert Collision.**

The question of the contributory negligence of the plaintiff was held properly submitted to the jury by a lengthy instruction, in an action under the Federal Employers' Liability Act for injuries sustained in a rear end collision by a freight conductor, as the result of the failure of his flagman to protect the rear of their train while it stood temporarily on a main track, when the conductor was adjusting a new air hose. *Penn. R. Co. v. Goughnour*, 126 C. C. A. 39, 208 Fed. 961.

The jury was properly instructed, in an action under the Federal Employers' Liability Act for the death of a freight conductor in a rear end collision, to the effect that his failure to perform his duty of seeing that a switch leading to a main track was closed, instead of leaving such duty to a brakeman, amounted to contributory negligence. *Louisville & N. R. Co. v. Wene*, 121 C. C. A. 245, 202 Fed. 887.

The jury was properly instructed, in an action based on the Federal Employers' Liability Act for the death of an engineer as the result of a collision, that it was his duty to use every reasonable effort at his command to stop his train and to protect himself if he could do so by the exercise of ordinary care after he received warning of or was given signals indicating the proximity of the other train, and that his failure to exercise such care amounted to contributory negligence. *Louisville & N. R. Co. v. Holloway*, 163 Ky. 125, 173 S. W. 343, S. C. 168 Ky. 262, 181 S. W. 1126.

**—Crossing Tracks.**

The defendant, in an action under the Federal Employers' Liability Act for injuries received by a brakeman of an interstate train who was struck by a car as he was crossing a track in a yard without looking or listening for approaching cars or trains, was entitled to an instruction to the effect that a person crossing a track is bound to make diligent use of his senses to discover approaching trains, and that a failure to do so is negligence, since he could not rely wholly on the railway company for protection. *Illinois C. R. Co. v. Nelson*, 122 C. C. A. 258, 203 Fed. 956.

**—Sitting Beside Track.**

Where an inexperienced section hand, between fifteen and sixteen years of age, was struck and killed while flagging a train, an instruction to the effect that he was guilty of contributory negligence if he sat down near the track in a position of danger, although he believed he was in a place of safety, but that he would be

free from such negligence if he exercised for his own protection that degree of care which one of his age and intelligence would ordinarily have used under the circumstances, was erroneously given in an action under the Federal Employers' Liability Act, where his employer did not provide him with the proper means for signaling approaching trains with due regard to his safety. *Raines v. Southern R. Co.*, 169 N. C. 189, 85 S. E. 294.

**—To Avoid Kicked Cars.**

In an action under the Federal Employers' Liability Act for the death of a switchman who was struck by a string of kicked cars running without any one in charge, an instruction to the effect that if the decedent knew of their approach, or by the exercise of reasonable and ordinary care could have prevented the disaster, he was guilty of contributory negligence, which, if it directly contributed to his death, should be taken into consideration in arriving at the amount of the verdict, but that if such negligence was the sole and proximate cause of the accident the plaintiff could not recover, was erroneous, since the language was of doubtful meaning and did not sufficiently inform the jury that such negligence was not a complete defense, but should be considered only in reduction of damages. *Ross v. St. Louis & S. F. R. Co.*, 93 Kan. 517, 144 Pac. 844, 7 N. C. C. A. 737.

**—On Failure of Engineer to Observe Signals.**

Where a fireman, on the failure of his engineer to observe a cautionary signal and reduce the speed of his train, negligently failed to take any action which the rules of his employer required, the defendant was entitled, in an action under the Federal Employers' Liability Act for injuries received by the fireman in a resulting accident, to an instruction placing the fireman's conduct before the jury in reasonably definite and concrete form. *Penn. Co. v. Sheeley*, 137 C. C. A. 471, 221 Fed. 901.

## (d) Going Between Moving Cars.

Going between cars to operate or adjust couplers, see generally Safety Appliance Act, VII, F.

**In General.**

An instruction, in an action under the Federal Employers' Liability Act for injuries sustained by a brakeman, to the effect that if he voluntarily, unnecessarily and negligently went between cars to uncouple them while in motion and his conduct was the sole and only cause of his injury, and there was no negligence on the part of the defendant, he could not re-

cover, was erroneous, since the words "voluntarily, unnecessarily and negligently" should have been omitted. *Nashville, C. & St. L. R. Co. v. Henry*, 158 Ky. 88, 164 S. W. 310.

In an action based on the Federal Employers' Liability Act for injuries received by a brakeman while uncoupling cars, an instruction that if his injury was caused wholly or solely by his own negligence, without negligence on the part of the defendant, the jury should find for the latter, was erroneous, since it did not clearly present the defendant's side of the case, but the jury should have been instructed to find for the defendant if the plaintiff went between the moving cars and sustained injuries before they stopped. *Nashville, C. & St. L. R. Co. v. Banks*, 156 Ky. 609, 161 S. W. 554.

### (e) Doing Work in Improper Manner.

#### In General.

In an action founded on the Federal Employers' Liability Act for the loss of a fireman's eye by the explosion of a leaking water gauge glass while he was removing a protecting shield, without first having turned off the steam and drained the glass, an instruction was improperly refused to the effect that the verdict should be for the defendant if it were found that the shield was fastened with a nail—which was alleged as negligence—so as to be safe if untouched, and if the plaintiff was also found negligent in attempting to remove the shield without first draining the glass. *Atchison, T. & S. F. R. Co. v. Hines*, 127 C. C. A. 632, 211 Fed. 264.

Where a brakeman was injured while uncoupling cars, the jury should have been instructed, in an action under the Federal Employers' Liability Act for his injuries, according to the facts alleged in the defendant's plea of contributory negligence, to the effect that it was the plaintiff's duty to perform his work in the usual and reasonably safe way, and to exercise such care in doing so as might reasonably be expected under the circumstances from a man of ordinary prudence, and that his failure to do so amounted to contributory negligence. *Nashville, C. & St. L. R. Co. v. Banks*, 156 Ky. 609, 161 S. W. 554.

An instruction should not be given, in an action under the Federal Employers' Liability Act for injuries received by a brakeman while uncoupling cars, to the effect that if he was guilty of negligence in the performance of his duties he was chargeable with contributory negligence; but, instead, the facts set up in the defendant's plea of contributory negligence should have been given and the jury told that it was the plaintiff's duty to perform

his work in the usual and reasonably safe way and to exercise such care in doing so as might reasonably be expected from a man of ordinary prudence under like circumstances, and that his failure to do so was contributory negligence. *Nashville, C. & St. L. R. Co. v. Banks*, 156 Ky. 609, 161 S. W. 554.

### Working Train From Both Ends.

The defendant, in an action based on the Federal Employers' Liability Act, cannot complain of the modification of a requested instruction as to assumption of the risk of a method adopted for the making up of a manifest freight train by working it from both ends at the same time, so as to include the elements whether the method was such as a reasonably prudent employer would have adopted, and of whether the plaintiff had notice that the usual method of making up the train was followed on the occasion in question. *Chesapeake & O. R. Co. v. Proffitt*, 241 U. S. 462, 60 L. ed. —, 36 Sup. Ct. Rep. 620, affirming 134 C. C. A. 37, 218 Fed. 23.

In an action under the Federal Employers' Liability Act for injuries sustained by the head brakeman of a manifest freight train while coupling an air hose, in consequence of a violent movement of the train as the result of working it at both ends by switching crews at the same time, an instruction requested by the defendant was properly refused when to the effect that if the jury believed from the evidence that the method adopted by the defendant in making up the train was the usual and ordinary method of doing so the plaintiff assumed all risks incident thereto even though such method was the direct and proximate cause of his injury, where the evidence left in doubt what method was adopted and what was the usual and ordinary one, and the instruction ignored the question whether the plaintiff had knowledge of or was chargeable with notice of the customary method, since the instruction required a finding for the defendant if the usual method of doing the work was pursued, irrespective of the negligence of the switching crew in performing it. *Chesapeake & O. R. Co. v. Proffitt*, 241 U. S. 462, 60 L. ed. —, 36 Sup. Ct. Rep. 620, affirming 134 C. C. A. 37, 218 Fed. 23.

### (f) Going Into Dangerous Place.

#### Turntable Pit.

In an action under the Federal Employers' Liability Act for injuries sustained by an employee while working in a turntable pit making repairs, the refusal of a requested instruction that the plaintiff could not recover if he went into the pit before the time set for him to do so, and was injured by a movement of the table,

was not prejudicial to the defendant, where the jury was instructed that the plaintiff could not recover unless the defendant permitted the turntable to be operated when it knew or could have known by the exercise of ordinary care, of his presence in the pit, and that if those in charge of the turntable when it was moved did not know, or could not have known by the exercise of ordinary care, of the plaintiff's position, the verdict should be for the defendant. *Chesapeake & O. R. Co. v. Kornhoff*, 167 Ky. 353, 180 S. W. 523.

### (g) Knowledge of Danger.

#### Cinder Pile Beside Track.

An instruction to the effect that knowledge on the part of an employee of the unsafe condition or character of a roadbed was no defense to an action under the Federal Employers' Liability Act for injuries sustained by him from falling over a cinder pile beside a track, but that such knowledge might be considered by the jury with other evidence, in determining whether he was guilty of contributory negligence, was erroneous. *Southern R. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99, affirmed 241 U. S. 229, 60 L. ed. —, 36 Sup. Ct. Rep. 588.

#### Failure of Flagman to Signal Train.

In an action based on the Federal Employers' Liability Act for injuries received by a conductor while adjusting a new air hose, caused by the failure of his flagman to protect the rear of a freight train when temporarily stopped on a main track, a point presented by the plaintiff to the effect that he "had a right to assume that the flagman would obey the rules of the company and perform his duty" was properly affirmed, where the jury was instructed that if the conductor had knowledge of and acquiesced in the nonperformance of the flagman's duty it would constitute contributory negligence which would prevent a recovery. *Penn. R. Co. v. Goughnour*, 126 C. C. A. 39, 208 Fed. 961.

#### Riding on Pilot of Engine.

Where the death of a switchman, who was jarred from the narrow rim of the pilot of a yard engine used for switching purposes instead of an engine with a footboard, was attributable to the defective condition of a track, an instruction proffered by the defendant was properly refused because it ignored the condition of the track as a ground of negligence, and imperatively required the plaintiff's damages to be reduced to a nominal sum on account of the fact that he rode on such pilot without necessity and with knowledge of the apparent and obvious danger. *Louisville & N. R. Co. v. Lankford*, 126 C. C. A. 247, 209 Fed. 321.

### (h) Reduction of Damages For.

#### In General.

Requested instructions which require the jury to return a verdict for the defendant in an action founded on the Federal Employers' Liability Act, without taking into consideration the rule laid down by that act with respect to contributory negligence, were properly refused. *Arizona E. R. Co. v. Bryan*, — Ariz. —, 157 Pac. 376.

Mere verbal inaccuracies in an instruction as to diminution of damages for contributory negligence in an action based on the Federal Employers' Liability Act, when not prejudicial to the defendant is not reversible error, where the defect would have been corrected had the attention of the court been promptly called to it. *Illinois C. R. Co. v. Skaggs*, 240 U. S. 66, — L. ed. —, 36 Sup. Ct. Rep. 249, affirming 125 Minn. 532, 147 N. W. 1135, S. C. 124 Minn. 503, 145 N. W. 381.

Where an engineer, when on the ground at night beside his engine cooling a hot box, was injured in a collision caused by the negligent movement of a disabled engine that he had orders to tow to another station, and which he was informed could not move under its own steam, it was not error to refuse an instruction requested by the defendant, in an action under the Federal Employers' Liability Act, to the effect that if the plaintiff was injured partly by his own and partly by the defendant's negligence, such acts were to be compared, when such point was sufficiently covered by an instruction in substance that the plaintiff's recovery should be diminished according to his negligence. *Pfeiffer v. Oregon, W. R. & N. Co.*, 74 Oreg. 307, 144 Pac. 762, 7 N. C. C. A. 685, writ of error dismissed 239 U. S. 658, — L. ed. —, 36 Sup. Ct. Rep. 222.

An instruction as to the diminution of damages for contributory negligence was properly given in an action where the complaint, although defective, was sufficient to show that it was based on the Federal Employers' Liability Act. *Cincinnati, H. & D. R. Co. v. Gross*, — Ind. —, 111 N. E. 653.

Where the evidence, in an action based on the Federal Employers' Liability Act, justified a finding that both the plaintiff and the defendant were guilty of negligence contributing to the accident, the jury should be instructed concerning the rule of comparative negligence established by the Federal act. *Waina v. Penn. Co.*, 251 Pa. 213, 96 Atl. 461.

#### Correct Instructions.

##### — In General.

An instruction that under the Federal Employers' Liability Act an injured employee's damages should be "diminished

by the jury in proportion to the amount of negligence attributable to such employee (but that it) would not bar a recovery, but that it goes "by way of diminishing damages in the proportion his negligence compared with the negligence of the defendant," was not objectionable because it did not inform the jury that the plaintiff's contributory negligence "must diminish his damages." *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914 C. 172.

An instruction that the jury should "deduct" a reasonable amount, in an action based on the Federal Employers' Liability Act, for the contributory negligence of the plaintiff, instead of stating that the damages would be "diminished" on account thereof, was not erroneous. *Tilghman v. Seaboard A. L. R. Co.*, 167 N. C. 163, 83 S. E. 315, 1090, reversed on other grounds 237 U. S. 499, 59 L. ed. 1069, 35 Sup. Ct. Rep. 653.

In an action founded on the Federal Employers' Liability Act, it was not reversible error, although the language was not happily chosen, to instruct the jury that the damages of an injured employee should be diminished "in proportion to the amount of negligence attributable to" him; that such negligence would not bar a recovery, but would go "by way of diminution of damages in proportion to his negligence, as compared with that of the defendant," where the latter did not call the attention of the trial court to the inaccuracy of the instruction. *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914 C. 172.

An instruction, in an action based on the Federal Employers' Liability Act, that the negligence of a deceased employee and that of the defendant railway company, through other employees, if any, should be compared, and if the defendant's negligence was greater than that of the decedent a verdict should be rendered for the plaintiff, the total actual damages being diminished in proportion to the relative negligence of the two parties, was not prejudicial to the defendant. *New York, C. & St. L. R. Co. v. Niebel*, 131 C. C. A. 248, 214 Fed. 952.

In an action under the Federal Employers' Liability Act for the death of a freight conductor in a rear end collision, an instruction was properly given to the effect that his failure to perform his duty of seeing that the switch leading to the main track was closed, instead of leaving that duty to a brakeman, was contributory negligence, and that if the engineer of the following train was also negligent in failing to observe the signals of the open switch until too late to avert the accident, the jury should diminish the amount of

the plaintiff's recovery in proportion to the amount of negligence attributable to his intestate. *Louisville & N. R. Co. v. Wene*, 121 C. C. A. 245, 202 Fed. 887.

An instruction that if the negligence of both the plaintiff's intestate and the defendant contributed to the death of a railway employee that the plaintiff could recover, although his damages would be reduced in proportion to the negligence attributable to his intestate, was properly given in an action based on the Federal Employers' Liability Act. *Southern R. Co. v. Hill*, 139 Ga. 549, 77 S. E. 803.

The jury was properly instructed that the contributory negligence of the plaintiff would not bar a recovery under the Federal Employers' Liability Act, but that his damages should be diminished in proportion to the amount of negligence attributable to him, so that he would not recover full damages but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the defendant bears to the entire negligence attributable to both of them. *Louisville & N. R. Co. v. Holloway*, 168 Ky. 262, 181 S. W. 1126, S. C. 163 Ky. 125, 173 S. W. 343.

The jury should be instructed, in an action under the Federal Employers' Liability Act, that for the contributory negligence of the plaintiff they should diminish his damages in proportion to the amount of negligence attributable to him, so that instead of recovering his full damages he would receive only a proportionate part, bearing the same relation to the full amount as the negligence attributable to the defendant bore to the entire negligence of both. *Cincinnati, N. O. & T. P. R. Co. v. Goode*, 163 Ky. 60, 173 S. W. 329.

An instruction that the contributory negligence of the plaintiff, in an action under the Federal Employers' Liability Act, "goes by way of diminution of damages, if any, in proportion to the negligence, as compared with the combined negligence, if any, of the plaintiff and the defendant," was correct. *Louisville & N. R. Co. v. Winkler*, 162 Ky. 843, 173 S. W. 151, 9 N. C. C. A. 146.

An instruction was correctly given, in an action based on the Federal Employers' Liability Act, to the effect that if the negligence of the plaintiff and defendant contributed to the former's injury, the jury, in estimating damages, should subtract from the plaintiff's total damage a sum proportionate to the negligence attributable to him; that if the negligence of both was equal the plaintiff could recover but half his damages; that if his negligence was one-fourth and that of the defendant three-fourths of the total negligence, the plaintiff was entitled to three-fourths of damages actually suffered;

while if the proportions were reversed the plaintiff could recover but one-quarter thereof. *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

In an action under the Federal Employers' Liability Act for the impairment of the health of an employee from mist and spray thrown off by a paint sprayer or "gun" he was required to use, the jury was properly instructed that, if they believed from the evidence that the plaintiff's injury was caused in part by the negligence of himself and the defendant, the negligence of both contributing to cause the injury, in estimating damages they must subtract from the total damages found for the plaintiff such sum as they believed from the evidence was proportionate to the amount of negligence attributable to him in producing his injury; that if the parties were equally negligent but one-half of the plaintiff's damages could be awarded; that if the plaintiff's negligence was one-fourth and the defendant's three-fourths of the total producing negligence, the plaintiff should be awarded the amount of damages he suffered less one-fourth attributable to him, or if his negligence was three-fourths and the defendant's one-fourth of the total negligence, the jury should deduct three-fourths of the negligence attributable to him from the total amount of his damages, and so on for any other proportionate negligence the jury might find. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

An instruction as to contributory negligence, in an action under the Federal Employers' Liability Act, to the effect that it would not defeat a recovery, but that if the plaintiff was entitled to damages the amount thereof should be ascertained, and from it should be subtracted such proportion as was caused by the decedent's own negligence, properly submitted such question to the jury. *Walsh v. Lake Shore & M. S. R. Co.*, 185 Mich. 177, 151 N. W. 754.

An instruction to the effect that the plaintiff could recover a proportionate amount of his total injury, although his negligence was a proximate cause thereof, but that it should be taken into consideration by the jury in comparison with the negligence of the defendant, and that an amount depending on the ratio of the former's negligence to that of the latter should be deducted from the total amount of the plaintiff's damages, although technically erroneous, was held not prejudicial to the defendant in an action based on the Federal Employers' Liability Act. *Skaggs v. Illinois C. R. Co.*, 124 Minn. 503, 145 N. W. 381, affirmed 240 U. S. 66, 60 L. ed. —, 36 Sup. Ct. Rep. 249.

An instruction, in an action under the Federal Employers' Liability Act, that for the contributory negligence of the plaintiff

the jury should reduce his damages in proportion to the amount of negligence attributable to him, was not erroneous, although the word "proportion" was not defined, where the defendant did not request a change clarifying any obscurity it deemed to exist. *St. Louis & S. F. R. Co. v. Brown*, 241 U. S. 223, 60 L. ed. —, 36 Sup. Ct. Rep. 602, affirming — Okla. —, 144 Pac. 1075.

An instruction, in an action under the Federal Employers' Liability Act, that if the plaintiff, while engaged in interstate commerce, was injured through the negligence of a coemployee, and if the jury "should" find that the plaintiff was guilty of negligence which contributed to his injury, that it would not prevent a recovery, but that his damages "should" be reduced in proportion to the amount of negligence attributable to him, was not erroneous because of the use of the word "should" instead of "shall." *St. Louis & S. F. R. Co. v. Brown*, — Okla. —, 144 Pac. 1075, affirmed 241 U. S. 223, 60 L. ed. —, 36 Sup. Ct. Rep. 606.

An instruction that it was the duty of the jury to diminish or reduce the damages attributable to the defendant's negligence in proportion to the amount of negligence justly chargeable to the plaintiff, and that if there should be any difference in favor of the latter after the damages were reduced to a money value, the difference should be the amount of the verdict, was a sufficient compliance with the terms of the Federal Employers' Liability Act. *Chadwick v. Oregon, W. & N. Co.*, 74 Ore. 19, 144 Pac. 1165.

An instruction, in an action under the Federal Employers' Liability Act, to the effect that contributory negligence would not bar a recovery, but would diminish the plaintiff's damages in proportion to the amount of negligence attributable to him, and that if his negligence and that of the defendant were equal that the plaintiff was entitled to but one-half his damages, while if the negligence of the employee were more than half that the damages would have to be reduced in proportion to the amount of the latter's negligence, was substantially correct. *Waina v. Penn. Co.*, 251 Pa. 213, 96 Atl. 461.

An instruction that the contributory negligence of the plaintiff would not bar a recovery under the Federal Employers' Liability Act, but that it would diminish damages in proportion to the amount of such negligence which the jury believed from the evidence was attributable to him under all of the circumstances, was correct. *Southern R. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99, affirmed on other grounds 241 U. S. 229, 60 L. ed. —, 36 Sup. Ct. Rep. 588.

An instruction should have been given, in an action under the Federal Employers' Liability Act, to the effect that if

the plaintiff's negligence contributed to his injury and the defendant was also guilty of negligence, the plaintiff's damages should be diminished in proportion to the amount of negligence attributable to him. *Snyder v. Great N. R. Co.*, 88 Wash. 49, 152 Pac. 703.

An instruction which permitted the jury, in an action founded on the Federal Employers' Liability Act of 1906, to compare the negligence of an employer with that of an injured employee, and to render a verdict for the plaintiff if the negligence of the former was gross and that of the employee slight, was held in strict compliance with the act. *Philadelphia, B. & W. R. Co. v. Tucker*, 35 App. D. C. 123, L. R. A. 1915 C. 39, affirmed 220 U. S. 608, 55 L. ed. 607, 31 Sup. Ct. Rep. 725.

In an action based on the Federal Employers' Liability Act for injuries received by a section foreman as the result of the negligence of a fellow servant when the former was thrown from a slowly moving push-car on which he was standing, the modification by the court of an instruction requested by the defendant to the effect that the jury should find for the defendant, if satisfied that it was more hazardous for the plaintiff to stand than to sit upon such car, so as to state that from a verdict for the plaintiff there should be deducted an amount equal in proportion to that which his contributory negligence bore to the negligence of such fellow servant, was not prejudicial to the defendant, although open to criticism because not stating the true rule, when the defendant did not request a proper instruction. *Arizona E. R. Co. v. Bryan*, — Ariz. —, 157 Pac. 376.

The jury was correctly instructed, in an action under the Federal Employers' Liability Act, that the contributory negligence of an employee should diminish his damages "in proportion to his negligence as compared with the combined negligence of himself and the defendant." *Louisville & N. R. Co. v. Thomas*, — Ky. —, 185 S. W. 840.

In an action under the Federal Employers' Liability Act the jury should be instructed that where the causal negligence is attributable partly to the carrier and partly to the injured employee, he cannot recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both. *Blankenbaker v. St. Louis & S. F. R. Co.*, — Mo. —, 187 S. W. 840.

#### —Aider by Other Instructions.

An instruction, in an action under the Federal Employers' Liability Act, that the

plaintiff's recovery, if any, should be reduced "by such an amount as [the jury] find the negligence attributable to him bore in proportion to the negligence of the defendant company," when considered in connection with a further instruction that "if the negligence of the plaintiff was as great as the negligence of the defendant, there might be an equality of negligence, and therefore no substantial recovery," is not objectionable as permitting the plaintiff to recover one-half his damages if he were found twice as negligent as the defendant. *Penn. R. Co. v. Cole*, 131 C. C. A. 244, 214 Fed. 948.

An instruction that if an employee was guilty of contributory negligence it would not preclude a recovery under the Federal Employers' Liability Act, but that the amount of the verdict should be reduced in proportion to the amount of negligence attributable to the decedent, could not have misled the jury where they were also instructed that "the damages should be diminished in proportion to the decedent's negligence bears to the combined negligence of the deceased and the defendant." *St. Louis, I. M. & S. R. Co. v. Rodgers*, 118 Ark. 263, 176 S. W. 696.

An instruction, in an action under the Federal Employers' Liability Act, that if the plaintiff was guilty of negligence his recovery should be reduced in proportion to the amount of negligence attributable to him, was held not erroneous, when considered in connection with other instructions, since the jury could not have been misled by it. *St. Louis & S. F. R. Co. v. Brown*, — Okla. —, 144 Pac. 1075, affirmed 241 U. S. 223, 60 L. ed. —, 36 Sup. Ct. Rep. 602.

#### Erroneous Instructions.

An action based upon the Federal Employers' Liability Act should not be submitted under an instruction to the effect that, for the contributory negligence of the plaintiff, the jury should deduct from their findings such amount as they should think proper, without stating the rule of proportion specified in the statute as to contrasting the negligence of the injured employee with the total causal negligence as a means of ascertaining what proportion of the full damages should be excluded from the recovery. *Seaboard A. L. R. Co. v. Tilghman*, 237 U. S. 499, 59 L. ed. 1069, 35 Sup. Ct. Rep. 653, reversing 167 N. C. 163, 83 S. E. 315, 1090.

The correct rule of damages, in an action based on the Federal Employers' Liability Act, was not stated in an instruction to the effect that if an injured employee's negligence was less than that of the defendant, the amount of damages found against the latter should be compared with the amount of negligence attributable to the employee, and the latter

amount be set off against the sum found against the defendant, so as to discount the damages attributable to it in the ratio the lesser negligence of the employee bore to the greater negligence of the employer. *Penn. R. Co. v. Sheeley*, 137 C. C. A. 471, 221 Fed. 901.

An instruction, in an action under the Federal Employers' Liability Act, to the effect that if the negligence of the plaintiff was less than the negligence of the defendant, that the amount of the latter's negligence should be compared with the amount of negligence attributable to the plaintiff and the lesser amount set off against the sum found against the defendant, and the damages attributable to the defendant discounted in the ratio that the lesser negligence of the plaintiff bore to the greater negligence of the defendant, was held erroneous in an action under the Federal Employers' Liability Act, since it was probable that the jury did not make allowances for the plaintiff's negligence, as the statute requires. *Penn. Co. v. Sheeley*, 137 C. C. A. 471, 221 Fed. 901.

An instruction that, in an action under the Federal Employers' Liability Act, the plaintiff's damages must be reduced for his contributory negligence to the extent that it was found to have contributed to his injury, was erroneous. *Cincinnati, N. O. & T. P. R. Co. v. Goode*, 163 Ky. 60, 173 S. W. 329.

An instruction, in an action based on the Federal Employers' Liability Act, to the effect that if the plaintiff was guilty of contributory negligence the jury should by its verdict, state the amount of damages the plaintiff sustained, and also how much should be deducted therefrom for such negligence, was erroneous. *Cincinnati, N. O. & T. P. R. Co. v. Goode*, 163 Ky. 60, 173 S. W. 329.

An instruction that the plaintiff's recovery, under the Federal Employers' Liability Act, should be diminished for contributory negligence in proportion to the amount of negligence attributable to him, was erroneous. *Louisville & N. R. Co. v. Holloway*, 163 Ky. 125, 173 S. W. 343.

An instruction which permitted a recovery of diminished damages under the Federal Employers' Liability Act, where an injured employee was guilty of contributory negligence, even in the absence of negligence on the part of his employer, was erroneous. *Louisville & N. R. Co. v. Holloway*, 163 Ky. 125, 173 S. W. 343.

An instruction as to the diminution of the plaintiff's damages for contributory negligence in an action under the Federal Employers' Liability Act, where he was injured while between cars attempting to uncouple them when the automatic apparatus failed to work, was held erroneous, be-

cause not in accord with the rule laid down by the Supreme Court of the United States. *Nashville, C. & St. L. R. Co. v. Henry*, 158 Ky. 88, 164 S. W. 310.

An instruction that for the contributory negligence of the plaintiff the jury should diminish the damages in proportion to the amount of negligence attributable to him in causing or producing his injury, did not state the correct rule in an action under the Federal Employers' Liability Act, since it was not in harmony with that laid down by the Supreme Court of the United States. *Nashville, C. & St. L. R. Co. v. Banks*, 156 Ky. 609, 161 S. W. 554.

An instruction that under the Federal Employers' Liability Act contributory negligence would diminish the full damages in the proportion an employee's negligence bore to the negligence of the defendant, was erroneous. *Newkirk v. Pryor*, — Mo. App. —, 183 S. W. 682.

An instruction that if the plaintiff was guilty of contributory negligence, the jury should, in an action under the Federal Employers' Liability Act, diminish his damages "in proportion to the amount of negligence attributable to him, as compared with the negligence" attributable to the defendant, was erroneous, the true rule being that where the negligence causing an injury is partly attributable to the plaintiff and partly to his employer, the former shall not recover full damages, but only a proportionate amount which bears the same relation to the full amount as the negligence attributable to the carrier bears to the negligence attributable to both. *Cross v. Chicago, B. & Q. R. Co.*, — Mo. App. —, 177 S. W. 1127, S. C. second appeal — Mo. App. —, 186 S. W. 1130.

#### (i) Curing Omission to Instruct by Remittiture.

#### In General.

The failure to instruct the jury as to contributory negligence, in an action founded on the Federal Employers' Liability Act, was not prejudicial to the defendant where, on a motion for a new trial, the plaintiff, for his contributory negligence, remitted a substantial amount from his judgment. *Yazoo & M. V. R. Co. v. Wright*, 125 C. C. A. 25, 207 Fed. 281, affirming 197 Fed. 94, affirmed on other grounds 235 U. S. 376, 59 L. ed. 277, 35 Sup. Ct. Rep. 130.

#### 6. Damages.

##### (a) In General.

#### Form of Instructions.

The instruction as to the measure of damages in an action in a state court



founded on the Federal Employers' Liability Act should be that approved by the Supreme Court of the United States. *Cincinnati, N. O. & T. P. R. Co. v. Nolan*, 161 Ky. 205, 170 S. W. 650, S. C. 167 Ky. 11, 179 S. W. 1046, 10 N. C. C. A. 812.

#### **Amount of Recovery.**

An instruction, in an action based on the Federal Employers' Liability Act, that damages might be awarded not in excess of \$35,000 as to the jury might seem just and fair, will not be presumed prejudicial to the defendant where a verdict was rendered for \$25,000. *Chesapeake & O. R. Co. v. Carnahan*, 118 Va. 46, 86 S. E. 863, affirmed on other grounds 241 U. S. 241, 60 L. ed. —, 36 Sup. Ct. Rep. 594.

An instruction relating only to the issue of damages should not be given in an action under the Federal Employers' Liability Act where, if found by the jury, it would defeat a recovery by the plaintiff. *Lloyd v. Southern R. Co.*, 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489, affirmed on other grounds 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210.

#### **Failure of Employee to Care for Injuries.**

The defendant cannot predicate error on the failure of the court, in an action founded on the Federal Employers' Liability Act, to instruct as to the reduction of the plaintiff's damages because of his failure to properly care for himself after his injury, where an instruction to that effect was not requested. *Delano v. Roberts*, — Mo. App. —, 182 S. W. 771.

#### **(b) Personal Injuries.**

##### **In General.**

An instruction as to the measure of damages, in an action founded on the Federal Employers' Liability Act for injuries sustained by an employee, was held correct. *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

An instruction that the plaintiff was entitled to recover full damages under the Federal Employers' Liability Act for personal injuries if he was without fault or negligence, was not erroneous, although the doctrine of comparative negligence created by the act was not mentioned. *Carpenter v. Kansas City S. R. Co.*, 189 Mo. App. 164, 175 S. W. 234.

The words, "for injuries to his person," should have been omitted from an instruction, in an action predicated on the Federal Employers' Liability Act for the loss of both of an employee's hands, where the instruction permitted the jury to assess such damages as they might believe from

the evidence would fairly and reasonably compensate the plaintiff for "injuries to his person," for loss of time, physical and mental suffering, and permanent injury to his earning power. *Nashville, C. & St. L. R. Co. v. Banks*, 156 Ky. 609, 161 S. W. 554.

In an action under the Federal Employers' Liability Act for personal injuries, an instruction that such sum might be awarded as would reasonably compensate the plaintiff for physicians' and surgeons' bills necessarily incurred on account of his injuries, for reasonably necessary drug bills, for loss of time, for injury to his person, for physical and mental suffering and for permanent injury lessening his power to earn money, was erroneous. *Nashville, C. & St. L. R. Co. v. Henry*, 158 Ky. 88, 164 S. W. 310.

The words "diminution of" instead of "lessening" should be used in an instruction in an action under the Federal Employers' Liability Act for permanent injuries to an employee "lessening his power to earn money." *Nashville, C. & St. L. R. Co. v. Banks*, 156 Ky. 609, 161 S. W. 554.

An instruction in an action under the Federal Employers' Liability Act, permitting a recovery for loss of time and pain and suffering, together with such other sum as would reasonably compensate the plaintiff for the impairment of his earning power, because not limiting the recovery for the loss of earning power to the time when the lost time ended, did not permit the assessment of double damages, especially when the defendant did not request a more specific instruction. *Chesapeake & O. R. Co. v. Shaw*, 168 Ky. 537, 182 S. W. 653.

An instruction in an action under the Federal Employers' Liability Act, that if the jury found for the plaintiff they should award "such an amount of damages, not exceeding \$20,000," as would compensate him for his injury, held, as against a general objection, not to convey to the jury an intimation that a finding for such amount was justified, especially where the defendant did not call the attention of the trial court to the matter so as to permit a modification or an explanation of the instruction. *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914 C. 172.

An instruction was properly given, in an action founded on the Federal Employers' Liability Act for the loss of an eye, to the effect that the jury, if they found for the plaintiff, might allow him for such prospective suffering and loss of health, if any, as they might believe from all the evidence he sustained by his injury; since such instruction did not violate the rule requiring the court to instruct that only such damages could be allowed as were reasonably certain to result from an injury.

*Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419, 148 N. W. 145, affirmed on other grounds 241 U. S. 470, 60 L. ed. —, 36 Sup. Ct. Rep. 624.

An instruction, in an action under the Federal Employers' Liability Act, that in assessing damages for the loss of a leg, the jury might take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained, his pecuniary loss, the loss of his power and capacity for work and the effect upon his future, was not objectionable as permitting the jury to take into consideration possible future physical effects such as suffering, of which there was no evidence. *Chesapeake & O. R. Co. v. Carnahan*, 118 Va. 46, 86 S. E. 863, affirmed on other grounds 241 U. S. 241, 60 L. ed. —, 36 Sup. Ct. Rep. 594.

An instruction that the damages awarded to an injured employee, in an action under the Federal Employers' Liability Act, should be limited to a lump sum representing the present cash value of what his entire damages growing out of the reduction of his earning power, might be through the period of his permanent injury, if paid him in monthly installments throughout such time, was not prejudicial to the defendant, since to the effect that the amount awarded should be a sum which if placed at interest would be wholly consumed at the termination of the time for which damages were awarded. *Chesapeake & O. R. Co. v. Kornhoff*, 167 Ky. 353, 180 S. W. 523.

An instruction in an action based on the Federal Employers' Liability Act, to the effect that the jury, in assessing the plaintiff's damages, might take into consideration his pain and suffering, mental anguish, bodily injury, pecuniary loss, loss of power and capacity for work, and the effect upon his future, and award damages not exceeding the amount mentioned in his declaration, as to the jury might seem just and fair, is not open to the criticism that it permitted the consideration of speculative and remote consequences, where the jury was explicitly enjoined that there must be a proximate and causal relation between the damages and the negligence of the defendant. *Chesapeake & O. R. Co. v. Carnahan*, 241 U. S. 241, 60 L. ed. —, 36 Sup. Ct. Rep. 594, affirming 118 Va. 46, 86 S. E. 863.

An instruction to the jury to allow such damages as would fully compensate an employee for mental and physical suffering caused by an injury is not rendered erroneous, in an action predicated on the Federal Employers' Liability Act, by the addition of the words "and for the personal inconvenience" resulting from his injuries. *Arizona E. R. Co. v. Bryan*, — Ariz. —, 157 Pac. 376.

Notwithstanding that in an action based on the Federal Employers' Liability Act for an injury resulting in stammering and stuttering, humiliation is a proper element of damages, there was no prejudicial error in refusing a long instruction containing such element, where the general charge fairly presented the rule as to general damages. *Burke v. Chicago & N. W. R. Co.*, 131 Minn. 209, 154 N. W. 960.

The jury was correctly instructed, in an action under the Federal Employers' Liability Act for injuries to the health of an employee from the inhalation of mist or spray from a paint sprayer or "gun," that in estimating damages they should consider the plaintiff's condition and health before his injury as compared with his present condition in consequence of his injuries, whether the same were of a permanent nature, how far they were calculated to disable him from engaging in such business pursuits for which, but for his injury, he would have been qualified, also the physical mental suffering to which his injury subjected him, and to determine what would be fair and just compensation for his injuries, after deducting therefrom the amount paid him by the defendant by way of relief. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

#### Probable Promotions.

The refusal to give an instruction for the defendant, in an action under the Federal Employers' Liability Act, to the effect that the jury should not take into consideration the plaintiff's prospects of increased earnings by reason of promotions had he not been hurt, was not erroneous, where there was no evidence to justify the giving of such an instruction. *Chesapeake & O. R. Co. v. Carnahan*, 118 Va. 46, 86 S. E. 863, affirmed on other grounds 241 U. S. 241, 60 L. ed. —, 36 Sup. Ct. Rep. 594.

An instruction, in an action based on the Federal Employers' Liability Act, to the effect that in assessing damages for the loss of a leg the jury might take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, the loss of power and capacity for work and its effect upon his future, was not objectionable as permitting the jury to consider the possibility of his promotion (of which there was no evidence) or speculative profits from collateral undertakings which he might have embarked upon but for his injury, where the jury was further instructed that probable promotions or increase of his earning capacity should not be taken into consideration. *Chesapeake & O. R. Co. v. Carnahan*, 118 Va. 46, 86 S. E. 863, affirmed on other grounds 241 U. S. 241, 60 L. ed. —, 36 Sup. Ct. Rep. 594.

**(c) Contributory Negligence.**

Instructions as to diminution of damages for contributory negligence, see *supra* XIX, E, 5, (h).

**(d) Death.****In General.**

An instruction that the plaintiff, in an action under the Federal Employers' Liability Act for the death of a switchman, would be entitled to recover, if anything, the present value of the net earnings of the decedent based on his expectancy of life, was erroneous. *Kenney v. Seaboard A. L. R. Co.*, 165 N. C. 99, 80 S. E. 1078, affirmed on other grounds 240 U. S. 489, 60 L. ed. —, 36 Sup. Ct. Rep. 458.

The instructions as to damages for wrongful death in an action under the Federal Employers' Liability Act, should be limited to the pecuniary loss sustained by the decedent's surviving beneficiaries. *Culp v. Virginian R. Co.*, — W. Va. —, 87 S. E. 187.

An instruction that the amount awarded for wrongful death in an action under the Federal Employers' Liability Act, should be such damages as the decedent's widow sustained, was erroneous, where contributory negligence was shown. *Culp v. Virginian R. Co.*, — W. Va. —, 87 S. E. 187.

In an action under the Federal Employers' Liability Act for the suffering and death of an employee, the jury was erroneously instructed that the plaintiff could not recover for pain and suffering of the decedent prior to his death, nor for his loss of time, doctor's bills, or other damage or expense by him prior to his death, for which he could have sued had he lived. *Brooks v. Yazoo & M. V. R. Co.*, — Miss. —, 72 So. 227.

**For Benefit of Widow and Children.****—Widow.**

An instruction that the jury might, in an action under the Federal Employers' Liability Act, draw upon their experiences as men, and measure as far as they could, what it would have been worth to the widow in dollars and cents, to have had the care and advice of her husband during her life had he lived, constitutes reversible error. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 517, 33 Sup. Ct. Rep. 193, Ann. Cas. 1914 C. 176, reversing 189 Fed. 495.

It is reversible error to give an instruction in an action under the Federal Employers' Liability Act, to the effect that a widow was entitled to recover, in addition to her loss of support, for the deprivation of the companionship and association of her husband, where such thought was repeated and the loss of her home life com-

mented on in a way to indicate its importance, and the amount awarded would at the legal rate of interest purchase an annuity of nearly the amount the deceased could have devoted to the support of his family exclusive of his own maintenance. *New York, C. & St. L. R. Co. v. Niebel*, 131 C. C. A. 248, 214 Fed. 952.

An instruction that, in an action under the Federal Employers' Liability Act for wrongful death, a widow should be awarded such damages as will fairly and reasonably compensate her for the loss of pecuniary benefits she might reasonably have received had her husband not been killed, was held, in connection with an instruction as to the diminution of damages for contributory negligence, to correctly state the law. *Louisville & N. R. Co. v. Holloway*, 168 Ky. 262, 181 S. W. 1126, S. C. 163 Ky. 125, 173 S. W. 343.

An instruction was correctly given, in an action under the Federal Employers' Liability Act for the benefit of a widow, to the effect that the damages awarded should be such sum as would fairly and reasonably compensate her for the pecuniary loss sustained by reason of the death of her husband, taking into consideration the latter's age, habits, business ability, earning capacity and probable duration of life, also for such other pecuniary loss sustained by the widow by the deprivation of support and maintenance or pecuniary advantage she would have received but for her husband's death, the award being limited to the period of the expectancy of both their lives. *Chesapeake & O. R. Co. v. Dwyer*, 162 Ky. 427, 172 S. W. 918, reversed 241 U. S. 494, 60 L. ed. —, 36 Sup. Ct. Rep. 633.

**—Widow and Children.**

It is reversible error to instruct the jury in an action under the Federal Employers' Liability Act for the benefit of the widow and infant children of a deceased railway employee, that their pecuniary injury would be much greater than if the beneficiaries were adults or dependent next of kin. *Norfolk & W. R. Co. v. Holbrook*, 235 U. S. 625, 59 L. ed. 394, 35 Sup. Ct. Rep. 143, 7 N. C. C. A. 814, reversing 131 C. C. A. 621, 666, 215 Fed. 687. 1007,

An instruction was erroneously given in an action based on the Federal Employers' Liability Act, although in accordance with the law of the state in which the action was brought, to the effect that the jury should award such a sum as they found to be a fair and just compensation for the pecuniary loss sustained by a widow and child from the death of an employee, taking into consideration the decedent's age, health, habits, occupation, expectancy of life, as well as his earning power and rate of wages, together with his

mental and physical disposition to labor, and the probable diminution of that ability with the lapse of time, deducting therefrom his personal expenses, and reducing the remainder to its present value. *Kansas City S. R. Co. v. Leslie*, 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844, reversing 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915 B. 834.

An instruction in an action under the Federal Employers' Liability Act for the benefit of the widow and minor children of a deceased employee, that the jury might consider as an element of damages "the care, attention, instruction and training, if any, one of the decedent's disposition and capacity as shown by the evidence might reasonably be expected to give his wife and children, which was lost to them by his death," was not erroneous, where a verdict of but \$2,000 was rendered, since the jury could not have understood that the instruction and training mentioned did not refer to the children. *St. Louis, I. M. & S. R. Co. v. Rodgers*, 118 Ark. 263, 176 S. W. 696.

An instruction was improperly given in an action under the Federal Employers' Liability Act, permitting a recovery for the benefit of a widow and child of a deceased railway employee, not only for the pecuniary loss sustained by them, but also for the excess of the decedent's earnings during his expectancy of life. *Southern R. Co. v. Hill*, 139 Ga. 549, 77 S. E. 803.

An instruction that the damages in an action under the Federal Employers' Liability Act for the benefit of a widow and children, is such sum as would reasonably compensate them for the pecuniary loss sustained by the death of the decedent, considering his age, habits, abilities, earning capacity, probable duration of life, together with the loss by his family of their support and maintenance, as well as other pecuniary advantages which they would have derived from the continuance of the decedent's life, was not erroneous. *Chesapeake & O. R. Co. v. Kelly*, 160 Ky. 296, 169 S. W. 736, reversed 241 U. S. 494, 60 L. ed. —, 36 Sup. Ct. Rep. 633.

An instruction that for the death of a husband and father the jury should allow a widow and child such sum as they found and believed would fairly and reasonably compensate the estate of the decedent, was reversible error, in an action founded on the Federal Employers' Liability Act, since the correct measure of damages was such sum as would compensate the survivors for the pecuniary loss resulting from the decedent's death. *Chesapeake & O. R. Co. v. Dwyer*, 157 Ky. 590, 163 S. W. 752, reversed 241 U. S. 494, 60 L. ed. —, 36 Sup. Ct. Rep. 633.

An instruction was not erroneous, in an action under the Federal Employers' Lia-

bility Act for the benefit of the widow and child of a deceased employee, when to the effect that "by pecuniary aid is meant not only money, but everything that can be valued in money," including the reasonable pecuniary value of the nurture, care and admonition which the jury believe from the evidence that the child would have received during minority from its father had he lived, but excluding any allowance for sorrow, grief, loss of society, companionship or affection. *St. Louis, S. F. & T. R. Co. v. Geer*, — Tex. Civ. App. —, 149 S. W. 1178.

An instruction in an action under the Federal Employers' Liability Act, to the effect that in determining the worth of a deceased employee to his family his actual earning power should be considered and "his power to earn for the length of time he may be expected to live," sufficiently submits to the jury the contingency of illness, or loss or impairment of earning power before his death, as well as the possibility of his death before the expiration of his expectancy of life. *White v. Central Vt. R. Co.*, 87 Vt. 330, 89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, Ann. Cas. 1916 B. 252.

It was reversible error to instruct the jury in an action for the benefit of a widow and child under the Federal Employers' Liability Act, that in such case the law has no fixed standard by which to ascertain their loss, and that the sole question for the jury was what loss did they sustain. *Fogarty v. Northern P. R. Co.*, 74 Wash. 397, 133 Pac. 609, L. R. A. 1916 C. 800, S. C. 85 Wash. 90, 147 Pac. 652, L. R. A. 1916 C. 803.

An instruction was correctly given, in an action founded on the Federal Employers' Liability Act for the benefit of a widow and dependent child, to the effect that the jury should include in their award of damages the value of the "support and protection" which the survivors would have received during the time the decedent would probably have lived but for the accident, since the word "protection" was evidently used in the sense of pecuniary protection from want or penury. *Sweet v. Chicago & N. W. R. Co.*, 157 Wis. 400, 147 N. W. 1054.

#### — Deserted Widow and Children.

An instruction that it was the legal duty of a husband in his lifetime to care for and support his wife and child, even though they lived apart, and that such duty could not be avoided by any voluntary act on his part, and that there could be a recovery under the Federal Employers' Liability Act for his death for the benefit of his widow and child irrespective of whether he contributed anything to

their support, was erroneous, since it fixed a legal duty independent of pecuniary benefits as a means by which damages should be established. *Fogarty v. Northern P. R. Co.*, 74 Wash. 397, 133 Pac. 609, L. R. A. 1916 C. 800, S. C. 85 Wash. 90, 147 Pac. 652, L. R. A. 1916 C. 803.

#### — Adult Children.

An instruction to the effect that the adult married children of a deceased employee might expect assistance by way of support from him during their probable illnesses, was held not prejudicial to the defendant in an action based on the Federal Employers' Liability Act. *Thornton v. Seaboard A. L. R. Co.*, 98 S. C. 348, 82 S. E. 433, reversed without opinion, 238 U. S. 606, 59 L. ed. 1485, 35 Sup. Ct. Rep. 601.

#### — Dependent Children.

An instruction in an action under the Federal Employers' Liability Act as to the right to recover for the benefit of the dependent children of a deceased employee, was held not prejudicial to the defendant because of references to the rights of an adult married daughter, where the court explicitly limited the plaintiff's right of recovery to the loss of financial support sustained by those dependent on the decedent. *Thornton v. Seaboard A. L. R. Co.*, 98 S. C. 348, 82 S. E. 433, reversed without opinion, 238 U. S. 606, 59 L. ed. 1485, 35 Sup. Ct. Rep. 601.

An instruction that in awarding damages for the benefit of dependent children in an action under the Federal Employers' Liability Act, the amount must of necessity be left to the good sense and sound judgment of the jury, taking into consideration all of the facts and circumstances that in any way tend to show the pecuniary value of the decedent's life to his children, his capacity to earn money and accumulate property, his inclination to provide support for his children, his health, probable duration of life, and the ages, sex and condition of the children, as well as every other fact and circumstance that in any way show or established the just measure of the value of the decedent's life, and that the jury should be dispassionate in assessing damages and should act with neither miserliness nor reckless extravagance, but should assess such sum as their good judgment told them would provide the means of caring for, educating and properly training the children, was held reversible error. *Kansas City M. & O. R. Co. v. Roe*, — Okla. —, 150 Pac. 1035.

#### — Minor Children.

Where there was testimony in an action under the Federal Employers' Liability Act for the benefit of the minor children of a deceased railway employee, as to the

interest he took in the family, the jury may be instructed that they may take into consideration the care, attention, instructions, training, advice and guidance which the evidence showed the decedent might reasonably have been expected to give his children during their minority, and to include the pecuniary value thereof in the damages awarded. *Norfolk & W. R. Co. v. Holbrook*, 235 U. S. 625, 59 L. ed. 394, 35 Sup. Ct. Rep. 143, 7 N. C. C. A. 814, reversing 131 C. C. A. 621, 666, 215 Fed. 687, 1007.

An instruction in an action founded on the Federal Employers' Liability Act, to the effect that the jury might take into consideration in determining the pecuniary loss sustained by the children of a deceased employee, the care, instructions and training which the evidence showed that one of his disposition and character might be reasonably expected to give his children, was not erroneous. *St. Louis & S. F. R. Co. v. Duke*, 112 C. C. A. 564, 192 Fed. 306, affirming 172 Fed. 684.

In the absence of proof of the nature of a decedent's customary contributions to the support of his wife and child, or to indicate what they might have reasonably expected from him in the way of support, or as to the personal quality of the decedent, or the interest taken by him in his family, there is no occasion, in an action based on the Federal Employers' Liability Act, to instruct the jury that they may take into consideration the care, counsel, training and education the child might reasonably have expected to receive from its father. *Nashville, C. & St. L. R. Co. v. Anderson*, — Tenn. —, 185 S. W. 677.

#### For Benefit of Parents.

##### — In General.

An instruction in an action under the Federal Employers' Liability Act for the benefit of the surviving parents of a deceased employee, that the measure of damages was the present worth of the amount which it was reasonably probable the decedent would have contributed to the support of his parents during the whole expectancy of life in proportion to the amount he was contributing, if any, at the time of his death, not exceeding his expectancy of life, was not erroneous. *Louisville & N. R. Co. v. Fleming*, — Ala. —, 69 So. 125.

An instruction, in an action based on the Federal Employers' Liability Act for the benefit of the surviving parents of a deceased employee, that the measure of damages was the present worth of the amount which it was reasonably probable the decedent would have contributed to the support of his parents during the whole expectancy of life in proportion to the amount he was contributing, if any, at the time of his death, not exceeding his ex-

pectancy of life, and that the jury might take into consideration the increasing wants of the parents by reason of advancing years, and the increasing ability of the son to supply those wants, was held sustained by the evidence. *Louisville & N. R. Co. v. Fleming*, — Ala. —, 69 So. 125.

It was reversible error to instruct the jury, in an action under the Federal Employers' Liability Act for the benefit of a parent that the measure of damages was the loss of the life of the decedent, estimated at the present worth of his net income for the period of his expectancy, after deducting the cost of living and expenditures from the gross income and ascertaining the present worth of the accumulations from the net income. *Dooley v. Seaboard A. L. R. Co.*, 163 N. C. 454, 79 S. E. 970.

#### (c) Apportionment.

Duty of jury to apportion damages among beneficiaries, see *infra* XIX, I, 4.

#### In General.

An instruction as to the duty of the jury to apportion the damages among the several beneficiaries should be given in an action under the Federal Employers' Liability Act. *Louisville & N. R. Co. v. Stewart*, 156 Ky. 550, 161 S. W. 557, S. C. 163 Ky. 823, 174 S. W. 744, affirmed on other grounds 241 U. S. 261, 60 L. ed. —, 36 Sup. Ct. Rep. 586.

It was a reversible error to instruct the jury to assess the damages in a single sum for the benefit of a widow and child in an action under the Federal Employers' Liability Act. *Fogarty v. Northern P. R. Co.*, 74 Wash. 397, 133 Pac. 609, L. R. A. 1916 C. 800, S. C. 85 Wash. 90, 174 Pac. 652, L. R. A. 1916 C. 803.

### 7. Defective Instrumentalities.

#### Engines and Cars.

##### — Engine Leaking Steam.

An instruction to the effect that if the jury found that the proximate cause of the death of a brakeman in a rear end collision was not a defect in a locomotive which permitted steam to escape from the cylinder in such quantities as to prevent switch-lights and the signals of the preceding train from being seen, the question of such defect was eliminated from the case, was properly refused in an action under the Federal Employers' Liability Act, since the condition of the engine was to be considered in determining whether the carrier was negligent in failing to notify the crew of the preceding train that it was closely followed by a faster one, and in not giving orders reasonably necessary to prevent the collision. *White v. Central Vt. R. Co.*, 87 Vt. 330,

89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, Ann. Cas. 1916 B. 252.

##### — Inspection.

In an action under the Federal Employers' Liability Act for the death of a brakeman who was killed by the breaking of the sidebar of an engine on which he was riding, it was not error to instruct the jury as to lack of inspection as a ground of negligence, although the evidence affirmatively showed an inspection on the day before the accident, where the condition of the engine was such that its defects should have been discovered. *McCullough v. Chicago, R. I. & P. R. Co.*, 160 Ia. 524, 142 N. W. 67, 47 L. R. A. (N. S.) 23.

#### Motor Cars.

An instruction that a carrier was not under any duty to furnish a self-starter for a motor car provided for track hands was properly refused in an action under the Federal Employers' Liability Act for injuries sustained by an employee while pushing a car to start the motor, since the question whether the defendant exercised due care was for the jury. *Chicago, R. I. & G. R. Co. v. Cosio*, — Tex. Civ. App. —, 182 S. W. 83.

#### Switches.

An instruction, in an action founded on the Federal Employers' Liability Act for the death of an engineer by the derailment of a train at a switch, was held not to impose liability on the defendant in the absence of negligence on the latter's part in failing to inspect and discover the defect, merely because the switch was defective. *Gulf C. & S. F. R. Co. v. McGinnis*, — Tex. Civ. App. —, 147 S. W. 1188, reversed on other grounds 228 U. S. 173 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806.

### 8. Due Care.

#### In General.

The jury was erroneously instructed in an action based on the Federal Employers' Liability Act, to the effect that the care required of a carrier and its employees in the particular in which they were charged with negligence, was ordinary care, such as a prudent railway company would exercise through its employees under the same or similar circumstances. *Southern R. Co. v. Hill*, 139 Ga. 549, 77 S. E. 803.

In an action founded on the Federal Employers' Liability Act for the death of a brakeman in a rear end collision at night, the jury was correctly instructed that it was his duty to protect his train, when losing time, against a following train, with fuses and torpedoes, if as a prudent

and careful person, he knew or should have known that his train was liable to be overtaken by the second train. *White v. Central Vt. R. Co.*, 87 Vt. 330; 89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, Ann. Cas. 1916 B. 252.

The jury was correctly instructed in an action under the Federal Employers' Liability Act for the death of an engineer in a collision, to the effect that it was his duty to use every reasonable effort at his command to stop his train and to protect himself if he could do so by the exercise of ordinary care after he was warned of or given signals indicating the presence of the other train on the track, and that his failure to do so amounted to contributory negligence. *Louisville & N. R. Co. v. Holloway*, 163 Ky. 125, 173 S. W. 343, S. C. 168 Ky. 262, 181 S. W. 1126.

Where an employee was injured through a negligent condition created by a co-employee, and the jury in an action under the Federal Employers' Liability Act, was instructed to the effect that if the latter failed to exercise such ordinary and reasonable care as a prudent person would have used under like circumstances, the defendant would be answerable, was not prejudicial to the defendant because not presenting to the jury the plaintiff's knowledge of the situation, where the defendant did not request an instruction on the subject. *Illinois C. R. Co. v. Skaggs*, 240 U. S. 66, — L. ed. —, 36 Sup. Ct. Rep. 249, affirming 125 Minn. 532, 147 N. W. 1135, S. C. 124 Minn. 503, 145 N. W. 381.

## 9. Evidence.

### (a) In General

#### Emphasizing Importance of Testimony.

In an action under the Federal Employers' Liability Act for the death of an engineer as the result of a boiler explosion, due to its alleged scaly and worn condition, where a witness testified that a large piece of scale picked up near the scene of the explosion fitted into the curve of the crown sheets of five of the defendant's locomotives, an instruction that such testimony should be disregarded by the jury unless they believed that the fireboxes of such engines were of the same shape as that of the exploded boiler, improperly emphasized and called attention to the importance of such testimony. *Dungan v. St. Louis & S. F. R. Co.*, 178 Mo. App. 164, 165 S. W. 1116.

#### Interest of Witness.

In an action under the Federal Employers' Liability Act, an instruction was not erroneous when to the effect that an in-

jured employee had an interest in the outcome of the suit of such a character as to require the jury to give due consideration to such fact and to scrutinize his testimony with care, and when this was done, if they should conclude that he had told the truth, to give his testimony the same weight as that of any other credible witness. *Ferbee v. Norfolk & S. R. Co.*, 167 N. C. 290, 83 S. E. 360, affirmed on other grounds 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781.

### (b) Presumptions and Burden of Proof.

#### Presumptions.

##### —Negligence.

The refusal to instruct the jury in an action under the Federal Employers' Liability Act, that there was no presumption that an employee was killed as the result of the defendant's negligence, does not raise the question whether the jury was likely to find negligence from the mere happening of the accident. *Ft. Worth & D. C. R. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279.

#### Burden of Proof.

##### —In General.

An instruction in an action founded on the Federal Employers' Liability Act of 1906, as to the necessity of showing that a railway employee was killed by a passing train, as alleged, held sufficient. *Philadelphia & W. R. Co. v. Tucker*, 35 App. D. C. 123, L. R. A. 1915 C. 39, affirmed 220 U. S. 608, 55 L. ed. 607, 31 Sup. Ct. Rep. 725.

##### —Shifting.

The jury was erroneously instructed, in an action based on the Federal Employers' Liability Act, to the effect that in the first instance the burden of proof was on the plaintiff to show that he was injured and damaged as set out in his declaration, and that thereupon the burden was upon the defendant to show that it used ordinary care and diligence to prevent the injury, or that the plaintiff by the exercise of ordinary and reasonable care could have prevented injury to himself, and that if it showed either, the plaintiff could not recover, but if it showed neither and the plaintiff was injured and damaged as he contended, he could recover. *Alabama G. S. R. Co. v. Tidwell*, — Ga. —, 88 S. E. 939.

##### —Employment in Interstate Commerce.

The jury was correctly instructed, in an action based on the Federal Employers' Liability Act, that the burden was on the plaintiff to establish by a preponderance of evidence that he was injured while engaged in interstate commerce in the employment of the defendant, and that his in-

jury was caused by the latter's negligence. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

#### —Negligence of Defendant.

In an action under the Federal Employers' Liability Act the jury was correctly instructed that the burden was upon the plaintiff to establish, by a preponderance of evidence, that he was injured in whole or in part by the negligence of the defendant; and that in the case at bar the plaintiff must show by a preponderance of evidence that the failure of the defendant to provide him with a nose guard or respirator for use while operating a paint sprayer or "gun," was negligence, and that the plaintiff's health was injured in consequence thereof. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

#### —Contributory Negligence.

When the court instructs the jury that the plaintiff was guilty of contributory negligence, no error prejudicial to the defendant, in an action based on the Federal Employers' Liability Act, was committed by giving another instruction to the effect that the burden was upon the latter to show such negligence. *Barker v. Kansas City, M. & O. R. Co.*, 88 Kan. 767, 129 Pac. 1151, 43 L. R. A. (N. S.) 1121.

Where the complaint, in an action for personal injuries, was drawn with a two-fold aspect, one under the common law in the event that the Federal Employers' Liability Act did not control, there was no inconsistency between an instruction placing on the plaintiff the burden of showing the absence of contributory negligence in order to recover at common law, and a further instruction that if the Federal law controlled such negligence was no defense and that the plaintiff was not required to show his freedom therefrom. *Hubert v. New York, N. H. & H. R. Co.*, — Conn. —, 96 Atl. 967.

#### —Defendant's Knowledge of Defects.

In an action based on the Federal Employers' Liability Act for injuries received by an engineer from a defective ash pan lever while he was inspecting a locomotive just from the repair shop, preparatory to making a trial run, the jury was correctly instructed that the plaintiff must show by a preponderance of the evidence, that the defendant knew or should have known from a reasonable inspection, of the existence of such defect. *Lloyd v. Southern R. Co.*, 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 163 N. C. 485, 78 S. E. 489, affirmed on other grounds 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210.

#### —Dependency.

An instruction in an action under the Federal Employers' Liability Act for the

benefit of the sole surviving parent of a deceased minor section hand, that the plaintiff had the burden of satisfying the jury that his intestate, after arriving at majority, would have continued to contribute to his father's support, as well as of showing the amount of such contributions, was erroneous, since the Federal act does not require such accurate or even approximate proof of damages. *Raines v. Southern R. Co.*, 169 N. C. 189, 85 S. E. 294.

#### —Death Result of Injury Not Pledged.

Where the evidence, in an action founded on the Federal Employers' Liability Act, disclosed that an employee sustained an injury on the day preceding the injury which was alleged as the cause of his death, the jury could not have been misled by an instruction which placed on the defendant the burden of showing that the previous injury and not that alleged was the cause of his death. *Illinois C. R. Co. v. Porter*, 125 C. C. A. 55, 207 Fed. 311.

#### —Preponderance.

An instruction that the jury must believe that the plaintiff has established the issues by a preponderance of the evidence before they can find in his favor, was properly refused in an action under the Federal Employers' Liability Act. *Louisville & N. R. Co. v. Stewart*, 163 Ky. 823, 174 S. W. 744, S. C. 156 Ky. 550, 161 S. W. 557, 157 Ky. 642, 163 S. W. 755, affirmed on other grounds 241 U. S. 261, 60 L. ed. —, 36 Sup. Ct. Rep. 586.

A requested instruction that the jury could not find for the plaintiff in an action under the Federal Employers' Liability Act, unless they believed from a preponderance of the evidence that his theory of the case in his petition was true, was properly denied. *Louisville & N. R. Co. v. Winkler*, 162 Ky. 843, 173 S. W. 151, 9 N. C. C. A. 146.

#### (c) Negligence.

##### Direct or Circumstantial Evidence.

In an action founded on the Federal Employers' Liability Act an instruction that a fact might be established by direct or circumstantial evidence was held not without support in the evidence, in view of testimony showing that an unusually violent jolt of a train caused the plaintiff's injury. *Alabama G. S. R. Co. v. Tidwell*, — Ga. —, 88 S. E. 939.

##### Happening of Accident as Evidence of Negligence.

##### —Conclusive Evidence.

An instruction in an action under the Federal Employers' Liability Act for in-



juries received by an engineer from the bursting of a water gauge glass which did not have a proper guard glass, to the effect that its absence was conclusive evidence of negligence, was erroneous. *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, L. R. A. 1915 C. 1, Ann. Cas. 1915 B. 475, 8 N. C. C. A. 834, reversing 162 N. C. 424, 78 S. E. 494.

#### — Prima Facie Evidence.

In an action based on the Federal Employers' Liability Act for the death of a fireman who was killed by the falling of his engine through a burning bridge the old rotten timbers of which were set on fire by sparks from another engine, an instruction to the effect that the injury of an employee by reason of defective instrumentalities was prima facie evidence of the negligence of his employer, and that the latter assumed the burden of showing that due care was exercised in providing such instrumentalities, was not prejudicial to the defendant, where other portions of the charge placed on the plaintiff throughout the action the burden of proving, in its strict sense, the negligence of the employer. *Southern R. Co. v. Bennett*, 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566, 10 N. C. C. A. 853, affirming 98 S. C. 42, 79 S. E. 710.

An instruction that if an employee's injury was caused by a moving train it constituted prima facie evidence of the negligence of a carrier, was held erroneous in an action under the Federal Employers' Liability Act, although such instruction was based on a state statute providing that in an action against a carrier proof that the plaintiff's injury was due to a defect should be prima facie evidence of negligence. *Kansas City S. R. Co. v. Cook*, 100 Ark. 467, 140 S. W. 579.

#### (d) Weight and Sufficiency.

##### In General.

An instruction in an action under the Federal Employers' Liability Act, that expert witnesses who testified for the plaintiff "were naturally inclined to view the circumstances that make for the plaintiff's side in a favorable light and contrary circumstances in an unfavorable light," was properly refused, since it expresses an opinion on the weight of the evidence. *Ferbee v. Norfolk & S. R. Co.*, 167 N. C. 290, 83 S. E. 360, affirmed on other grounds 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781.

In an action based on the Federal Employers' Liability Act for the death of a brakeman who at night was thrown from the top of a box car when it was stopped with unusual and unnecessary violence, an instruction which asked the jury to find

whether the jerk of the train was due to the negligence of the defendant, was not upon the weight of the evidence. *Ft. Worth & D. C. R. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279.

In an action under the Federal Employers' Liability Act for injuries sustained by a switchman from the movement of a train while he was between cars adjusting a defective coupler, a requested instruction to the effect that the testimony of a car inspector, who had no recollection of the car in question other than as shown by his records, that he did not discover any defect when he examined said car, should be given the same consideration, other things being equal between witnesses, as positive testimony of the defect, was properly refused, where the general instructions correctly stated the law as to the weight of the testimony and the credibility of witnesses. *Grand Trunk W. R. Co. v. Lindsay*, 120 C. C. A. 166, 301 Fed. 836, affirmed 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914 C. 168.

#### Uncorroborated Testimony.

The failure to instruct, in an action under the Federal Employers' Liability Act, as to the weight to be given to the uncorroborated testimony of the plaintiff as to the speed of a freight train from which he was thrown by an alleged violent and unnecessary jerk, where his evidence was positively contradicted by three other trainmen, does not require a reversal of a judgment for the plaintiff, when the jury was specifically told that the plaintiff's testimony as to the speed of the train was but an expression of opinion in which he was not corroborated, and the attention of the jury was called to the testimony of three trainmen that the train was moving less than nine miles an hour, since the defendant should have requested a fuller instruction if one was desired. *Hartman v. Western Md. R. Co.*, 246 Pa. 460, 92 Atl. 698.

#### 10. Warning of Danger.

##### Approach of Engine or Train.

It was held that there was no prejudicial error in the giving or refusing of instructions in an action founded on the Federal Employers' Liability Act for the death of an engineer who, while on his way through a railway yard to his engine in a cloud of steam and smoke, was struck by an engine running backward at an excessive speed, without lookout, warning or signal. *Huxoll v. Union P. R. Co.*, 99 Neb. 170, 155 N. W. 900.

An instruction as to the duty of the defendant to give warning to an engineer, who was killed in a collision with a work train, of its presence on a main track, and

as to the defendant's negligence in failing to do so, was held correct in an action based on the Federal Employers' Liability act. *Louisville & N. R. Co. v. Holloway*, 163 Ky. 125, 173 S. W. 343, S. C. 168 Ky. 262, 181 S. W. 1126.

In an action under the Federal Employers' Liability Act for injuries sustained by an employee who, while shoveling ashes from an ash pit, was struck by a switch engine, an instruction was rightfully refused when to the effect that the plaintiff could not recover if the bell was rung and at least one person was on the engine maintaining a lookout as it approached and entered upon the ash pit, since the instruction did not require the ringing of the bell for a sufficient time to allow the plaintiff an opportunity to escape, nor declare that when the lookout saw the plaintiff's peril it was his duty to take action to save him from harm. *Cincinnati, N. O. & T. P. R. Co. v. Clarke*, — Ky. —, 185 S. W. 94.

#### Unlighted Headlight.

Where an engineer, who had orders to tow a disabled engine to another station, while on the ground beside his engine at night, cooling a hot box, was injured by the negligent movement of the disabled engine when its electric headlight was not burning, an instruction was properly refused, in an action under the Federal Employers' Liability Act, to the effect that as a matter of law it was not negligence to move the disabled engine without its headlight burning, since such instruction did not include the question whether the engine had sufficient steam to operate the dynamo to supply electricity for the headlight. *Pfeiffer v. Oregon, W. R. & N. Co.*, 74 Ore. 307, 144 Pac. 762, 7 N. C. C. A. 685, writ of error dismissed 239 U. S. 658, — L. ed. —, 36 Sup. Ct. Rep. 222.

#### Kicked Cars.

The correctness of instructions determined in an action under the Federal Employers' Liability Act for the death of a section man, who, while working in a railway yard, went, pursuant to orders given the section crew by their foreman, between the ends of two box cars to urinate, and was killed when a cut of cars, without a brakeman on them to control their speed or give warning of their approach, was violently kicked against the cars between which the decedent was standing. *Louisville & N. R. Co. v. Johnson*, 161 Ky 824, 171 S. W. 847.

An instruction to find for the defendant in an action under the Federal Employers' Liability Act, unless the jury was reasonably satisfied from the evidence that it was the duty of a switching crew to give the plaintiff notice that cars were about to be kicked on the track on which he was stand-

ing, was properly refused, since it did not take into consideration any duty on the part of the crew to look out for obstructions on the track or to give warning after discovering the plaintiff's danger. *Alabama G. S. R. Co. v. Skotzy*, — Ala. —, 71 So. 335.

### 11. Interstate Commerce.

#### In General.

The jury was correctly instructed, in an action under the Federal Employers' Liability Act for the death of a brakeman who jumped from a moving freight train at a station and was killed as the alleged result of defects in a platform, to the effect that before the plaintiff could recover it must appear that the decedent did not assume any of the risks and dangers that resulted in his death, and that the disaster was caused by defective planks in the platform while the decedent was assisting the defendant in carrying on interstate traffic between one or more states and in maintaining and operating an interstate railway which extended continuously from one state to another, including that wherein the accident occurred, and on which the defendant was engaged in carrying on interstate commerce. *St. Louis & S. F. R. Co. v. Clampitt*, — Okla. —, 154 Pac. 40.

Where an allegation of the defendant's answer, in an action for injuries to a railway employee, that if the former was liable it was under the Federal Employers' Liability Act, stated a proposition of law only and did not controvert any allegation of the plaintiff's petition and thereby raise an issue, it was not error for the court to fail to mention such allegation in its preliminary statement to the jury, when there was no allegation in the answer that at the time of the plaintiff's injury the defendant was engaged in interstate commerce, the defendant merely denying that the plaintiff was in its employ or under its direction or control. *Wichita F. & N. W. R. Co. v. Puckett*, — Okla. —, 157 Pac. 112.

The jury was correctly instructed, in an action under the Federal Employers' Liability Act, to the effect that in order for the plaintiff to recover for an injury to his health from the use of a paint "gun," he must prove by the greater weight of evidence, that at the time of his injury he was employed by the defendant in the performance of some work which had some real or substantial relation to the movement of interstate traffic. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

#### Inspecting Engine for Trial Trip.

An instruction requested by the defendant in an action based on the Federal Employers' Liability Act, that the facts did

not show that the plaintiff was engaged in interstate commerce at the time of his injury, was rightfully refused, where it appeared that he was an engineer in the employ of an interstate carrier, and that he was injured by a defect in an engine he was inspecting on its arrival from a regular repair shop preparatory to making a trial trip, and that the engine had been and was used in interstate commerce. *Southern R. Co. v. Lloyd*, 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210, affirming 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489.

#### **Moving Fuel for Engines.**

It was reversible error to instruct the jury, in an action based on the Federal Employers' Liability Act, that the movement of cars of coal entirely within a state constituted interstate commerce if the shipper or the defendant intended that the coal at its destination should be used by locomotives engaged in such commerce. *Barker v. Kansas City, M. & O. R. Co.*, 94 Kan. 176, 146 Pac. 358.

#### **Switching.**

In an action under the Federal Employers' Liability Act for injuries received by a switchman while moving a string of cars, the jury should be instructed that he was employed in interstate commerce if among such cars was one loaded with lumber which had actually started on its journey for a point in another state. *Bolch v. Chicago, M. & St. P. R. Co.*, — Wash. —, 155 Pac. 422.

An instruction to the effect that if the usual employment of the engineer of a switch engine was the indiscriminate moving of cars containing both interstate and intrastate freight, he was engaged in interstate commerce, was correctly given in an action founded on the Federal Employers' Liability Act. *Snyder v. Great N. R. Co.*, 88 Wash. 49, 152 Pac. 703.

#### **Moving Cars on Repair Track.**

The jury was erroneously instructed, in an action based on the Federal Employers' Liability Act, to the effect that the replacing of a car loaded with interstate traffic on a repair track where it was awaiting necessary repairs en route, after the removal of empty cars which had been repaired, was not a movement in interstate commerce. *Bolch v. Chicago, M. & St. P. R. Co.*, — Wash. —, 155 Pac. 422.

#### **Boat Used to Complete Interstate Journey.**

The instructions, in an action under the Federal Employers' Liability Act for injuries received while the plaintiff was employed on a tug boat used by an interstate railroad company in continuing or completing interstate traffic, were held

correct under conflicting evidence as to whether the boat was engaged in interstate commerce at the time of the accident. *Erie R. Co. v. Jacobus*, 137 C. C. A. 151, 221 Fed. 335.

#### **Waiver.**

##### **— Failure to Request Instruction.**

The failure of the defendant in an action for the death of an employee, to request an instruction submitting to the jury the issue of interstate commerce under the Federal Employers' Liability Act, was not a waiver of its right to require such submission, where the court wrongfully withdrew that phase of the case. *Bruckshaw v. Chicago, R. I. & P. R. Co.*, — Ia. —, 155 N. W. 273.

### **12. Knowledge of Danger Defects.**

#### **Danger.**

An instruction was properly refused, in an action based on the Federal Employers' Liability Act for the death of an inexperienced car inspector who was thrown from a car as the result of the negligence of a coemployee who was detailed to instruct him in his duties, when it was to the effect that the plaintiff must show that his intestate was killed by an unknown danger which, in the exercise of ordinary care, would not have come to his knowledge; and that there could be no recovery if the risk of injury from the unexpected separation of two cars in switching was one ordinarily incident to his employment, which he should have known and appreciated and which he assumed, as such instruction contained two elements, one of which might and the other might not be of effect, since the decedent did not assume the risk of injury from the negligence of a fellow servant. *Boston & M. R. Co. v. Benson*, 124 C. C. A. 68, 205 Fed. 876.

#### **Defects.**

##### **— Obviousness.**

In an action under the Federal Employers' Liability Act for injuries sustained by a brakeman while stationed on the inside of a curve relaying signals to an engineer, when a cable used in drawing a plow along a train of flat cars slipped and injured the former, an instruction permitting a recovery if the plaintiff did not know that the appliances used were not reasonably safe and suitable, was not erroneous because it did not refer to the obviousness of the danger, where such omission was covered by other instructions. *Louisville & N. R. Co. v. Henry*, 167 Ky. 151, 180 S. W. 74.

##### **— Actual Knowledge.**

In an action founded on the Federal Employers' Liability Act for injuries received by a train porter who alighted at night at

a water tank in obedience to an order of the conductor, and fell from the unfloored side of a bridge on which the train was standing, an instruction limiting the porter's knowledge of the location and condition of the bridge to actual knowledge was not erroneous when considered in connection with other instructions. *Missouri, K. & T. R. Co. v. Bunkley*, — Tex. Civ. App. —, 153 S. W. 937.

### 13. Method of Doing Work.

#### In General.

An instruction as to the liability of an employer for the negligent manner in which a section foreman directed work to be performed was improperly given in an action under the Federal Employers' Liability Act for an injury received by a section hand as the result of the negligence of a coemployee. *Missouri, K. & T. R. Co. v. Mooney*, — Tex. Civ. App. —, 181 S. W. 543.

When negligence in the doing of work is the gravamen of the plaintiff's case in an action under the Federal Employers' Liability Act, the defendant is not entitled to an instruction making the pursuit of a customary system decisive of the issues without regard to whether due care was exercised in doing the work itself. *Chesapeake & O. R. Co. v. Proffitt*, 241 U. S. 462, 60 L. ed. —, 36 Sup. Ct. Rep. 620, affirming 134 C. A. 37, 218 Fed. 23.

#### Poling Car.

A lengthy instruction, in an action founded on the Federal Employers' Liability Act for the death of a flagman who was killed while assisting in moving a car with a push pole, was held a correct statement of the law upon the case shown by the evidence. *Irvin v. Southern R. Co.*, 164 N. C. 5, 80 S. E. 78.

### 14. Movement of Cars with Unnecessary Violence.

#### Stopping with Violence.

In an action founded on the Federal Employers' Liability Act for injuries sustained by a brakeman who was thrown from a freight train by a jerk thereof, the customary terms "violent, unusual and unnecessary" should be used in an instruction to describe the movement of the train, instead of the terms "quick, violent, sudden and unusual," since a jerk in the operation of a heavy freight train might be violent and yet necessary and usual. *Cincinnati, N. O. & T. P. R. Co. v. Goldston*, 156 Ky. 410, 161 S. W. 246, S. C. 163 Ky. 42, 173 S. W. 161.

Where the issue, in an action based on the Federal Employers' Liability Act, was whether the sudden stopping of a train

was caused by an emergency application of the air brakes by the engineer or the failure of brakes to operate properly, the jury was correctly instructed that the plaintiff could recover if the engineer unnecessarily caused the sudden stopping of the train. *Owens v. Chicago G. W. R. Co.*, 113 Minn. 49, 128 N. W. 1011, writ of error dismissed 225 U. S. 716, 56 L. ed. 1270, 32 Sup. Ct. Rep. 834.

### 15. Negligence in General.

#### What Constitutes Negligence.

An instruction that negligence is the failure to use ordinary care, by which is meant such care as an ordinarily prudent person would usually exercise under the same or similar circumstances, was properly given in an action founded on the Federal Employers' Liability Act. *Louisville & N. R. Co. v. Holloway*, 163 Ky. 125, 173 S. W. 343, S. C. 168 Ky. 262, 181 S. W. 1126.

Where a track hand, on the approach of a train at high speed in violation of cautionary signals, attempted at the order of his foreman to remove a jack from the track, and on his inability to do so, instead of remaining where he was, there being but little space between the track and a bluff, attempted to cross the track in front of the train and was killed, it was error for the court, in an action under the Federal Employers' Liability Act, to instruct the jury as a matter of law that the negligence of the defendant in whole or in part caused the death of the decedent. *Cincinnati, N. O. & T. P. R. Co. v. Jones*, — Ky. —, 186 S. W. 897.

#### Injury to Health From Using Paint Sprayer.

In an action under the Federal Employers' Liability Act for the impairment of the plaintiff's health from the use of a paint sprayer or "gun," the jury was correctly instructed to the effect that in order to recover the plaintiff must prove by the greater weight of evidence that the defendant negligently caused or directed the plaintiff to use in such paint gun, without providing a respirator or nose guard, material that was poisonous or deleterious to the health of the operator when expelled therefrom in the shape of mist or spray, and that in using appliance the plaintiff was employed by the defendant in doing an act or service which had some real or substantial relation to interstate commerce. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

#### On New Trial as to Damages.

The jury was properly instructed, in an action under the Federal Employers' Liability Act, where the appellate court sent the case back for a retrial on the measure

of damages only, that the issue as to negligence was settled on the former trial and that the second trial was confined to the quantum of damages. *Ferbee v. Norfolk & S. R. Co.*, 167 N. C. 290, 83 S. E. 360, affirmed on other grounds 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781.

## 16. Negligence Not Alleged.

### In General.

An instruction in an action founded on the Federal Employers' Liability Act, which stated the purport and effect of such act, was held not to authorize a verdict for the plaintiff if any act of negligence on the part of the defendant was shown, whether that charged in the declaration or not, where other portions of the instructions restricted the jury to a consideration of the negligence alleged. *Devine v. Chicago, R. I. & P. R. Co.*, 266 Ill. 248, 107 N. E. 595, Ann. Cas. 1916 B. 481, affirming 185 Ill. App. 488, affirmed 239 U. S. 52, 60 L. ed. —, 36 Sup. Ct. Rep. 27.

The jury should not be instructed, in an action under the Federal Employers' Liability Act, as to the liability of the defendant for failing to inspect an engine where such failure was not alleged as negligence. *Oberlin v. Oregon, W. R. & N. Co.*, 71 Oreg. 177, 142 Pac. 554.

Where the evidence, in an action under the Federal Employers' Liability Act, disclosed that an employee sustained an injury on the day preceding that on which the fatal injury was alleged to have occurred, the jury was properly instructed that there could be no recovery except for the latter injury. *Illinois C. R. Co. v. Porter*, 125 C. C. A. 55, 207 Fed. 311.

## 17. Negligence of Fellow Servants.

### In General.

In an action founded on the Federal Employers' Liability Act against a carrier and an engineer for the death of another employee, the jury was erroneously instructed that the carrier might be liable if any negligence of a train crew caused the disaster, since the instruction failed to exclude the conduct of the engineer even though he were found free from fault. *Irvin v. Southern R. Co.*, 164 N. C. 5, 80 S. E. 78.

It is prejudicial error, in an action based on the Federal Employers' Liability Act against both a carrier and an engineer for the death of another employee, to refuse an instruction that the acts of the engineer, if he were found free from negligence, would not support a finding of the negligence of the carrier, and could not be considered by the jury as affecting its liability. *Irvin v. Southern R. Co.*, 164 N. C. 5, 80 S. E. 78.

## Signals Negligently Given by Yardmaster.

In an action under the Federal Employers' Liability Act for injuries sustained by an engineer in jumping from his engine in order to escape a collision with a switch engine on a curved track in a railway yard, it was error to instruct the jury that the plaintiff might recover if he was proceeding in obedience to a signal from the yardmaster, without also submitting the question whether there had been an abrogation of a rule requiring him to proceed with his engine under control. *St. Louis, I. M. & S. R. Co. v. Stewart*, — Ark. —, 187 S. W. 920.

In an action under the Federal Employers' Liability Act for injuries sustained by an engineer in jumping from an engine in order to escape a collision with a switch engine on a curved track in a railway yard, it was error to instruct the jury that the proximate cause of the accident was the negligence of the yardmaster in giving the plaintiff a signal to proceed when the switch engine was on the main track, where all reference was omitted as to the violation by the plaintiff of a rule relating to speed of trains in the yard and as to keeping them under control. *St. Louis, I. M. & S. R. Co. v. Stewart*, — Ark. —, 187 S. W. 920.

## Failure of Flagman to Protect Train.

A lengthy instruction, in an action under the Federal Employers' Liability Act for injuries received in a rear end collision by a freight conductor as the result of the failure of his flagman to protect the rear of a train when it stopped temporarily on a main track while the former was adjusting a new air hose, was held to properly submit to the jury the question of the negligence of the flagman. *Penn. R. Co. v. Goughnour*, 126 C. C. A. 39, 208 Fed. 961.

## Failure of Engineer to Keep Lookout.

The jury was correctly instructed, in an action under the Federal Employers' Liability Act, to the effect that if they believed from the evidence that it was necessary or usual for an employee in the performance of his duties, to walk between the rails in front of a locomotive while piloting it over switch tracks, and if the engineer knew of such custom that it was his duty, in the management of his engine, to use such reasonable care and caution and to keep such lookout for the pilot as an ordinarily prudent and careful person would have kept under the circumstances, and that if the engineer did not do so and his failure was the proximate cause of running down and injuring the pilot, the jury must find for the plaintiff. *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914 C. 172.

### Application of Emergency Brakes by Brakeman.

Where the death of an engineer was caused by the act of a brakeman in too hastily opening an angle cock so as to apply the brakes and stop a backing freight train with unusual violence when the latter thought, because of the conductor's signals, that the rear of the train would run off a switch, an instruction was properly given, in an action under the Federal Employers' Liability Act, where the conductor testified that there was room on the siding for the train without overrunning the switch, as to the negligence of the brakeman in applying the brakes as he did, and that the plaintiff might recover if any of the defendant's agents or employees in charge of such train negligently operated it so as to cause the engineer's death. *Louisville & N. R. Co. v. Stewart*, 163 Ky. 823, 174 S. W. 744, S. C. 156 Ky. 550, 161 S. W. 557, 157 Ky. 642, 163 S. W. 755, affirmed 241 U. S. 261, 60 L. ed. —, 36 Sup. Ct. Rep. 586.

### Conductor Directing Porter to Alight on Bridge at Night.

An instruction, in an action under the Federal Employers' Liability Act for injuries sustained by a train porter in alighting at night, under orders from the conductor, on the unfloored side of a trestle of the existence of which the former was unaware, was held not to permit a finding of the negligence of the conductor who was aware of the condition of the bridge, in failing to warn the porter of its location and construction, although the instruction did not require a finding that the conductor knew or should have known of the ignorance of the porter, since if the instruction was unsatisfactory the defendant should have requested a proper one. *Missouri, K. & T. R. Co. v. Bunkley*, — Tex. Civ. App. —, 153 S. W. 937.

### 18. Proximate Cause.

#### In General.

The instructions taken as a whole held to sufficiently cover the question of proximate and remote cause in an action under the Federal Employers' Liability Act for the death of a brakeman in a rear end collision resulting from the defective condition of the following engine which permitted the escape of steam in such quantities as to obscure the signals of the preceding train, notwithstanding the alleged negligence of the decedent in not protecting the rear of his train with torpedoes and fuses. *White v. Central Vt. R. Co.*, 87 Vt. 330, 89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265.

The failure to instruct as to proximate cause, in an action founded on the Federal Employers' Liability Act for the death of a freight conductor in a rear end collision, was not prejudicial to the defendant where the decedent was guilty of negligence in failing to perform his duty of seeing that a switch was closed instead of leaving that duty to a brakeman, and the engineer of the following train was also negligent in failing to observe the switch signal until too late to avert the disaster. *Louisville & N. R. Co. v. Wene*, 121 C. C. A. 245, 202 Fed. 887.

The failure to define proximate cause in an instruction relating to the negligence of a fellow servant which was alleged as the cause of the death of a coemployee, was not reversible error in an action under the Federal Employers' Liability Act, where the defendant did not make timely objection, and such omission apparently did not affect the amount of the verdict. *Yazoo & M. V. R. Co. v. Wright*, 125 C. C. A. 25, 207 Fed. 281, affirming 197 Fed. 94, affirmed on other grounds 235 U. S. 376, 59 L. ed. 277, 35 Sup. Ct. Rep. 130.

### 19. Rules.

#### Reasonableness.

A charge to the jury in an action under the Federal Employers' Liability Act, that certain rules of a carrier, if reasonable and lawful, were binding on its employees, does not necessarily import that the reasonableness of the rules was left to the determination of the jury; and if the defendant desired that their reasonableness should be passed on by the court it should have so requested. *Seaboard A. L. R. Co. v. McMichael*, 143 Ga. 689, 85 S. E. 891.

#### Hand Signals as Against Fixed Signals.

Where an engineer was killed when his engine left a derail switch, an instruction was properly refused, in an action based on the Federal Employers' Liability Act, as to the effect of a rule of a carrier prohibiting the acceptance of "clear hand" signals as against fixed signals until the employee receiving the signal was fully informed as to the situation, since such rule required of the decedent absolute knowledge of the situation. *Southern R. Co. v. Hill*, 139 Ga. 549, 77 S. E. 803.

#### When Observance of Standard Rules Negligence.

An instruction was properly given, in an action under the Federal Employers' Liability Act, to the effect that it was negligence for a carrier to follow the standard railway rules on an occasion when a prudent person should have foreseen that the accident which ensued might and probably would result from an adherence to the

rules. *White v. Central Vermont R. Co.*, 87 Vt. 330, 89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, Ann. Cas. 1916 B. 252.

### **Violation by Employee Cause of Own Injury.**

#### **— In General.**

Where an instruction was requested by the defendant to the effect that where the duties of an employee in certain circumstances were particularly specified in unambiguous and reasonable rules of his employer, of which the employee had knowledge and to which he had assented, and if nonobservance or disobedience of such rules was the proximate cause of his injury or death without negligence on the part of his employer, the jury should find for the defendant, if the rule referred to was one prohibiting the running of trains against the current of traffic on a main line, the instruction was properly refused in an action under the Federal Employers' Liability Act for the death of an engineer in a collision at night with an engine left on a crossover track so as not to clear the main track, when the accident occurred while he was testing an engine fresh from the repair shop by running at high speed against the current of traffic, where it was almost a nightly occurrence to run engines back and forth on the main track for such purpose. *Louisville & N. R. Co. v. Fleming*, — Ala. —, 69 So. 125.

#### **— Leaving Engine While Switching.**

Where an engineer while on the ground at night beside his engine cooling a hot box, was injured when another engine which he had been informed was disabled so that it could not move under its own steam, and which he was to tow to another station, was negligently moved under its own power so as to collide with the other engine, a rule of the employer requiring engineers and firemen to remain on their engines while engaged in switching, was sufficiently covered, in an action under the Federal Employers' Liability Act, by an instruction to the effect that if the plaintiff in violation of such rule left his engine while a switching movement was being made and if he could have avoided injury by obeying that he was, as a matter of law, guilty of negligence. *Pfeiffer v. Oregon, W. R. & N. Co.*, 74 Oreg. 307, 144 Pac. 762, 7 N. C. C. A. 685, writ of error dismissed 239 U. S. 658, — L. ed. —, 36 Sup. Ct. Rep. 222.

Where an engineer while on the ground beside his engine at night cooling a hot box, was injured in a collision caused by the negligent movement of a disabled engine which he had orders to take from a siding and tow to another point, and which he was informed could not move under its

own steam, it was not error to refuse an instruction requested by the defendant in an action under the Federal Employers' Liability Act, to the effect that if the accident was caused solely by the plaintiff's violation of a rule requiring engineers and firemen to remain on their engines while engaged in switching, he could not recover, when the court instructed the jury in substance that if the plaintiff did an act or number of acts which a prudent man would not have done under the circumstances, he was guilty of negligence, and that if his acts and not those of the defendant, were the proximate cause of his injury he could not recover. *Pfeiffer v. Oregon, W. R. & N. Co.*, 74 Oreg. 307, 144 Pac. 762, 7 N. C. C. A. 685, writ of error dismissed 239 U. S. 658, — L. ed. —, 36 Sup. Ct. Rep. 222.

#### **— Riding on Pilot.**

In an action under the Federal Employers' Liability Act for injuries sustained by a rear brakeman, who, on being left by his own train after flagging another, rode on the latter train as required by the rules of his employer until his own train was overtaken, and, then being unable to catch his own train, he was injured while attempting to reboard the moving engine of the second train by means of a step on the rear of the pilot beam, an instruction requested by the defendant to the effect that if such step was intended for the sole use of shopmen in working about the engine when not in motion, and trainmen were forbidden by the employer's rules to use such step while engines were in motion in road service, and if the plaintiff, with knowledge of and in violation of such rule, attempted to board such moving locomotive while in road service and was injured, that the jury should find for the defendant, was properly refused, since the rule in question merely forbade riding on the pilots of engines and not their temporary use in boarding them. *Norfolk & W. R. Co. v. Thompson*, 161 Ky. 814, 171 S. W. 451.

#### **—Speed Limit Rule.**

It was error, in an action under the Federal Employers' Liability Act for injuries sustained by an engineer in jumping from his engine in order to escape a collision with a switch engine on a curved track in a railway yard, to refuse to instruct that the plaintiff could not recover if at the time of the accident he was running his engine in excess of 10 miles an hour in violation of a rule of the defendant. *St. Louis, I. M. & S. R. Co. v. Stewart*, — Ark. —, 187 S. W. 920.

In an action founded on the Federal Employers' Liability Act for injuries sustained by an engineer in jumping from an engine in order to escape a collision with a switch

engine on a curved track in a railway yard, it was error to refuse an instruction to the effect that, although a yardmaster gave the plaintiff a signal indicating that the track was clear and that he might proceed, it did not give him the right to run his train in violation of a speed limit rule, if such rule was in force and known to the plaintiff. *St. Louis, I. M. & S. R. Co. v. Stewart*, — Ark. —, 187 S. W. 920.

#### Reliance on Observance of Rules.

An instruction was properly refused, in an action under the Federal Employers' Liability Act, to the effect that, in the exercise of ordinary care, those in charge of a train which at night ran into the rear of another train that had stopped temporarily, had the right to rely on the presumption that those in charge of such train would protect its rear by a flag, as required by the rules of a carrier, since the instruction probably would have led the jury to understand that conclusive reliance might have been placed on such presumption. *Penn. R. Co. v. Cole*, 131 C. C. A. 244, 214 Fed. 948.

#### Habitual Violation of Rules.

An instruction was correctly given to the effect that the failure of a car repairer to display a flag, as required by rule, on a car he was working on, would not prevent a recovery, under the Federal Employers' Liability Act, for his death, where there had been an open, continuous and habitual disregard of the rule for such a period of time as to justify an inference that the rule had been abrogated by the employer, or its non-observance had been acquiesced in for such a length of time as to lead the jury to believe that the employer had knowledge of or acquiesced in such violation. *St. Louis, I. M. & S. R. Co. v. Sharp*, 115 Ark. 308, 171 S. W. 95, writ of error dismissed 238 U. S. 697, 59 L. ed. 1504, 35 Sup. Ct. Rep. 939.

An instruction was properly given in an action under the Federal Employers' Liability Act for the death of a car inspector who was killed by the sudden movement of a train when he went between cars at night, in the discharge of his duties, without displaying a blue light, to the effect that if those in charge of the train knew that the "blue light" rule had not been enforced for months, and that workmen were in the habit of disregarding it, that it was their duty, before moving the train, to see that no one was in a place of danger. *Dutton v. Atlantic C. L. R. Co.*, — S. C. —, 88 S. E. 263.

In an action under the Federal Employers' Liability Act, an instruction that any usage or practice by the plaintiff or other employees tending to uphold the former in

violating a rule relating to the speed of trains in a railway yard would not relieve him of the consequence of his own negligent violation of such rule, unless the evidence showed its abrogation, while correctly stating the law, was calculated to mislead the jury, since it left them no guide for determining to what extent violations of the rule would constitute its abrogation. *St. Louis, I. M. & S. R. Co. v. Stewart*, — Ark. —, 187 S. W. 920.

#### 20. Safe Place.

##### Defective Platform.

In an action under the Federal Employers' Liability Act for the death of a brakeman who jumped from a moving freight train at a station and was killed as the alleged result of defects in a platform, the jury was correctly instructed to the effect that the defendant was required to use ordinary care in furnishing its employees with a reasonably safe place in which to work, and if, to the knowledge of the defendant, such platform was, and had been for some weeks prior to the brakeman's death, defective and unsafe for ordinary use by employees while performing their duties, by reason of rotten planks and protruding nails, that the defendant was guilty of negligence which proximately and materially contributed to the decedent's death. *St. Louis & S. F. R. Co. v. Clappitt*, — Okla. —, 154 Pac. 40.

##### Defective Car.

An instruction as to safe place was properly given, in an action based on the Federal Employers' Liability Act for injuries received by a switchman by being thrown from a car as the result of the combined negligence of his employer in furnishing a car with a defective coupler and that of other members of a switch crew in stopping a train with unnecessary violence, so as to cause the defective coupler to permit two cars to separate as the plaintiff was stepping from one to the other. *Vandalia R. Co. v. Holland*, 183 Ind. 438, 108 N. E. 580.

##### Defective Premises.

###### — Cinder Pit.

An instruction, in an action predicated on the Federal Employers' Liability Act for injuries sustained by a brakeman by falling into a cinder pit in a railway yard at night, was held to correctly submit to the jury the question of the defendant's negligence. *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

##### Cars Not in Clear.

In an action under the Federal Employers' Liability Act for injuries sustained by a fireman at night when his head came into



contact with the marker of a caboose of a train which had been left so as not to clear a lead track, the jury was properly instructed to the effect that if he was injured by reason of the caboose being placed or allowed to remain dangerously near the track over which the plaintiff had to pass on his engine, thereby rendering such track not reasonably safe to him in the performance of his duties, the jury should find for the plaintiff, unless his injury was due to some risk assumed by him, if they believed that at the time of his injury he was attending to his accustomed duties and using such care as a man of ordinary prudence would have exercised. *Chesapeake & O. R. Co. v. Meadows*, — Va. —, 89 S. E. 244.

### 21. Scope of Employment.

#### Termination of Services.

In an action under the Federal Employers' Liability Act for injuries sustained by a rear brakeman who was left by his train after flagging a following train, and after riding thereon, as required by his employer's rules, until his own train was overtaken just outside of the terminal yard at the end of its run, when he was unable to catch his train before it pulled into the yard, and he was injured while attempting to reboard the moving engine of the second train, and the conductor of the preceding train took it into the terminal and registered off all of the crew, including the rear brakeman, it was not reversible error to refuse an instruction to the effect that under such circumstances, if the plaintiff had no further duties to perform, either upon his own or the following train, he did not act in the line of his employment in boarding such train, and that he could not recover, where the jury was instructed in substance that if upon the arrival of the second train the plaintiff did not see his own train and did not believe, and had no reasonable grounds to believe, that he could catch his train, but left the second train without necessity and out of the line of his employment, he could not recover. *Norfolk & W. R. Co. v. Thompson*, 161 Ky. 814, 171 S. W. 451.

#### Assisting in Emergency.

When there is no evidence to show that an emergency existed which required a deadheading employee to assist at the request of the conductor of a train, in switching en route, an instruction as to the effect of working in an emergency should not have been given in an action based on the Federal Employers' Liability Act. *Seaboard A. L. R. Co. v. McMichael*, 143 Ga. 689, 85 S. E. 891.

### 22. Selection of Competent Servants.

#### In General.

An instruction as to the liability of an employer for failure to select competent servants should not be given in an action based on the Federal Employers' Liability Act for an injury received by an employee from the negligence of an experienced co-employee. *Missouri, K. & T. R. Co. v. Mooney*, — Tex. Civ. App. —, 181 S. W. 543.

### 23. Unavoidable Accident.

#### Trespasser Misplacing Switch.

The instructions, in an action based on the Federal Employers' Liability Act for the death of an engineer by the derailment of a train at a switch, were held sufficient to show the defendant's freedom from liability if, without negligence on its part, the wreck was due to the act of a trespasser in tampering with the switch. *Gulf, C. & S. F. R. Co. v. McGinnis*, — Tex. Civ. App. —, 147 S. W. 1188, reversed on other grounds 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806.

### 24. Violation of Safety Statutes.

See in general, Hours of Labor Act and Safety Appliance Act.

### 25. Curing Error by Supplemental Instructions or Remittitur.

#### Instructions.

Where a supplemental instruction was given without exception, in an action based on the Federal Employers' Liability Act, as to the absolute duty of a brakeman to protect the rear of his train with fuses and torpedoes when stopping temporarily on a main track, defects in the original instructions were thereby cured. *White v. Central Vermont R. Co.*, 87 Vt. 330, 89 Atl. 618, affirmed 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, Ann. Cas. 1916 B. 252.

#### Remittitur.

Where an employee of one railroad company was injured by the negligence of another company over the tracks of which he was moving cars in interstate commerce, an erroneous instruction in an action against the latter company under the Federal Employers' Liability Act, that the defendant was not entitled to credit for benefits received by the plaintiff from his employer's relief department, may be cured by a remittitur. *Wagner v. Chicago & A. R. Co.*, 180 Ill. App. 196, affirmed 265 Ill. 245, 106 N. E. 809, affirmed 239 U. S. 452, — L. ed. —, 36 Sup. Ct. Rep. 135, Ann. Cas. 1916 A. 778.

## 26. Failure of Jury to Follow Instructions.

### In General.

Where the evidence clearly showed the negligence of a fireman in operating a locomotive in the absence of the engineer, a verdict for the plaintiff was held, in an action based on the Federal Employers' Liability Act for injuries inflicted on another employee, not to be perverse because contrary to an instruction to the effect that the fireman in running the engine in violation of a rule of the defendant, acted without the scope of his employment so as to absolve the defendant from liability, and that the evidence did not show an abrogation of such rule. *Callaghan v. Chicago & N. W. R. Co.*, 161 Wis. 288, 154 N. W. 449.

### As to Apportionment of Damages.

The failure of the jury to comply with the court's instructions to apportion the damages awarded under the Federal Employers' Liability Act among the next of kin of a deceased unmarried railway employee, is reversible error. *Collins v. Penn. R. Co.*, 163 App. Div. 452, 148 N. Y. Supp. 777.

## F. Nonsuit.

### 1. In General.

#### When Any Testimony to Sustain Case.

A nonsuit should not be granted in an action under the Federal Employers' Liability Act, when there is any competent evidence tending to sustain the plaintiff's allegations. *Bennett v. Southern R. Co.*, 98 S. C. 42, 79 S. E. 710, affirmed on other grounds 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566, 10 N. C. C. A. 853.

A motion for a nonsuit was properly denied, in an action founded on the Federal Employers' Liability Act for the death of a switchman who, the evidence showed, was thrown from the roof of a box car against which another car was kicked with unusual violence. *Kenney v. Seaboard A. L. R. Co.*, 165 N. C. 99, 80 S. E. 1078, affirmed on other grounds 240 U. S. 489, 60 L. ed. —, 36 Sup. Ct. Rep. 458.

When a switchman was killed, while between cars adjusting a defective coupler, in consequence of other cars being kicked against them without warning and contrary to custom, by coemployees who were aware of the decedent's position, it is error to dismiss an action based on the Federal Employers' Liability Act and the Safety Appliance Act, at the close of the plaintiff's testimony. *Hurley v. Illinois C. R. Co.*, — Minn. —, 157 N. W. 1005.

### For Assumed Risk.

A nonsuit was properly granted, in an

action based on the Federal Employers' Liability Act for injuries sustained by a switchman from the construction of the tracks too close together in a switch yard, where, with knowledge of the conditions, he continued to work for 40 minutes on a dark night after the electric lights provided by his employer had been extinguished, since he assumed the risk of injury. *Kirbo v. Southern R. Co.*, — Ga. App. —, 89 S. E. 179, S. C. 16 Ga. App. 49, 84 S. E. 491.

### When Employment in Interstate Commerce Shown But Not Pleaded.

Where, in an action for the death of a railway employee, prosecuted under a state law, the evidence showed that at the time he was killed he was employed in interstate commerce, a nonsuit should not have been granted on the ground that the Federal Employers' Liability Act controlled, where the defendant did not allege such defense in its answer. *Bitondo v. New York C. & H. R. R. Co.*, 163 App. Div. 823, 149 N. Y. Supp. 339.

### When Evidence Conflicting.

When the testimony as to assumption of risk is conflicting in an action based on the Federal Employers' Liability Act, the plaintiff cannot be nonsuited. *Lorick v. Seaboard A. L. R. Co.*, 102 S. C. 276, 86 S. E. 675.

## Second Action.

Where it is doubtful whether a plaintiff can secure his rights under his original declaration or by an amendment setting up the Federal Employers' Liability Act, justice does not require the dismissal of a second suit based on the Federal Act for the same cause of action. *Tinkham v. Boston & M. R. Co.*, 77 N. H. 111, 88 Atl. 709.

## 2. When Negligence Inferred.

### In General.

A motion for a nonsuit was properly overruled in an action founded on the Federal Employers' Liability Act, where the evidence tended to show that an engineer was injured through the negligence of the defendant in assigning a defective engine to him without his knowledge. *Lloyd v. Southern R. Co.*, 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489, affirmed on other grounds 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210.

A motion for a nonsuit was properly overruled, in an action founded on the Federal Employers' Liability Act, where there was testimony from which the negligence of the defendant could be inferred, as well as that the risk of injury was not so obvious as to have been assumed by an employee. *Tonsellito v. New York C.*

& H. R. R. Co., 87 N. J. L. 651, 94 Atl. 804.

A motion for a nonsuit was properly denied in an action under the Federal Employers' Liability Act for injuries sustained by a brakeman, while coupling cars, as a result of the negligence of a superior employee. *Steele v. Atlantic C. L. R. Co.*, — S. C. —, 87 S. E. 639.

### 3. For Contributory Negligence.

#### In General.

The plaintiff in an action based on the Federal Employers' Liability Act cannot be nonsuited because of contributory negligence, where there is evidence of the negligence of the defendant. *Horton v. Seaboard A. L. R. Co.*, 157 N. C. 146, 72 S. E. 958, S. C. 169 N. C. 108, 85 S. E. 218, affirmed 239 U. S. 595, — L. ed. —, 36 Sup. Ct. Rep. 180.

### 4. As to Portion of Defendants.

#### Action Against Lessor and Lessee.

A nonsuit was improperly granted in an action founded on the Federal Employers' Liability Act, as to one defendant which owned and leased to its codefendant, an interstate carrier, a piece of railway lying wholly within one state, for use as a part of the latter's interstate system, where a recovery was sought for injuries sustained by an engineer in the employ of the lessee while he was inspecting an engine used in interstate commerce, preparatory to a trial run after it came from a repair shop, which engine had to pass over such leased line before reaching the other lines of the lessee. *Lloyd v. North Carolina R. Co.*, 162 N. C. 485, 78 S. E. 489, S. C. 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520.

### 5. Action on State Law and Employment in Interstate Commerce Shown.

#### In General.

Where an action for an injury sustained by a railway employee was based on both a state law and the Federal Employers' Liability Act, the defendant's motion to dismiss except as to the Federal act should have been granted, where it was conceded that at the time of his injury the plaintiff was engaged in interstate commerce. *Burnett v. Erie R. Co.*, 159 App. Div. 712, 144 N. Y. Supp. 969.

### 6. Waiver of Motion.

#### By Introduction of Testimony.

A defendant, by producing evidence in defense, waives the denial of a motion for a nonsuit made at the close of the plaintiff's case in an action under the Federal

Employers' Liability Act. *Copper R. & N. W. R. Co. v. Heney*, 128 C. C. A. 131, 211 Fed. 459.

### G. Directing Verdict.

When state laws pertaining to apply, see *Supra XVI, D, 3, (o)*.

### 1. In General.

#### Action Against Carrier and Individual.

The defendants in an action under the Federal Employers' Liability Act against two corporations, one of which was not a common carrier, are not entitled to a directed verdict, the proper procedure being a motion to compel the plaintiff to elect as to which he will proceed against. *Copper R. & N. W. R. Co. v. Heney*, 128 C. C. A. 131, 211 Fed. 459.

#### Want of Capacity to Maintain Action.

In an action by a widow in her own name for the benefit of herself, her minor children and the parents of her husband for his wrongful death, the jury should have been instructed to the effect that the defendant was entitled to a verdict on its plea of want of capacity in the plaintiff to maintain the action, if her husband at the time of his death was engaged in examining and making a record of the seals on cars moving in interstate commerce, which was a necessary part of his customary work, or if he had just completed such inspection without having finished his record and placed it where it was usually kept, since the action was controlled by the Federal Employers' Liability Act. *Pecos & N. T. R. Co. v. Rosenbloom*, 240 U. S. 439, 60 L. ed. —, 36 Sup. Ct. Rep. 390, reversing — Tex. —, 173 S. W. 215, 177 S. W. 952, — Tex. Civ. App. —, 141 S. W. 175.

#### When Any Competent Testimony.

A verdict cannot be directed for the defendant, in an action founded on the Federal Employers' Liability Act, where there is any competent testimony to go to the jury. *Thornton v. Seaboard A. L. R. Co.*, 98 S. C. 348, 82 S. E. 433, reversed without opinion 238 U. S. 606, 59 L. ed. 1485, 35 Sup. Ct. Rep. 601.

A verdict will not be directed for the defendant in an action under the Federal Employers' Liability Act, where the scintilla of evidence doctrine is the law of the forum. *Dutton v. Atlantic C. L. R. Co.*, — S. C. —, 88 S. E. 263.

Even though the weight of the evidence in an action founded on the Federal Employers' Liability Act shows that the defendant was not guilty of negligence, yet under the "scintilla" rule prevailing in a state court having jurisdiction of the action, a peremptory instruction should not

be given for the defendant. *Louisville & N. R. Co. v. Holloway*, 163 Ky. 125, 173 S. W. 343, S. C. 168 Ky. 262, 181 S. W. 1126.

#### Failure of Evidence.

A Federal court may, in an action under the Federal Employers' Liability Act, direct a verdict for the defendant where the evidence is insufficient to support a recovery by the plaintiff. *Nordgard v. Marysville & N. R. Co.*, 211 Fed. 721, affirmed on other grounds 134 C. C. A. 415, 218 Fed. 737.

The granting of a motion to direct a verdict for the defendant in an action under the Federal Employers' Liability Act, because of the insufficiency of the plaintiff's evidence, does not violate the Seventh Amendment to the Federal Constitution. *Nordgard v. Marysville & N. R. Co.*, 211 Fed. 721, affirmed on other grounds 134 C. C. A. 415, 218 Fed. 737.

The failure of the plaintiff to prove one of the several acts of negligence alleged in an action under the Federal Employers' Liability Act, does not furnish grounds for directing a verdict for the defendant. *Thornton v. Seaboard A. L. R. Co.*, 98 S. C. 348, 82 S. E. 433, reversed without opinion 238 U. S. 606, 59 L. ed. 1485, 35 Sup. Ct. Rep. 601.

#### For Receipt of Benefits From Relief Department.

Where a case is shown falling within the Federal Employers' Liability Act, although such act was not pleaded, the defendant is not entitled to a directed verdict because of the plaintiff's receipt of benefits from the defendant's relief department. *Hogarty v. Philadelphia & R. R. Co.*, 245 Pa. 443, 91 Atl. 854.

### 2. Nonemployment in Interstate Commerce.

#### In General.

Where the plaintiff, in an action based on the Federal Employers' Liability Act, fails to show that he was injured while engaged in interstate commerce, his case falls for proof and a peremptory instruction may be given for the defendant. *Chesapeake & O. R. Co. v. Shaw*, 168 Ky. 537, 182 S. W. 653; *Chesapeake & O. R. Co. v. Tucker*, 168 Ky. 144, 181 S. W. 940.

A verdict should be directed for the defendant in an action under the Federal Employers' Liability Act, where the evidence does not show that the plaintiff was injured while engaged in interstate commerce. *Tamura v. Great N. R. Co.*, 58 Wash. 316, 108 Pac. 774, see 72 Wash. 503, 130 Pac. 597, 47 L. R. A. (N. S.) 8.

A peremptory instruction for the defendant cannot be given in an action based

on the Federal Employers' Liability Act for the death of an engineer, on the ground that he was not engaged in interstate commerce at the time of the fatal accident, where the evidence tends to show that the train he was hauling at the time of the accident contained cars loaded with oil and lumber such as were not produced in the state wherein his run lay. *Southern P. R. Co. v. Vaughn*, — Tex. Civ. App. —, 165 S. W. 885, 7 N. C. C. A. 632.

The fact that an interstate freight train from which a switchman was distributing cars at the time of his injury, was a local, does not warrant a directed verdict for the defendant in an action under the Federal Employers' Liability Act, on the theory that all interstate traffic may have been dropped and intrastate cars substituted before arriving at the point where the accident occurred. *Seaboard A. L. v. Koennecke*, 239 U. S. 352, — L. ed. —, 36 Sup. Ct. Rep. 126, affirmed 101 S. C. 86, 85 S. E. 374.

A verdict should be directed for the defendant where the evidence, in an action founded on the Federal Employers' Liability Act, shows that an employee was not engaged in interstate commerce at the time of his death. *McKee v. Ohio V. E. R. Co.*, — W. Va. —, 88 S. E. 616.

### 3. When Negligence Shown or Inferred.

#### Where Negligence Shown.

In an action founded on the Federal Employers' Liability Act for the death of an employee who, at night, was killed by falling into a deep pit in a roundhouse which was alleged to have been insufficiently lighted, the evidence held sufficient to justify a refusal to direct a verdict for the defendant. *Seaboard A. L. R. v. Padgett*, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481, affirming 99 S. C. 364, 83 S. E. 633.

An action based on the Federal Employers' Liability Act cannot be withdrawn from the jury when there is any legal evidence tending to show that the negligence of the defendant was the cause of the plaintiff's injury. *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

An action based on the Federal Employers' Liability Act for the death of a switchman while engaged in interstate commerce, cannot be taken from the jury on the ground that no negligence on the part of the defendant was shown, where it appeared that a backing train which struck and killed him had just come into a railway yard and was moving on a main track without having a lookout on the rear end or giving warning of its approach, precautions which the exercise of reasonable care, as well as the rules of the defendant, required. *Seaboard A. L.*

v. Koennecke, 239 U. S. 352, — L. ed. —, 36 Sup. Ct. Rep. 126, affirming 101 S. C. 86, 85 S. E. 374.

A motion to direct a verdict for the defendant was properly overruled, in an action founded on the Federal Employers' Liability Act for the death of a track-walker, who, while assisting at night in repairing a switch in a yard, was struck and killed by kicked cars which came from the direction opposite to that in which he was facing, where his position was such as to justify him in relying on warning being given by his coemployees. *Colasurdo v. Central R. of N. J.*, 180 Fed. 832, affirmed 113 C. C. A. 379, 192 Fed. 901, writ of error dismissed by stipulation 226 U. S. 617, 57 L. ed. 383, 33 Sup. Ct. Rep. 111.

A peremptory instruction for the defendant should not be given in an action based on the Federal Employers' Liability Act for injuries sustained by an employee who, as the result of the negligence of the defendant, was struck by a train, while he was crossing a railway yard by the customary route on his way to his place of labor. *Missouri, K. & T. R. Co. v. Rentz*, — Tex. Civ. App. —, 162 S. W. 599.

#### When Negligence Inferred.

A motion to direct a verdict for the defendant was properly denied in an action founded on the Federal Employers' Liability Act, where it appeared that, while making repairs on a double track bridge of an interstate carrier at a point where the view of the tracks was obstructed by a tunnel, a bridge carpenter was struck and killed by a passing train, and the evidence permitted an inference that the carrier did not exercise due care in taking the necessary precautions for the safety of its employees. *Norfolk & W. R. Co. v. Holbrook*, 131 C. C. A. 621, 215 Fed. 687, reversed on other grounds 235 U. S. 625, 59 L. ed. 392, 35 Sup. Ct. Rep. 143, 7 N. C. C. A. 814.

A motion to direct a verdict for the defendant was properly denied, in an action founded on the Federal Employers' Liability Act for the death of a switchman who slipped from the narrow rim of the pilot of a road engine used for switching purposes, where the jury might infer negligence on the part of the defendant in failing to provide an engine with a foot-board, which might have been attached in a short time. *Louisville & N. R. Co. v. Lankford*, 126 C. C. A. 247, 209 Fed. 321.

#### When Negligence of Fellow Servants Shown.

A peremptory instruction for the defendant was properly refused in an action founded on the Federal Employers' Lia-

bility Act for injuries received by a conductor while adjusting a new air hose, as the result of the failure of his flagman to protect the rear of the train when it stopped temporarily on a main track. *Penn. R. Co. v. Goughnour*, 126 C. C. A. 39, 208 Fed. 961.

Where an employee's own negligence contributes to his injury a peremptory instruction cannot be given for the defendant in an action under the Federal Employers' Liability Act, when the negligence of another employee also was a proximate cause of the accident. *Cincinnati, N. O. & T. P. R. Co. v. Goode*, 163 Ky. 60, 173 S. W. 329.

A verdict was improperly directed for the defendant in an action under the Federal Employers' Liability Act for injuries received by a carpenter while assisting in constructing an extension to a shop in which engines used in both interstate and intrastate commerce were repaired, where the accident was caused by the negligence of a subforeman. *Thompson v. Cincinnati, N. O. & T. P. R. Co.*, 165 Ky. 256, 176 S. W. 1006.

A motion to direct a verdict for the defendant was properly denied in an action under the Federal Employers' Liability Act for injuries sustained by a brakeman while coupling cars, as the result of the negligence of a superior employee. *Steele v. Atlantic C. L. R. Co.*, — S. C. —, 87 S. E. 639.

Where a train running slowly at night under cautionary signals, ran into the rear of another train and injured an employee, who was asleep in the caboose, and the failure of those in charge of the train to see the tail lights of the preceding train was not alleged as negligence, although evidence to that effect was given at the trial without objection from the defendant, a motion to direct a verdict for the defendant was properly refused, in an action based on the Federal Employers' Liability Act, since the complaint might have been amended to conform to the proof had objection been made to the admission of such testimony. *Penn. R. Co. v. Cole*, 131 C. C. A. 244, 214 Fed. 948.

Where a night assistant roundhouse foreman was injured by falling over a small jackscrew, which was left on the floor between two engine stalls by workmen of the day shift, a peremptory instruction for the defendant was properly denied, in an action under the Federal Employers' Liability Act, where it was the duty of the day employees to remove all tools from the floor at the end of the day's work, and the plaintiff was not charged with any duty of inspecting the floors for obstructions. *Hawkins v. St. Louis & S. F. R. Co.*, 189 Mo. App. 201, 174 S. W. 129.

Where an engineer negligently ran his engine around a curved switchtrack at a point where his view of the switch was obscured, at such a speed that he was unable to stop when he saw that the switch was turned, and he was injured in a collision with another engine running on the main track, a motion to direct a verdict for the defendant was properly denied, in an action under the Federal Employers' Liability Act, where the engineer of the latter engine negligently failed to have his engine under control, as required by a rule of his employer, when he approached a "home" signal, which suddenly indicated the presence of the plaintiff's engine on the side track. *Chadwick v. Oregon, W. R. & N. Co.*, 74 Oreg. 19, 144 Pac. 1165.

#### 4. When Negligence Not Shown.

##### In General.

An action under the Federal Employers' Liability Act was properly taken from the jury on the ground that no negligence on the part of the defendant was shown, where it appeared that a fireman who was familiar with the conditions in a railway yard in which the tracks were closer together than the standard generally adopted by a carrier, was killed at night as he was leaning from the gangway of a switch engine drawing drinking water from a tap in the side of the tender, when he was struck by cars standing on a parallel track. *Reese v. Philadelphia & R. R. Co.*, 239 U. S. 463, — L. ed. —, 36 Sup. Ct. Rep. 134, affirming 10 C. C. A. 660, 225 Fed. 518.

A verdict was properly directed for the defendant in an action based on the Federal Employers' Liability Act for the death of a flagman, where those in charge of the train that struck him could not in the exercise of ordinary care have discovered his peril in time to avert the disaster. *Ellis v. Louisville, H. & St. L. R. Co.*, 155 Ky. 745, 166 S. W. 512.

Where the evidence in an action based on the Federal Employers' Liability Act is not sufficient to support the affirmative issue of negligence, the jury may be instructed to find for the defendant. *Culp v. Virginian R. Co.*, — W. Va. —, 87 S. E. 187.

A binding instruction should have been given for the defendant in an action founded on the Federal Employers' Liability Act for the death of an employee who fell from the unguarded side of a bridge 14 feet in width, where the evidence did not show whether the proximate cause of the disaster was the decedent's negligence, some unexplained happening, or the negligence of the defendant in leaving one side of the

bridge unguarded. *Delaware, L. & W. R. Co. v. Ketz*, — C. C. A. —, 233 Fed. 31.

#### Accident Due to Negligence of Injured Employee.

A verdict was properly directed for the defendant, in an action under the Federal Employers' Liability Act for the death of a freight conductor, who, without obtaining necessary permission from the yardmaster and without making an examination for obstructions, at night rode on the rear of the tender of the backing locomotive of his train with a lantern in his hand, as required by the rules of the defendant, and he was killed in a collision with cars standing on such track, since the accident was due solely to the decedent's own negligence. *Gillis v. New York, N. H. & H. R. Co.*, — Mass. —, 113 N. E. 212.

#### 5. Failure to Show Dependency or Survivorship.

##### Dependency.

A peremptory instruction should be given for the defendant in an action under the Federal Employers' Liability Act by a personal representative of an adult son for the benefit of a surviving parent, where it does not appear that the decedent contributed to the latter's support. *Carolina, C. & O. R. Co. v. Shewalter*, 128 Tenn. 363, 161 S. W. 1136, Ann. Cas. 1915 C. 605, L. R. A. 1916 C. 964, affirmed without opinion 239 U. S. 630, — L. ed. —, 36 Sup. Ct. Rep. 166.

A motion to direct a verdict for the defendant was properly denied, in an action under the Federal Employers' Liability Act, where there was evidence that the mother of a deceased employee was dependent upon him at the time of his death. *Illinois C. R. Co. v. Stewart*, 138 C. C. A. 444, 223 Fed. 30.

##### Survivorship.

A peremptory instruction for the defendant was wrongfully refused, in an action under the Federal Employers' Liability Act, where it did not appear that the decedent was survived by any person who was naturally or actually dependent upon him. *Illinois C. R. Co. v. Doherty*, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31.

A verdict was properly directed for the defendant in an action under the Federal Employers' Liability Act by an administrator for the death of an employee, where neither the pleadings nor the proof showed that the decedent left surviving any one falling within the class of beneficiaries designated by the act. *Melzner v. Northern P. R. Co.*, 46 Mont. 277, 127 Pac. 1002.

## 6. For Assumed Risk.

Nonsuit for, see *supra* XIX, F, 1.

### In General.

Unless, in an action under the Federal Employers' Liability Act, the evidence tending to show assumption of risk is clear, comes from unimpeached witnesses and is free from contradictions, the trial court does not err in refusing to take such question from the jury. *Kanawha R. v. Kerse*, 239 U. S. 576, — L. ed. —, 36 Sup. Ct. Rep. 174.

An action founded on the Federal Employers' Liability Act for the death of a switchman while engaged in interstate commerce cannot be taken from the jury on the ground that he assumed the risk of injury, where it appeared that a backing freight train which struck and killed him had just arrived in a railway yard and was moving in violation of the rules of the defendant, without having a look-out on the rear end or giving warning of its approach. *Seaboard A. L. v. Koennecke*, 239 U. S. 352, — L. ed. —, 36 Sup. Ct. Rep. 126, affirming 101 S. C. 86, 85 S. E. 374.

A verdict was properly directed for the defendant, in an action based on the Federal Employers' Liability Act for injuries sustained by a section hand from the rebound of a heavy rail when dropped to the ground by him and his coemployees without negligence, since it was a danger incident to his employment which he assumed. *Truesdell v. Chesapeake & O. R. Co.*, 159 Ky. 718, 169 S. W. 471.

A verdict should have been directed for the defendant in an action founded on the Federal Employers' Liability Act for the death of a conductor of a switching crew, who had worked for six years about a freight house with the construction of which he was familiar, where, while placing a refrigerator car in the house, he was caught between the side of a narrow doorway and the side of the car, the doors of which had to be opened back before it could be placed in the house, since as a matter of law he assumed the risk of injury. *Miller v. Michigan C. R. Co.*, 185 Mich. 432, 152 N. W. 235.

A verdict should be directed for the defendant, in an action based on the Federal Employers' Liability Act, where it appears that as a matter of law an employee assumed the risk of his injury. *Thompson v. Minneapolis & St. L. R. Co.*, — Minn. —, 158 N. W. 42.

## 7. Contributory Negligence.

### In General.

A verdict cannot be directed for the defendant on the ground of the contributory

negligence, in an action under the Federal Employers' Liability Act, since such negligence does not bar a recovery but merely diminishes damages. *Chicago G. W. R. Co. v. McCormick*, 118 C. C. A. 527, 200 Fed. 375, 47 L. R. A. (N. S.) 18.

## 8. Action on State Law and Employment in Interstate Commerce Shown.

### In General.

Where both a state law and the Federal Employers' Liability Act are relied on in separate counts, and it appears that the plaintiff was injured while engaged in interstate commerce, it was reversible error to refuse an affirmative charge for the defendant as to the count based on the local law. *Ex parte Atlantic C. L. R. Co.*, 190 Ala. 132, 67 So. 256, reversing 9 Ala. App. 499, 63 So. 693; see also *Atlantic C. L. R. Co. v. Jones*, 12 Ala. App. 419, 67 So. 632.

There was no error in refusing to instruct the jury to find for the defendant in a common-law action as modified by a state statute, for injuries sustained by a switchman, if at the time of the accident he was employed in interstate commerce, where there was no substantial difference between the state law and the Federal Employers' Liability Act. *Pipes v. Missouri P. R. Co.*, — Mo. —, 184 S. W. 79.

## 9. Action in Name of Beneficiary.

### In General.

A verdict should be directed for the defendant in an action prosecuted individually under the Federal Employers' Liability Act by the surviving beneficiaries of a deceased employee. *Kansas City, M. & O. R. Co. v. Pope*, — Tex. Civ. App. —, 152 S. W. 185.

A peremptory instruction for the defendant should have been given in an action by a widow in her own name against a carrier for the death of her husband, where the pleadings and proof showed that it occurred while he was employed in interstate commerce; since the action was governed by the Federal Employers' Liability Act, and could be maintained only by a personal representative. *Cincinnati, N. O. & T. P. R. Co. v. Bonham*, 130 Tenn. 435, 171 S. W. 79.

## 10. Waiver of Motion.

### By Introduction of Testimony.

The denial of a motion for a directed verdict at the close of the plaintiff's case, in an action prosecuted under the Federal Employers' Liability Act, was waived where the defendant introduced testimony on the merits without renewing such motion at the close of the case. *Arizona &*

N. M. R. Co. v. Clark, 125 C. C. A. 305, 207 Fed. 817, affirmed on other grounds 235 U. S. 669, 59 L. ed. 415, 35 Sup. Ct. Rep. 210.

#### H. Argument to Jury.

##### In General.

An improper argument by the plaintiff's counsel, in an action predicated on the Federal Employers' Liability Act, was not prejudicial to the defendant where it was immediately withdrawn and the jury instructed to disregard it. *Ft. Worth & D. C. R. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279.

##### Damages.

The argument of the plaintiff's counsel to the jury as to the defendant's negligence and the measure of damages was held not prejudicial to the defendant in an action under the Federal Employers' Liability Act. *Texas & P. R. Co. v. Rasmussen*, — Tex. Civ. App. —, 181 S. W. 212.

#### Comment on Failure of Witness to Testify.

##### — In General.

It was prejudicial for the plaintiff's counsel, in an action based on the Federal Employers' Liability Act, notwithstanding that the defendant did not offer any evidence, to comment on the failure of a section foreman to take the stand and deny the plaintiff's testimony that the former gave an order which caused the accident. *Cincinnati, N. O. & T. P. R. Co. v. Tucker*, 168 Ky. 144, 181 S. W. 940.

##### — Beneficiary.

Counsel for the defendant may, in an action founded on the Federal Employers' Liability Act for the benefit of a surviving mother, comment to the jury on her failure to testify that the decedent contributed to her support. *Irvin v. Southern R. Co.*, 164 N. C. 5, 80 S. E. 78.

The refusal to permit the counsel for the defendant, in an action under the Federal Employers' Liability Act, to comment to the jury on the failure of a mother who was the sole surviving beneficiary, to testify that her deceased son contributed to her support, was prejudicial error, where the court refused defendant's requested instruction regarding such omission. *Irvin v. Southern R. Co.*, 164 N. C. 5, 80 S. E. 78.

#### Financial Condition of Defendant.

An argument of the plaintiff's counsel to the jury, in an action founded on the Federal Employers' Liability Act, urging the jury to consider the financial condition of the defendant in awarding damages,

was reversible error where such argument was not explicitly withdrawn. *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

#### Loss of Care of Parent.

It is improper for counsel for the plaintiff, in his argument to the jury, in an action under the Federal Employers' Liability Act for the benefit of the widow and children of tender age of a deceased railway employee, to draw a picture of an imaginary wayward son or daughter at the crucial period when prone to go astray, saved by the timely interference of a strong, tender and watchful father, and to infer therefrom that no money could compensate for the loss of a parent, and ask that such loss should be made the basis of a verdict. *Duke v. St. Louis & S. F. R. Co.*, 172 Fed. 684, affirmed 112 C. C. A. 564, 192 Fed. 306.

#### Reading Opinions in Other Cases.

The fact that the plaintiff's counsel, in the presence of the jury in an action founded on the Federal Employers' Liability Act, read to the court a portion of an opinion in another case, was not erroneous, where the defendant also read several cases in reply without requesting that the jury retire or be instructed to disregard such reading. *Ft. Worth & D. C. R. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279.

#### I. Verdict.

##### 1. In General.

#### Verdict Must Be Present Worth of Damages.

In an action under the Federal Employers' Liability Act for wrongful death, in computing damages recoverable for the deprivation of future benefits, the verdict should be made upon the basis of their present value, since adequate allowance must be made, according to circumstances, for the earning power of the money. *Chesapeake & O. R. Co. v. Kelly*, 241 U. S. 485, 60 L. ed. —, 36 Sup. Ct. Rep. 630, reversing 160 Ky. 296, 169 S. W. 736, S. C. 161 Ky. 655, 171 S. W. 185; *Chesapeake & O. R. Co. v. Gainey*, Admr. of Dwyer, 241 U. S. 494, 60 L. ed. —, 36 Sup. Ct. Rep. 633, reversing 162 Ky. 427, 172 S. W. 918.

#### Rejection of Improper Item.

An item of damages allowed in an action under the Federal Employers' Liability Act for an injury neither proved nor found by the jury, should be deducted from the amount of the verdict. *Barker v. Kansas City, M. & O. R. Co.*, 88 Kan. 767, 129 Pac. 1151, 43 L. R. A. (N. S.) 1181.



## 2. Majority Verdict.

### In General.

The trial in a state court of an action founded on the Federal Employers' Liability Act by a jury of 7 as permitted by a law of the forum, does not infringe the Seventh Amendment to the Federal Constitution. *Chesapeake & O. R. Co. v. Carnahan*, 241 U. S. 241, 60 L. ed. —, 36 Sup. Ct. Rep. 594, affirming 118 Va. 46, 86 S. E. 863.

The provision of the Seventh Amendment of the Federal Constitution guaranteeing the right of trial by a common-law jury is not infringed, in an action in a state court under the Federal Employers' Liability Act, by the application of a law of the forum permitting a verdict to be returned by 9 or more of the 12 jurors. *Louisville & N. R. Co. v. Stewart*, 241 U. S. 261, 60 L. ed. —, 36 Sup. Ct. Rep. 586, affirming 163 Ky. 823, 174 S. W. 744, S. C. 156 Ky. 550, 161 S. W. 557, 157 Ky. 642, 163 S. W. 755; *Chesapeake & O. R. Co. v. Kelly*, 241 U. S. 485, 60 L. ed. —, 36 Sup. Ct. Rep. 630, reversing 160 Ky. 296, 169 S. W. 736, S. C. 161 Ky. 655, 171 S. W. 185; *St. Louis & S. F. R. Co. v. Brown*, 241 U. S. 223, 60 L. ed. —, 36 Sup. Ct. Rep. 602, affirming — Okla. —, 144 Pac. 1075.

Since the provision of the Seventh Amendment to the Federal Constitution guaranteeing the right to trial by a common-law jury, applies only to proceedings in the Federal courts, it is not infringed by the trial in a state court, of an action under the Federal Employers' Liability Act in accordance with a provision of the state constitution and laws to the effect that when a case has been under submission to a jury for 12 hours without a unanimous verdict, 5/6 of the jury may render a verdict which shall be entitled to the legal effect of a unanimous verdict at common law. *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U. S. 211, 60 L. ed. —, 36 Sup. Ct. Rep. 595, affirming 128 Minn. 112, 150 N. W. 385.

In an action in a state court under the Federal Employers' Liability Act, a verdict may be rendered by a majority of the jurors less than the full panel as permitted by a law of the forum, without violating the Seventh Amendment to the Federal Constitution preserving the right to trial by jury, since that relates only to actions in Federal courts. *Cincinnati, N. O. & T. P. R. Co. v. Claybourn*, — Ky. —, 183 S. W. 903; *Chesapeake & O. R. Co. v. Shaw*, 168 Ky. 537, 182 S. W. 653; *Louisville & N. R. Co. v. Holloway*, 168 Ky. 262, 181 S. W. 1126, S. C. 163 Ky. 125, 173 S. W. 343; *Louisville & N. R. Co. v. Stewart*, 163 Ky. 823, 174 S. W. 744; *Louisville & N. R. Co. v. Winkler*, 162 Ky. 848, 173 S. W. 151, 9 N. C. C. A. 146; *Chesapeake & O. R. Co. v. Kelly*, 161 Ky. 655, 171 S. W. 185; *Bom-*

*bolis v. Minneapolis & St. L. R. Co.*, 128 Minn. 112, 150 N. W. 385; *Winters v. Minneapolis & St. L. R. Co.*, 126 Minn. 260, 148 N. W. 106; *St. Louis & S. F. Co. v. Brown*, — Okla. —, 144 Pac. 1075; *Chesapeake & O. R. Co. v. Carnahan*, 118 Va. 46, 86 S. E. 863; *Donaldson v. Great N. R. Co.*, 89 Wash. 161, 154 Pac. 133; *Louisville & N. R. Co. v. Thomas*, — Ky. —, 185 S. W. 840; *Cincinnati, N. O. & T. P. R. Co. v. Clarke*, — Ky. —, 185 S. W. 94.

## 3. Special Issues and Questions.

Applicability of state laws, see *supra* XVI, D. 3, (o).

### Separate Issues.

#### — Negligence and Contributory Negligence.

Separate issues need not be submitted to the jury in an action founded on the Federal Employers' Liability Act, with respect to the total damages and the amount deducted for the contributory negligence of the injured employee. *Gray v. Southern R. Co.*, 167 N. C. 433, 83 S. E. 849.

### Special Issues.

#### — Damages.

A special issue, in an action based on the Federal Employers' Liability Act for the death of an employee, requiring the jury to find what sum if presently paid would fully compensate his widow for her pecuniary loss, was not objectionable as implying that the award should be large, or that it should cover mental anguish and grief for the loss of the husband's society and companionship, where the jury were further instructed not to consider such elements in making up their verdict. *Ft. Worth & D. C. R. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279.

### Special Findings and Questions.

#### — In General.

In an action based on the Federal Employers' Liability Act for injuries sustained by a person who, while sealing at night the vent door in the roof of a refrigerator car, was thrown to the ground by the impact when another car was violently shunted against it, a special finding that the defendant was negligent in not giving the plaintiff proper instructions was held, when construed with other findings, to mean a failure to inform the plaintiff to look out for the impact, which omission was charged as negligence. *Cole v. Atchison, T. & S. F. R. Co.*, — Kan. —, 155 Pac. 949, S. C., 92 Kan. 132, 139 Pac. 1177.

In an action based on the Federal Employers' Liability Act the jury cannot be required to return a special verdict ascertaining the ultimate facts as to the negligence, the proximate cause of the plaintiff's injury, the amount of his damages, the

question of assumed risk, contributory negligence and the amount thereof, as well as the proportion such negligence bears to the combined negligence of himself and the defendant. *Chesapeake & O. R. Co. v. Meadows*, — Va. —, 89 S. E. 244.

#### — Contributory Negligence.

The defendant is not entitled to a judgment on a special finding of the plaintiff's contributory negligence in an action under the Federal Employers' Liability Act. *Duggan v. Missouri P. R. Co.*, 96 Kan. 249, 150 Pac. 557.

In an action founded on the Federal Employers' Liability Act, where the evidence as to the contributory negligence of the plaintiff was conflicting, the answers of the jury to special interrogatories, together with the instructions as to such negligence, were held to show that the general verdict in favor of the plaintiff did not free him from contributory negligence. *Cincinnati, H. & D. R. Co. v. Gross*, — Ind. —, 111 N. E. 653.

#### — When Inconsistent With General Verdict.

In an action for wrongful death under the Federal Employers' Liability Act, a general verdict for the plaintiff must be set aside where the jury declare in one finding that the accident would have happened even if the decedent had not been negligent, and in another that his negligence contributed to it, and no deduction on account thereof appeared to have been made. *Pyles v. Atchison, T. & S. F. R. Co.*, — Kan. —, 155 Pac. 788.

Where, in answer to special questions in an action under the Federal Employers' Liability Act, the jury found that the defendant used ordinary care to adopt a reasonably safe method and manner of performing the work in which the plaintiff was engaged at the time he was injured, and found further that the defendant was negligent in failing to use ordinary care in such respect, such answers were so contradictory that it could not be said whether the defendant was negligent or used due care. *Missouri, K. & T. R. Co. v. Denahy*, — Tex. Civ. App. —, 165 S. W. 529.

A general verdict for the plaintiff in an action under the Federal Employers' Liability Act, cannot be sustained where the jury specially finds facts which show that at the time of his injury he was not engaged in interstate commerce. *Barker v. Kansas City, M. & O. R. Co.*, 94 Kan. 176, 146 Pac. 358.

#### — When Within Issues.

Where an employee who, while sealing the vent doors in the roof of a refrigerator

car at night, was thrown to the ground by the violent impact of a shunted car, a special finding that a brakeman was not in a proper place to give the necessary signals to an engineer in order to prevent a violent coupling, was held, in an action under the Federal Employers' Liability Act, to be within the issues made by the pleadings. *Cole v. Atchison, T. & S. F. R. Co.*, — Kan. —, 155 Pac. 949, S. C. 92 Kan. 132, 139 Pac. 1177.

#### Special Verdict.

The refusal of the trial court, in an action governed by the Federal Employers' Liability Act, to submit the issues in the form of a special verdict as permitted by a state law, was not an abuse of discretion, where the defendant did not request such submission until the close of the evidence on both sides of the case. *Callaghan v. Chicago & N. W. R. Co.*, 161 Wis. 288, 154 N. W. 449.

#### 4. Apportionment of Damages.

##### (a) For Pain and Suffering.

#### In General.

In an action brought by a personal representative under the Federal Employers' Liability Act, the jury need not separate the amount awarded for the conscious pain and suffering of an employee prior to his death, from that awarded for the pecuniary loss of the surviving beneficiaries. *Kansas City S. R. Co. v. Leslie*, 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844, reversing 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915 B. 834.

The failure of the jury, in an action based on the Federal Employers' Liability Act, to separate the damages awarded for the conscious pain and suffering of an employee prior to his death from that allowed for the benefit of his widow and child, was not prejudicial to the defendant, where all proper elements of damages were considered by the jury, and the verdict was not excessive, nor did the defendant object to its form at the trial. *Kansas City S. R. Co. v. Leslie*, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915 B. 834, reversed on other grounds 238 U. S. 599, 59, L. ed. 1478, 35 Sup. Ct. Rep. 844.

The jury need not, in an action under the Federal Employers' Liability Act for the death of an employee, apportion the damages so as to show separately the amount allowed for the pain and suffering of the decedent and that awarded for the pecuniary loss sustained by his widow and next of kin, since there can be but one recovery for both. *St. Louis, I. M. & S. R. Co. v. Rodgers*, 118 Ark. 263, 176 S. E. 696.

**(b) Among Beneficiaries.****In General.**

The Federal Employers' Liability Act does not require the jury to apportion the damages awarded for the death of an employee, among those entitled to share in the recovery. *Central Vt. R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, Ann. Cas. 1916 B. 252, affirming 87 Vt. 330, 89 Atl. 618.

Since the action given by the Federal Employers' Liability Act is not for the equal benefit of each of the surviving beneficiaries, the jury must by their verdict apportion to each the amount of loss by him sustained. *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806, reversing — *Tex. Civ. App.* —, 147 S. W. 1188.

The jury need not apportion between a widow and minor child the damages awarded in an action by an administrator under the Federal Employers' Liability Act, for the mental and physical suffering of an employee who survived his injury for some months. *Cincinnati, N. O. & T. P. R. Co. v. Claybourn*, — Ky. —, 183 S. W. 903.

A general verdict for the plaintiff may be returned by the jury in an action by an administrator under the Federal Employers' Act, for the benefit of the widow and children of a deceased employee, without apportioning the damages between them. *Hadley v. Union P. R. Co.*, 99 Neb. 349, 156 N. W. 765.

The jury may return a general verdict in favor of a personal representative in an action under the Federal Employers' Liability Act, without apportioning the damages among the several beneficiaries. *St. Louis & S. F. R. Co. v. Clappitt*, — Okla. —, 154 Pac. 40.

The failure of the jury to apportion between the widow and children of a deceased employee the damages awarded under the Federal Employers' Liability Act, is not prejudicial to the defendant where neither party excepted to the form of the verdict. *Copper R. & N. W. R. Co. v. Reed*, 128 C. C. A. 39, 211 Fed. 111.

The failure of the jury to apportion among the several beneficiaries the amount awarded in an action under the Federal Employers' Liability Act for the death of an employee, is not prejudicial to the defendant, where neither an instruction requiring them to do so was requested, nor objection made nor exception taken to the verdict as rendered. *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328.

The defendant cannot question the apportionment among the several beneficiaries of the amount awarded in an action under the Federal Employers' Liability

Act for wrongful death. *Anest v. Columbia & P. S. R. Co.*, 89 Wash. 609, 154 Pac. 1100.

The jury should apportion the damages awarded under the Federal Employers' Liability Act, among the several beneficiaries. *Chesapeake & O. R. Co. v. Dwyer*, 157 Ky. 590, 163 S. W. 752, reversed on other grounds 241 U. S. 494, 60 L. ed. —, 36 Sup. Ct. Rep. 633.

The verdict, in an action based on the Federal Employers' Liability Act for the death of an employee, should apportion the amount allowed to each beneficiary. *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328.

The jury must apportion the damages between a widow and child according to the pecuniary loss of each, in an action under the Federal Employers' Liability Act for the death of an employee. *Fogarty v. Northern P. R. Co.*, 74 Wash. 397, 133 Pac. 609, L. R. A. 1916 C. 800, S. C. 85 Wash. 90, 147 Pac. 652, L. R. A. 1916 C. 803.

**J. Interest.****When Allowed.**

Interest may be allowed from the date of a judgment on the amount awarded in an action based on the Federal Employers' Liability Act. *Arizona & N. M. R. Co. v. Clark*, 125 C. C. A. 305, 207 Fed. 817, affirmed on other grounds 235 U. S. 669, 59 L. ed. 415, 35 Sup. Ct. Rep. 210.

Interest cannot be awarded in an action under the Federal Employers' Liability Act, from the time of the death of an employee to the date of a verdict in the plaintiff's favor. *Grow v. Oregon S. L. R. Co.*, — Utah, —, 150 Pac. 970.

Interest on a verdict in an action founded on the Federal Employers' Liability Act, will not be allowed, as permitted by a state law, from the date of the death of the plaintiff's intestate. *Norton v. Erie R. Co.*, 163 App. Div. 468, 148 N. Y. Supp. 771, affirming 83 Misc. 159, 144 N. Y. Supp. 656.

Under sections 14 and 18 of ch. 131, W. Va. Code 1913 (§§ 4923, 4927), interest runs only from the date of judgment and not from the time the verdict was rendered in an action under the Federal Employers' Liability Act. *Easter v. Virginian R. Co.*, — W. Va. —, 86 S. E. 37.

Since under sections 14 and 18 of ch. 131, W. Va. Code 1913 (§§ 4923, 4927), interest runs only from the date of the judgment and not from the rendition of the verdict in an action based on the Federal Employers' Liability Act, it is reversible error to allow interest from the date of the verdict when in excess of \$100, although not sufficient to entitle the defendant to a new trial, since the appellate court may make

the necessary correction. *Easter v. Virginian R. Co.*, — W. Va. —, 86 S. E. 37.

It cannot be shown by the affidavits of the jurors, in an action based on the Federal Employers' Liability Act, that they did not, in rendering their verdict, add or allow interest from the time of an employee's death until the date of the verdict. *Grow v. Oregon S. L. R. Co.*, — Utah —, 150 Pac. 970.

#### K. Costs.

##### Setting Off Costs Awarded Defendant in Suit Under State Law.

Where an action was brought under a state statute in the individual name of a widow in behalf of herself and her minor children for the death of a husband as the result of the negligence of a carrier, was dismissed with costs to the defendant because the action was controlled by the Federal Employers' Liability Act, such costs may be set off against a judgment subsequently rendered in the plaintiff's favor in an action brought by the widow in a representative capacity under the Federal law. *Troxell v. Delaware, L. & W. R. Co.*, 205 Fed. 830.

#### L. Judgment.

##### Non Obstante Veredicto.

Where, in an action under the Federal Employers' Liability Act for the death of an engineer as the result of the explosion of a locomotive boiler, the fireman testified that at the time of the accident the water glass indicated sufficient water in the boiler to prevent a low-water explosion, the defendant's motion for a judgment non obstante veredicto was properly denied, notwithstanding expert testimony to the effect that the explosion must have been caused by low water. *Donaldson v. Great N. R. Co.*, — Wash. —, 154 Pac. 133.

A state court may enter a judgment notwithstanding the verdict in an action founded on the Federal Employers' Liability Act. *Marshall v. Chicago, R. I. & P. R. Co.*, — Minn. —, 157 N. W. 638.

Where there is an issue of negligence on which the plaintiff might recover in an action under the Federal Employers' Liability Act, although not submitted to the jury, the defendant is not entitled to judgment notwithstanding the verdict, merely because the plaintiff could not recover on the issues actually submitted to the jury. *Maijala v. Great N. R. Co.*, — Minn. —, 158 N. W. 430.

##### Quod Recuperet.

Judgment quod recuperet will not be rendered for the plaintiff in an action founded on the Federal Employers' Li-

bility Act, on the overruling of a plea in abatement which presents a question of law only. *Woodruff v. Yazoo & M. V. R. Co.*, 127 C. C. A. 411, 210 Fed. 849, S. C. 137 C. C. A. 567, 222 Fed. 29.

#### M. New Trial.

##### 1. In General.

##### When Recovery May Be Had on Unsubmitted Issues.

Where there is an issue of negligence on which the plaintiff might recover in an action under the Federal Employers' Liability Act, although it was not submitted to the jury, the defendant is entitled to a new trial rather than to a judgment notwithstanding the verdict. *Maijala v. Great N. R. Co.*, — Minn. —, 158 N. W. 430.

##### When Evidence Sufficient to Sustain Verdict.

The granting of a new trial in an action founded on the Federal Employers' Liability Act, is discretionary with the trial court where there is sufficient evidence to sustain the verdict. *Bennett v. Southern R. Co.*, 98 S. C. 42, 79 S. E. 710, affirmed on other grounds 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566, 10 N. C. C. A. 853.

##### When Beneficiary Is Self-Supporting.

It was not an abuse of discretion to deny the defendant's motion for a new trial in an action founded on the Federal Employers' Liability Act for the benefit of a dependent mother, on a showing that she had property of her own and supported herself. *Donaldson v. Great N. R. Co.*, 89 Wash. 161, 154 Pac. 133.

##### Improper Instructions.

###### — In General.

The modification of an instruction requested by the defendant, in an action predicated on the Federal Employers' Liability Act, as to the right of the jury to consider the ability of the defendant to pay damages, by inserting the word "large" before the word "damages," is not error which will justify the granting of a new trial. *Ferbee v. Norfolk & S. R. Co.*, 167 N. C. 290, 83 S. E. 360, affirmed on other grounds 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781.

##### Refusal to Instruct.

###### — Presumption of Negligence.

While there is no presumption of negligence in an action based on the Federal Employers' Liability Act, the failure to so instruct the jury does not entitle the defendant to a new trial, where it did not request a charge to that effect. *Charleston & W. C. R. Co. v. Brown*, 13 Ga. App. 744, 79 S. E. 932.

**Statute Dispensing with Exceptions.**

A state statute permitting the specification on a motion for a new trial of errors in rulings or instructions to which exceptions were not taken at the trial, will not permit the defendant, in an action under the Federal Employers' Liability Act, to sit silently by until after verdict and then insist that it be set aside because of the failure of the trial court to particularly specify in its charge some matter to which its attention was not called. *Illinois C. R. Co. v. Skaggs*, 240 U. S. 66, — L. ed. —, 36 Sup. Ct. Rep. 249, affirming 125 Minn. 532, 147 N. W. 1135, S. C. 124 Minn. 503, 145 N. W. 381.

**2. Improper Admission of Testimony.**

**Receipt of Insurance Money by Beneficiary.**

A new trial will be granted the plaintiff, in an action under the Federal Employers' Liability Act for the benefit of the parents of a deceased railway employee, where the improper admission at the instance of the defendant of evidence that one of the parents had received \$2,500 insurance money for the death of the decedent, was calculated to confuse and mislead the jury as to the amount the plaintiff was entitled to recover. *Brabham v. Baltimore & O. R. Co.*, 136 C. C. A. 117, 220 Fed. 35.

**3. Failure to Diminish Damages for Contributory Negligence.**

**In General.**

A new trial will be granted the defendant in an action based on the Federal Employers' Liability Act, where the verdict does not show how much it was reduced because of the clearly shown contributory negligence of the plaintiff. *New York C. & H. R. R. Co. v. Banker*, 140 C. C. A. 37, 224 Fed. 351.

**4. Remarriage of Widow.**

**Concealment.**

Whether a new trial should be granted the defendant in an action founded on the Federal Employers' Liability Act, because of the concealment by the plaintiff of the fact that the widow of a deceased employee had remarried, rests in the discretion of the trial court, which will not be interfered with by an appellate court, since such matter would not tend to mitigate damages. *Worthington v. Elmer*, 125 C. C. A. 50, 207 Fed. 306.

**5. Excessiveness of Verdict.**

**In General.**

A new trial will not be granted for excessiveness of the damages awarded under

the Federal Employers' Liability Act, unless so great and disproportionate to the injury as to cause the mind at first blush to assume that the verdict was the result of passion or prejudice. *Cincinnati, N. O. & T. P. R. Co. v. Goldston*, 163 Ky. 42, 173 S. W. 161, S. C. 156 Ky. 410, 161 S. W. 246.

Where an action under the Federal Employers' Liability Act was tried within two months after an alleged serious and unexpected malady developed, and the evidence as to its permanency was so unsatisfactory that the trial court considered the verdict excessive to the extent of one-half, a new trial should have been granted the defendant instead of requiring the plaintiff to remit such proportion. *Rief v. Great N. R. Co.*, 126 Minn. 430, 148 N. W. 309.

**XX. APPEAL AND ERROR.**

**A. To Federal Supreme Court.**

**1. In General.**

(No decisions.)

**2. Writ of Error.**

**(a) In General.**

(No decisions.)

**(b) Return Day.**

**In General.**

In an action under the Federal Employers' Liability Act a writ of error from the Supreme Court of the United States to a state court of last resort, returnable "within thirty days from the date" thereof, sufficiently complies with United States court rule 8, clause 5, although no return day was specifically mentioned in the writ. *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, L. R. A. 1915 C. 1, Ann. Cas. 1915 B. 475, 8 N. C. C. A. 834, reversing 162 N. C. 424, 76 S. E. 494.

**(c) To Federal Courts.**

**In General.**

Under section 238 of the Judicial Code, a writ of error will not lie directly to the Supreme Court of the United States from an order of a Federal district court, in an action founded on the Federal Employers' Liability Act, nonsuited the plaintiff on the ground that the evidence did not show that at the time of his injury he was engaged in interstate commerce, since such ruling does not involve the jurisdiction of the trial court to hear and determine the action. *Farrugia v. Philadelphia & R. R. Co.*, 233 U. S. 352, 58 L. ed. 996, 34 Sup. Ct. Rep. 591.

On a writ of error the Supreme Court of the United States, in order to acquire jurisdiction, will presume that, in directing a verdict for the defendant in an action under the Federal Employers' Liability Act, a Federal court based its decision on the ground that a treaty with a foreign nation did not give a nonresident alien a right of action under such statute, where such court so held on a previous trial. *McGovern v. Philadelphia & R. R. Co.*, 235 U. S. 389, 59 L. ed. 283, 35 Sup. Ct. Rep. 127, 8 N. C. C. A. 67, reversing 209 Fed. 975.

#### (d) To Courts of District of Columbia.

##### In General.

Since the effect of the Federal Employers' Liability Act of 1906 was limited to the District of Columbia and the territories of the United States, it was not a law of the United States within the meaning of section 250, clause 6, of the Judicial Code, permitting the review of decisions of the Court of Appeal of the District of Columbia by the Supreme Court of the United States. *Washington, A. & M. V. R. Co. v. Downey*, 236 U. S. 190, 59 L. ed. 533, 35 Sup. Ct. Rep. 406, dismissing writ of error to 40 App. D. C. 147.

The fact that a person employed on an interstate train was injured while in the District of Columbia does not make the Federal Employers' Liability Act of 1906 a law of general application so as to be within section 250, clause 6, of the Judicial Code, pertaining to the review by the United States Supreme Court of decisions of the Court of Appeals of the District of Columbia. *Washington, A. & M. V. R. Co. v. Downey*, 236 U. S. 190, 59 L. ed. 533, 35 Sup. Ct. Rep. 406, dismissing writ of error to 40 App. D. C. 147.

#### (e) To State Courts.

##### When Federal Question Involved. — In General.

A right, privilege or immunity under the Federal Employers' Liability Act is sufficiently asserted by the defendant in a state court so as to permit a review on writ of error by the Supreme Court of the United States, where a state court of last resort sustained the overruling by the trial court of a contention which, if acceded to, would presumably have resulted in a verdict in favor of the defendant. *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, L. R. A. 1915 C. 1, Ann. Cas. 1915 B. 475, 8 N. C. C. A. 834, reversing 162 N. C. 424, 78 S. E. 494.

By pleading contributory negligence in an action for injuries sustained by an employee, a carrier does not estop itself from

prosecuting a writ of error to the United States Supreme Court, where the question whether the suit was governed by the Federal Employers' Liability Act instead of a state statute under which it was brought, was decided by a state court of last resort. *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703, reversing 98 Ark. 240, 135 S. W. 874.

Section 709, R. S. U. S. Comp. St. 1901, p. 575, prohibits the Supreme Court of the United States, in an action predicated on the Federal Employers' Liability Act, from reviewing on writ of error a decision of a state court of last resort, where such court did not erroneously construe the act, or deny any particular construction which was sought by the parties. *Seaboard A. L. R. Co. v. Duvall*, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790, dismissing writ of error to 152 N. C. 524, 67 S. E. 1008.

No Federal question is presented on a writ of error to a state court of last resort by the denial of a contention of a railway company, when sued as a joint tortfeasor by an employee of another company, that the defendant company was relieved from liability by the conduct of the injured employee in accepting benefits from his employer's relief department, where the state court held that, under section 5 of the Federal Employers' Liability Act, such release was void as to the employer and therefore not available to the defendant. *Chicago & A. R. Co. v. Wagner*, 239 U. S. 452, — L. ed. —, 36 Sup. Ct. Rep. 135, affirming 265 Ill. 245, 106 N. E. 809.

If a declaration brings an action within the terms of the Federal Employers' Liability Act, even by an amendment alleging the same circumstances with the exception of the plaintiff's having come from beyond the state, no Federal question is raised. *Kansas City W. R. Co. v. McAdow*, 240 U. S. 51, 60 L. ed. —, 36 Sup. Ct. Rep. 252, affirming — Mo. App. —, 164 S. W. 188.

##### — Applying Federal Instead of State Law.

Federal questions are involved where it is contended on a writ of error to a state court, that the evidence in an action for the death of an employee, did not show that either he or the defendant were engaged in interstate commerce at the time of the disaster, and also that the court should have instructed the jury that, although the action was based on the Federal Employers' Liability Act, a state statute limiting the amount of the recovery applied. *Chicago, R. I. & P. R. Co. v. Devine*, 239 U. S. 52, — L. ed. —, 36 Sup. Ct. Rep. 27, affirming 266 Ill. 248, 107 N. E. 595.

A controlling Federal question is involved where a state court of last resort

reversed without opinion a holding of an intermediate court that an action for injuries received by a railway employee was governed by the Federal Employers' Liability Act instead of the state law. *Slavin v. Toledo, St. L. & W. R. Co.*, 236 U. S. 454, 59 L. ed. 671, 35 Sup. Ct. Rep. 306, reversing 88 Ohio St. 536, 106 N. E. 1077.

The denial by a state court of a carrier's contention that an action for injuries to an employee was governed by a territorial law under which the action was barred, rather than by the Federal Employers' Liability Act, involves a Federal question which the Supreme Court of the United States could determine on writ of error. *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21, affirming 102 Tex. 378, 117 S. W. 426, which reversed — *Tex. Civ. App.* —, 111 S. W. 159.

#### — Denying Application of Federal Act.

A writ of error lies from the United States Court to a state court of last resort which denied a contention of the defendant that an action for injuries to an employee was within the Federal Employers' Liability Act instead of a state statute under which it was brought. *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914 C. 156, 3 N. C. C. A. 800, reversing — *Tex. Civ. App.* —, 148 S. W. 1099.

No Federal question is involved in the decision of a state court, based on the pleadings and sustained by the evidence, that a person was in the employ of an express company rather than of the defendant railway company, and that an action for his death was not governed by the Federal Employers' Liability Act. *Missouri, K. & T. R. Co. v. West*, 232 U. S. 682, 58 L. ed. 795, 34 Sup. Ct. Rep. 471, dismissing writ of error to 38 Okla. 581, 134 Pac. 655.

Where on the trial of an action for injuries to an employee, a carrier expressly claimed immunity under the Federal Employers' Liability Act, and a state court of last resort, in denying such contention, either declared or assumed that such question was sufficiently presented by the record, a Federal question was raised which the Supreme Court of the United States could review on writ of error, notwithstanding that such question was not raised at the trial in the manner prescribed by the local rules of procedure. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 505, Ann. Cas. 1914 C. 159, 9 N. C. C. A. 109, reversing 156 N. C. 496, 72 S. E. 858.

The fact that a state court permitted a recovery for injuries to a railway employee after eliminating from the declaration an allegation that the action was based on the Federal Employers' Liability Act and that the plaintiff was injured while en-

gaged in interstate commerce, does not deny to the defendant any right or immunity under such act so as to permit of review by the Federal Supreme Court on a writ of error, where the latter was not prevented from asserting any defense open to it under such statute. *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, dismissing writ of error to 180 Ill. App. 511.

#### — Excluding Defense of Assumed Risk.

The denial by a state court of a carrier's contention that under the Federal Employers' Liability Act it could rely on the common-law defense of assumption of risk in the absence of a violation by it of some safety statute, presents a question which is reviewable by the Federal Supreme Court on writ of error. *Southern R. Co. v. Crockett*, 234 U. S. 725, 58 L. ed. 1564, 34 Sup. Ct. Rep. 897.

No right of a Federal character was denied the defendant by a ruling of a state court of last resort that no issue of assumed risk was made or submitted to the trial court, in an action based on the Federal Employers' Liability Act, where such conclusion was fully supported by the record. *Southern R. Co. v. Lloyd*, 239 U. S. 496, — L. ed. —, 36 Sup. Ct. Rep. 210, affirming 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520, S. C. 162 N. C. 485, 78 S. E. 489.

#### — Granting New Trial as to Damages.

A carrier was not deprived of any Federal right in an action based on the Federal Employers' Liability Act, by the granting by a state court of last resort, under a local rule of practice, of a partial new trial on the question of damages only (although such practice is not to be commended) where the carrier did not request a modification of the order, a rehearing or ask permission at the second trial to introduce newly discovered evidence, and the proof clearly showed the negligence of the carrier and the freedom of the injured employee from contributory negligence. *Norfolk & S. R. Co. v. Ferbee*, 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781, affirming 167 N. C. 290, 83 S. E. 360, S. C. 163 N. C. 351, 79 S. E. 685.

#### 3. Preserving Questions for Review.

Preserving questions for review in general, see *infra* XX, C, 1.

#### In General.

The question whether the Federal Employers' Liability Act governs an action for the death of a railway employee, is sufficiently presented so as to be reviewable by the Supreme Court of the United States on a writ of error, where a state court held that such question was properly

raised and decided it. *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703, reversing 98 Ark. 240, 135 S. W. 874.

That an action for the death of an employee was governed by the Federal Employers' Liability Act instead of the state statute on which it was founded, was sufficiently brought in question by a special exception made by the defendant both before and after the evidence was completed. *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914 C. 156, 3 N. C. C. A. 800, reversing — *Tex. Civ. App.* —, 148 S. W. 1099.

#### **Motion for Peremptory Instruction.**

The denial of a motion for a peremptory instruction for the defendant in an action under the Federal Employers' Liability Act, does not present a question of the construction of the act which is reviewable by the Federal Supreme Court, where such motion was absolutely without merit. *Southern R. Co. v. Gadd*, 233 U. S. 572, 58 L. ed. 1099, 34 Sup. Ct. Rep. 696, affirming 125 C. C. A. 21, 207 Fed. 277.

Where the pleadings in an action for injuries to a railway employee set up a state law, and the evidence shows that the Federal Employers' Liability Act controls, a motion for a peremptory instruction for the defendant in the nature of a demurrer to the evidence is sufficient to raise the question that the Federal act governs, so as to permit of review under U. S. R. S. § 709, U. S. Comp. St. 1901, p. 575, relating to the review by the Supreme Court of the United States of judgments of state courts. *Moliter v. Wabash R. Co.*, 180 Mo. App. 84, 168 S. W. 250.

A motion for a new trial, on the ground that a Federal question was involved by way of the construction of the Federal Employers' Liability Act, was sufficient under U. S. R. S. § 709, U. S. Comp. St. 1901, p. 575, relating to the review by the Supreme Court of the United States of judgments of state courts, to raise a Federal question, where the pleadings were based on a state law and the evidence showed that the plaintiff was injured while employed in interstate commerce. *Moliter v. Wabash R. Co.*, 180 Mo. App. 84, 168 S. W. 250.

#### **4. What Reviewable.**

##### **(a) In General.**

#### **When Meaning of Federal Act Not Involved.**

When there is no contention as to the meaning of the Federal Employers' Liability Act, the Supreme Court of the United States on writ of error need determine only whether plain error was com-

mitted in relation to the principles of general law involved in an action for an injury to an employee. *Yazoo & M. V. R. Co. v. Wright*, 235 U. S. 376, 59 L. ed. 277, 35 Sup. Ct. Rep. 130, affirming 125 C. C. A. 25, 207 Fed. 281, S. C. 197 Fed. 94.

A judgment of a state court in an action under the Federal Employers' Liability Act, will not be disturbed by the United States Supreme Court when no interpretation of the provisions of the act or the definition of legal principles in its application are involved, the only question being an appreciation of all the facts and inferences for the purpose of determining whether they were matters for the consideration of the jury. *Great N. R. Co. v. Knapp*, 240 U. S. 464, — L. ed. —, 36 Sup. Ct. Rep. 399, affirming 130 Minn. 405, 153 N. W. 848.

#### **Adverse Decision of Constitutional Questions in Other Cases.**

The fact that after the allowance of a writ of error, constitutional objections to the Federal Employers' Liability Act were decided in another case adversely to the contention of the plaintiff in error, does not prevent the Supreme Court of the United States from passing on other assignments of error. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. Rep. 193, Ann. Cas. 1914 C. 176, reversing 189 Fed. 495.

#### **Assumed Risk.**

##### **—In General.**

A decision of a state court of last resort in an action under the Federal Employers' Liability Act, as to whether the question of assumed risk was for the jury, is reviewable by the Supreme Court of the United States. *Chesapeake & O. R. Co. v. De Atley*, 241 U. S. 310, 60 L. ed. —, 36 Sup. Ct. Rep. 564, reversing 159 Ky. 687, 167 S. W. 933.

A holding by a trial court and a state court of last resort, in an action founded on the Federal Employers' Liability Act, that a brakeman assumed the risk, where he was killed while attempting to mount a moving freight car on a transfer barge, by reason of the tracks converging closely, will not be disturbed by the Supreme Court of the United States when not palpably erroneous. *Baugham v. New York, P. & N. R. Co.*, 241 U. S. 237, 60 L. ed. —, 36 Sup. Ct. Rep. 592.

##### **—Denying Defense.**

Where the trial court placed on the plaintiff the burden of showing that at the time he was injured he was engaged in interstate commerce, and the defendant was given the benefit of the defense of assumption of risk, the holding by an appellate



court in affirming a judgment for the plaintiff under the Federal Employers' Liability Act, that such defense was abolished by the act, and that the injured employee was entitled to the benefit of such act although not actually engaged in interstate commerce at the time of the accident, was held by the Supreme Court of the United States not to be reversible error. *Seaboard A. L. R. Co. v. Moore*, 228 U. S. 433, 57 L. ed. 907, 33 Sup. Ct. Rep. 580, affirming 113 C. A. 668, 193 Fed. 1022.

#### Recovery Under State Law.

That an employee's right to recover for personal injuries arose under a state law instead of the Federal Employers' Liability Act will be regarded by the Supreme Court of the United States as settled, on a writ of error to a state court to review a judgment in the plaintiff's favor, where the jury was instructed to that effect at the request of the defendant. *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, dismissing writ of error to 180 Ill. App. 511.

#### Kinship.

A contention in the Federal Supreme Court, in an action under the Federal Employers' Liability Act, that the father, rather than the lawful children of the deceased mother of an illegitimate son, was his next of kin, is foreclosed by an adverse ruling of a state court of last resort. *Seaboard A. L. R. Co. v. Kenney*, 240 U. S. 489, 60 L. ed. —, 36 Sup. Ct. Rep. 458, affirming 167 N. C. 14, 82 S. E. 968.

#### Dependency.

A contention that there was no proof of dependency between the next of kin and a deceased employee is foreclosed, in an action under the Federal Employers' Liability Act, by an affirmative finding by the jury, which was sanctioned by the trial court and not questioned in a state court of last resort, and will not be disturbed by the Supreme Court of the United States without a clear conviction of error. *Seaboard A. L. R. Co. v. Kenney*, 240 U. S. 489, 60 L. ed. —, 36 Sup. Ct. Rep. 458, affirming 167 N. C. 14, 82 S. E. 968.

#### Existence of Negligence.

When both the trial court and a state court of last resort sustain the refusal to instruct as a matter of law that there was no evidence of actual negligence in an action based on the Federal Employers' Liability Act, the Supreme Court of the United States will not interfere when there is no clear and certain error, since the question involves an appreciation of all the evidence and the inferences that might be drawn therefrom. *Seaboard A. L. R. Co. v. Renn*, 241 U. S. 290, 60 L. ed. —, 36 Sup.

Ct. Rep. 567, affirming 170 N. C. 128, 86 S. E. 964.

#### Refusal to Direct Verdict.

The refusal to direct a verdict for the defendant in an action under the Federal Employers' Liability Act will not be disturbed by the Supreme Court of the United States on writ of error to a state court of last resort unless clearly erroneous, where such holding has been upheld by two state courts. *Louisville & N. R. Co. v. Stewart*, 241 U. S. 261, 60 L. ed. —, 36 Sup. Ct. Rep. 586, affirming 163 Ky. 823, 174 S. W. 744, S. C. 156 Ky. 550, 161 S. W. 557, 157 Ky. 642, 163 S. W. 755.

#### (b) Employment in Interstate Commerce. In General.

On a writ of error to a state court the Supreme Court of the United States will analyze the evidence in order to determine whether a railway employee, at the time of his death, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 505, Ann. Cas. 1914 C. 159, 9 N. C. C. A. 109, reversing 156 N. C. 496, 72 S. E. 858.

On a writ of error to a state court the Supreme Court of the United States will not determine whether an employee, at the time of an injury, was engaged in interstate commerce so as to bring the action within the Federal Employers' Liability Act instead of a state statute, where a finding of liability under the state law did not harm the defendant. *Chicago & N. W. R. Co. v. Gray*, 237 U. S. 399, 59 L. ed. 1018, 35 Sup. Ct. Rep. 620, 9 N. C. C. A. 452, affirming 153 Wis. 637, 142 N. W. 505.

#### (c) Pleadings and Practice.

##### In General.

Questions relating to matters of pleading, the sufficiency of exceptions and the rulings of a trial court, which do not involve a construction of the Federal Employers' Liability Act, cannot be considered by the United States Supreme Court on a writ of error to a state court. *Central Vt. R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, Ann. Cas. 1916 B. 252, affirming 87 Vt. 330, 89 Atl. 618.

On a writ of error to a state court under section 237 of the Judicial Code, the Supreme Court of the United States cannot review incidental questions not Federal in character, which in their essence do not involve the existence of the right of the plaintiff to recover under the Federal Employers' Liability Act. *Seaboard A. L. R. Co. v. Padgett*, 236 U. S. 668, 59

L. ed. 777, 35 Sup. Ct. Rep. 481, affirming 99 S. C. 364, 83 S. E. 633.

### Pleading.

A ruling of a state court in an action based on the Federal Employers' Liability Act, that the failure of the declaration to allege that the plaintiff's intestate was employed in interstate commerce at the time he was killed, was cured by an allegation to that effect in the defendant's plea and the admission of the truth thereof in the replication, is a matter of state practice which is not reviewable by the Federal Supreme Court on writ of error. *Central Vt. R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, Ann. Cas. 1916 B. 252, affirming 87 Vt. 330, 89 Atl. 618.

In the absence of a showing that brings an action within the terms of the Federal Employers' Liability Act, the question whether the declaration will permit a recovery at common law is not one that the Supreme Court of the United States may review on writ of error to a state court. *Osborne v. Gray*, 241 U. S. 16, — L. ed. —, 36 Sup. Ct. Rep. 486, affirming 5 Tenn. Civ. App. 519.

### Amendment of Pleadings.

Whether the amendment of a complaint, in an action in a state court, more than two years after the cause of action accrued, so as to state distinctly that the plaintiff was engaged in interstate commerce at the time he was injured, was a violation of section 6 of the Federal Employers' Liability Act, is a Federal question that is reviewable by the Supreme Court of the United States, however much the actual allowance of the amendment might otherwise have rested in discretion or been a matter of local procedure. *Seaboard A. L. R. Co. v. Renn*, 241 U. S. 200, 60 L. ed. —, 36 Sup. Ct. Rep. 567, affirming 170 N. C. 128, 86 S. E. 964.

### (d) Admission of Testimony.

Review on the admission and rejection of testimony in general, see *infra* XX, D, 2.

### In General.

The admissibility of evidence which does not involve a construction of the Federal Employers' Liability Act will not be reviewed by the United States Supreme Court on writ of error to a state court. *Cent. Vt. R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, affirming 87 Vt. 330, 89 Atl. 618.

Since the refusal of a state court, in an action under the Federal Employers' Liability Act, to admit testimony as to the

contents of a clearance card and its delivery to a train crew, raises a question of general law not involving a construction of the act, nor directly or indirectly affecting any federal right, such ruling cannot, under section 237 of the Judicial Code, be reviewed by the Supreme Court of the United States on writ of error. *Central Vt. R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, affirming 87 Vt. 330, 89 Atl. 618.

Since the refusal of a state court, in an action under the Federal Employers' Liability Act for the death of a brakeman proximately resulting from steam leaking from the cylinders of a locomotive, to admit testimony to show that the boiler thereof together with those of other engines had been recently inspected as required by the Federal law, raises a question only of general law not involving a construction of the Employers' Liability Act, nor directly or indirectly affecting any Federal right, such ruling is not, under section 237 of the Judicial Code, reviewable by the Supreme Court of the United States on a writ of error. *Central Vt. R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, affirming 87 Vt. 330, 89 Atl. 618.

The affirmance by a state court of last resort, in an action based on the Federal Employers' Liability Act, of the exclusion of evidence tending to show contributory negligence, on the ground that it was tendered without restriction as to its legitimate use, denied to the defendant a Federal right where there was no rule of local practice requiring counsel to announce in advance the purpose for which the evidence was tendered. *Kansas City S. R. Co. v. Jones*, 241 U. S. 181, 60 L. ed. —, 36 Sup. Ct. Rep. 513, reversing 137 La. 178, 68 So. 401.

### (e) Weight of Testimony.

#### In General.

Conflicting testimony will not be weighed and considered by the Supreme Court of the United States on writ of error, except to determine whether there is evidence in the record fairly sustaining a verdict under the Federal Employers' Liability Act. *Troxell v. Delaware, L. & W. R. Co.*, 227 U. S. 434, 57 L. ed. 586, 33 Sup. Ct. Rep. 274, reversing 118 C. C. A. 272, 200 Fed. 44, and 105 C. C. A. 593, 183 Fed. 373, S. C. 185 Fed. 540, 180 Fed. 871.

Where an employee survived a fatal accident for thirty minutes, although apparently unconscious most of the time, the Federal Supreme Court will not, on a writ of error to a state court in an action founded on the Federal Employers' Liability Act, determine which way the evidence preponderates, but merely whether there was any evidence that the decedent

endured conscious pain and suffering before he died. *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. ed. 1160, 35 Sup. Ct. Rep. 704, 9 N. C. C. A. 754, affirming 115 Ark. 483, 171 S. W. 1185.

**(f) Amount of Verdict.**

When excessiveness of verdict reviewable in general, see *infra* XX, D, 6.

**In General.**

Whether the amount of a verdict, in an action under the Federal Employers' Liability Act, is excessive will not be considered by the Supreme Court of the United States on a writ of error to a state court, since it is a question of fact to be determined by the trial court. *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. ed. 1060, 35 Sup. Ct. Rep. 704, 9 N. C. C. A. 754, affirming 115 Ark. 483, 171 S. W. 1185.

Excessiveness of a verdict on the evidence in an action founded on the Federal Employers' Liability Act, must be corrected by the trial court and not by the Federal Supreme Court on a writ of error to a state court. *Southern R. Co. v. Bennett*, 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566, affirming 98 S. C. 42, 79 S. E. 710.

**(g) Questions Not Raised Below.**

**In General.**

The question whether a state law was superseded by the Federal Employers' Liability Act cannot be considered by the United States Supreme Court on writ of error to a state court, where no right under the statute was claimed in or passed upon by the state court. *Chicago, I. & L. R. Co. v. Hackett*, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581, affirming 170 Ill. App. 140.

Where, at the trial of an action under the Federal Employers' Liability Act, the only objection to an instruction as to assumption of risk was that it did not correctly state the common-law rule, and in a state court of last resort it was contended that under the Federal Act assumption of risk was not available as a defense, the Supreme Court of the United States will not, on writ of error, consider the objection that such instruction omitted the element of the plaintiff's appreciation of the danger of the situation. *Jacobs v. Southern R. Co.*, 241 U. S. 229, 60 L. ed. —, 36 Sup. Ct. Rep. 588, affirming 116 Va. 189, 81 S. E. 99.

**5. Affirmance or Reversal.**

**In General.**

Where, in an action under a state statute, the jury's finding of an employee's free-

dom from contributory negligence excluded the possibility that he assumed the risk of injury from the negligence of a fellow servant, a judgment for the plaintiff will not be disturbed by the Supreme Court of the United States on the ground that the action was governed by the Federal Employers' Liability Act, where the position of the defendant was no worse than if the case had been tried under the latter act. *Chicago & N. W. R. Co. v. Gray*, 237 U. S. 399, 59 L. ed. 1018, 35 Sup. Ct. Rep. 620, 9 N. C. C. A. 452, affirming 153 Wis. 637, 142 N. W. 505.

The fact that a state court of last resort may have inaccurately expressed itself in one respect in its reasons for affirming a judgment for the plaintiff in an action based on the Federal Employers' Liability Act, is not ground for reversal by the Supreme Court of the United States. *St. Louis & S. F. R. Co. v. Brown*, 241 U. S. 223, 60 L. ed. —, 36 Sup. Ct. Rep. 602, affirming — Okla. —, 144 Pac. 1075.

**When Appeal Without Merit.**

A judgment in favor of the plaintiff, in an action under the Federal Employers' Liability Act, will be affirmed by the Supreme Court of the United States, under rule 6, ¶ 5, where the only error alleged was the refusal to instruct that the plaintiff was not engaged in interstate commerce, and was injured while removing empty freight cars from a private sidetrack in order to place thereon cars containing interstate shipments. *Penn. Co. v. Donat*, 239 U. S. 50, — L. ed. —, 36 Sup. Ct. Rep. 4, affirming 139 C. C. A. 511, 224 Fed. 1021.

A judgment in favor of the plaintiff in an action based on the Federal Employers' Liability Act, will be affirmed under rule 6, ¶ 5, by the United States Supreme Court on writ of error, where the contention that a state statute applied limiting the amount of recovery for wrongful death is without merit, since the Federal Act is exclusive. *Chicago, R. I. & P. R. Co. v. Devine*, 239 U. S. 52, — L. ed. —, 36 Sup. Ct. Rep. 27, affirming 266 Ill. 248, 107 N. E. 595, Ann. Cas. 1916 B. 481.

A judgment for the plaintiff, under the Federal Employers' Liability Act, will be affirmed by the United States Supreme Court under rule 6, ¶ 5, where the contention that neither the defendant nor an employee were engaged in interstate commerce at the time of an accident, is without merit, since merely a question of the weight of the testimony. *Chicago, R. I. & P. R. Co. v. Divine*, 239 U. S. 52, — L. ed. —, 36 Sup. Ct. Rep. 27, affirming 266 Ill. 248, 107 N. E. 595, Ann. Cas. 1916 B. 481.

Where the defendant's appeal, in an action founded on the Federal Employers' Liability Act, was wholly without merit

the Supreme Court of the United States, under rule 23, added five per cent to the plaintiff's judgment on affirming it. *Southern R. Co. v. Gadd*, 233 U. S. 572, 58 L. ed. 1099, 34 Sup. Ct. Rep. 969, affirming 125 C. C. A. 21, 207 Fed. 277.

#### **When Common-Law Negligence Only Question.**

The Federal Supreme Court will affirm a judgment of the Circuit Court of Appeals in an action based on the Federal Employers' Liability Act, where an interpretation of the act is not required and the only question involved pertains to common-law negligence. *Southern R. Co. v. Gadd*, 233 U. S. 572, 58 L. ed. 1099, 34 Sup. Ct. Rep. 696, affirming 125 C. C. A. 21, 207 Fed. 277.

#### **Denial of New Trial.**

The denial of a motion for a new trial on a showing that the plaintiff's injuries were exaggerated by him, when based on conflicting evidence and supported by testimony, will not be disturbed on appeal in an action based on the Federal Employers' Liability Act. *St. Louis, I. M. & S. R. Co. v. Ingram*, — Ark. —, 187 S. W. 452.

#### **Reinstating Prior Judgment.**

When a verdict for the plaintiff, in an action under the Federal Employers' Liability Act, was set aside by a state court of last resort because of an erroneous instruction permitting a recovery for the benefit of the estate of the decedent, and on second trial a verdict for a smaller amount was rendered and affirmed on appeal, the Supreme Court of the United States cannot, on the plaintiff's cross-appeal, reinstate the first judgment. *Louisville & N. R. Co. v. Stewart*, 241 U. S. 261, 60 L. ed. —, 36 Sup. Ct. Rep. 586, affirming 163 Ky. 823, 174 S. W. 744, S. C. 156 Ky. 550, 161 S. W. 557, 157 Ky. 642, 163 S. W. 755.

#### **B. To Federal Circuit Court of Appeals.**

##### **1. In General.** (No decisions.)

##### **2. Writ of Error.**

##### **(a) Parties.**

##### **Joint Defendants.**

Both defendants are necessary parties to a writ of error sued out by the plaintiff, in an action under the Federal Employers' Liability Act against two different railway companies. *Teel v. Chesapeake & O. R. Co.*, 123 C. C. A. 210, 204 Fed. 914.

##### **(b) Amendment.**

##### **Parties.**

A writ of error sued out by the plaintiff against but one defendant in an action under the Federal Employers' Liability Act against two railway companies, may, under the Judiciary Act, be amended after the expiration of the time in which a new writ may be issued by inserting the name of an omitted defendant. *Teel v. Chesapeake & O. R. Co.*, 123 C. C. A. 210, 204 Fed. 914.

#### **3. Errors Noticed Without Exceptions or Assignments.**

##### **Failure to Apportion Damages.**

The failure of the jury, in an action founded on the Federal Employers' Liability Act, to apportion the damages between the widow and children of a deceased employee, when not questioned by the defendant, is not such prejudicial error as will justify an appellate court in noticing it on its own initiation. *Southern R. Co. v. Smith*, 123 C. C. A. 488, 205 Fed. 360.

##### **Erroneous Instructions.**

##### **— Reduction of Damages for Contributory Negligence.**

The failure of the court to give the jury the true rule for apportioning the damages in an action under the Federal Employers' Liability Act when the contributory negligence of the plaintiff was shown, although the instruction was more favorable to the defendant in some respects than it should have been, is plain error which will be noticed by the Federal Circuit Court of Appeals under rule 11, even in the absence of sufficient exceptions or assignments, where it seems probable that the jury did not make allowance for such negligence as the statute requires. *Penn. Co. v. Sheeley*, 137 C. C. A. 471, 221 Fed. 901.

##### **4. Verdict Non Obstante.**

##### **Under State Law.**

The Federal Court of Appeals cannot, in an action based on the Federal Employers' Liability Act, direct a verdict for the defendant non obstante veredicto under a state statute, on the ground that the evidence was insufficient to sustain a finding for the plaintiff, but a new trial must be granted, since otherwise the plaintiff was deprived of his right to a jury trial as guaranteed him by the Seventh Amendment to the Federal Constitution. *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, *Ann. Cas.* 1914 C. 153, 3 N. C. C. A. 779, reversing 117 C. C. A. 33, 197 Fed. 537, and 184 Fed. 737.

The right to a trial by jury was denied the plaintiff, in an action under the Fed-

eral Employers' Liability Act, by an order of the Circuit Court of Appeals reversing a judgment in his favor, and according to state practice, entering a judgment for the defendant on the ground that the evidence did not present a question for the jury. *Young v. Central R. Co. of N. J.*, 232 U. S. 602, 58 L. ed. 750, 34 Sup. Ct. Rep. 451, reversing 118 C. C. A. 465, 200 Fed. 359.

### 5. Finality of Judgment.

#### In General.

A judgment of the Circuit Court of Appeals in an action for injuries to a railway employee is final, where at the trial an allegation that the plaintiff was injured while engaged in interstate commerce and that he was entitled to recover under the Federal Employers' Liability Act, was stricken from his complaint. *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902, affirming 137 C. C. A. 23, 220 Fed. 429, 213 Fed. 537.

Since the jurisdiction of a Federal court in an action under the Federal Employers' Liability Act, does not depend entirely on diversity of citizenship, the judgment of the Circuit Court of Appeals is not final so as to preclude a review by the United States Supreme Court where the amount involved exceeds \$1,000. *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914 B. 134, affirming 113 C. C. A. 665, 192 Fed. 919.

### C. Practice in General.

#### 1. Preservation of Questions for Review.

Preserving questions for review by Federal Supreme Court, see *supra* XX, A, 3.

#### (a) In General.

##### Demurrer to Evidence.

The objection that a widow could not recover in her own name for the death of her husband, in an action based on the Federal Employers' Liability Act, was sufficiently raised by a demurrer to the evidence. *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144.

##### By Motion for Peremptory Instruction.

##### — Applicability of Federal Act.

The question whether an action lies on the Federal Employers' Liability Act is reviewable by an appellate court under a request by the defendant for a peremptory instruction as to a count of the declaration based thereon, where there was no conflict in the evidence and but one conclusion could be drawn therefrom. *Patry v. Chicago & W. I. R. Co.*, 265 Ill. 310, 106 N. E. 843, reversing 185 Ill. App. 361.

A motion for a peremptory instruction

for the defendant is sufficient to challenge the right of the plaintiff to proceed under a state law where the evidence shows that his cause of action was governed by the Federal Employers' Liability Act. *Cincinnati, N. O. & T. P. R. Co. v. Tucker*, 168 Ky. 144, 181 S. W. 940.

##### — Recovery for Pain and Suffering.

The question whether there could be a recovery under the Federal Employers' Liability Act for the pain and suffering of a decedent was sufficiently raised by a motion for a peremptory instruction for the defendant, where the evidence showed that he was injured while engaged in interstate commerce. *St. Louis, I. M. & S. R. Co. v. Hesterly*, 98 Ark. 240, 135 S. W. 874.

##### — Right of Widow to Sue in Own Name.

That an action by a widow in her own name against a carrier for the death of her husband was governed by the Federal Employers' Liability Act was sufficiently raised by a motion for a peremptory instruction for the defendant. *Cincinnati, N. O. & T. P. R. Co. v. Bonham*, 130 Tenn. 435, 171 S. W. 79.

The question whether a widow could maintain an action in her own name against a carrier for the death of her husband while employed in interstate commerce, or whether his personal representative alone could sue under the Federal Employers' Liability Act, was raised so as to permit of review by an appellate court by a motion for a peremptory instruction for the defendant, as well as by a motion for a new trial, although in neither motion was the attention of the trial court directed specifically to such point, since judicial notice will be taken of the Federal act. *Cincinnati, N. O. & T. P. R. Co. v. Bonham*, 130 Tenn. 435, 171 S. W. 79.

#### (b) Objections and Exceptions.

##### Objections.

The defendant cannot urge on appeal, in an action founded on the Federal Employers' Liability Act, that the testimony of a witness that the accident which caused the plaintiff's injury was due to the negligence of another employee, was inadmissible as opinion evidence, where the only objection to its admission was that the negligence of such employee was not alleged in the complaint. *Renn v. Seaboard A. L. R.*, 170 N. C. 128, 86 S. E. 964, affirmed on other grounds 241 U. S. 290, 60 L. ed. —, 36 Sup. Ct. Rep. 567.

An exception without an objection or ruling is not available on appeal in an action founded on the Federal Employers' Liability Act. *Lynch v. Central Vt. R. Co.*, — Vt. —, 95 Atl. 683.

The admissibility, in an action founded on the Federal Employers' Liability Act for injuries received by a car inspector, of a rule of the defendant pertaining to the former's duties, will not be determined on writ of error, where no ground for its rejection was stated. *Boston & M. R. Co. v. Benson*, 124 C. C. A. 68, 205 Fed. 876.

#### Exceptions.

##### —Necessity.

The instructions given for the plaintiff in an action founded on the Federal Employers' Liability Act will not be reviewed on writ of error where the defendant did not take seasonable exceptions thereto. *Copper R. & N. W. R. Co. v. Reed*, 128 C. C. A. 39, 211 Fed. 111.

An error in permitting the jury, in an action under the Federal Employers' Liability Act for the benefit of a widow, to take into consideration the pain and suffering of the decedent at the time of his death, is not available to the defendant on appeal where no exception was taken at the time the instruction was given. *Yazoo & M. V. R. Co. v. Wright*, 125 C. C. A. 25, 207 Fed. 281, affirming 197 Fed. 94, affirmed on other grounds 235 U. S. 376, 59 L. ed. 277, 35 Sup. Ct. Rep. 130.

Whether there was an improper joinder in the same declaration of counts under a state law and the Federal Employers' Liability Act will not be considered on appeal in the absence of appropriate exceptions. *Atlantic C. L. R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 693, reversed on other grounds — Ala. —, 67 So. 256.

Where the court instructed the jury, in an action based on the Federal Employers' Liability Act, that they should determine whether the plaintiff was guilty of contributory negligence, and if he was that they should prorate the amount of the damages between the parties in proportion to their negligence, the defendant cannot urge on appeal that the court should have instructed the jury that the plaintiff was guilty of contributory negligence, where no instruction was requested to that effect and no exceptions were taken to that given. *Denoyer v. Railway Transf. Co.*, 121 Minn. 269, 141 N. W. 175.

##### —Time for Taking.

Exceptions taken after the jury retired to consider their verdict in an action under the Federal Employers' Liability Act, will not be considered on writ of error, although before the jury retired the trial court gave the defendant permission to embody its objections in a bill of exceptions. *Arizona & N. M. R. Co. v. Clark*, 125 C. C. A. 305, 207 Fed. 817, affirmed on other grounds, 235 U. S. 669, 59 L. ed. 415, 35 Sup. Ct. Rep. 210.

Assignments of error based upon instructions given in an action predicated on the Federal Employers' Liability Act will not be considered on writ of error where no exceptions were taken until two days after the verdict was returned. *Copper R. & N. W. R. Co. v. Heney*, 128 C. C. A. 131, 211 Fed. 459.

##### —Sufficiency.

That an instruction as to contributory negligence should have been based on a state law instead of the Federal Employers' Liability Act will not be considered by an appellate court under a general exception to the submission of the action under the Federal act, where the defendant did not request an instruction under the state law. *Erie R. Co. v. Kennedy*, 112 C. C. A. 76, 191 Fed. 332.

An appellate court will not review the refusal of instructions, in an action founded on the Federal Employers' Liability Act, under an omnibus exception, where some of the instructions were good and some bad. *Penn. Co. v. Sheeley*, 137 C. C. A. 471, 221 Fed. 901.

An exception "to the definition of contributory negligence given in the charge" of the court in an action under the Federal Employers' Liability Act, raises no question for review. *Penn. Co. v. Sheeley*, 137 C. C. A. 471, 221 Fed. 901.

An exception "to the charge of the court in reference to the duty of the engineer, and all the court said upon that subject," raises no question for review in an action under the Federal Employers' Liability Act for injuries received by a fireman through the negligence of his engineer. *Penn. Co. v. Sheeley*, 137 C. C. A. 471, 221 Fed. 901.

Where the statement of an employee as to the cause of an accident that resulted in the death of a coemployee was excluded in an action founded on the Federal Employers' Liability Act, the question whether the testimony had such connection with the occurrence as to raise such a presumption of verity that its consideration would have aided the jury, is one of fact as to which no question of law is presented by an exception to the order of exclusion. *Wilson v. Grand Trunk R. Co.*, — N. H. —, 97 Atl. 981.

#### (c) Assignment of Error

##### In General.

Where a state statute makes a motion for a new trial the assignment of errors on appeal, an appellate court cannot review an objection that a finding of the jury that the plaintiff was not within the Federal Employers' Liability Act was against the weight of the undisputed testi-

mony, where such objection was not continued in the motion. *Ft. Worth Belt R. Co. v. Jones*, — *Tex. Civ. App.* —, 182 S. W. 1184.

#### **Necessity.**

The question whether an action by a miner in the employ of an interstate carrier, for injuries received while mining coal for use in locomotives employed in interstate commerce, was governed by the Federal Employers' Liability Act, and whether the Federal courts only had jurisdiction, will not be considered on appeal where there was no sufficient assignment of error to raise the questions. *Baisdrenghien v. Missouri, K. & T. R. Co.*, 91 Kan. 730, 139 Pac. 428.

#### **Sufficiency.**

An assignment of error in an action founded on the Federal Employers' Liability Act cannot be based on the overruling of an objection to the admission of testimony, where no reason for the objection was stated. *Penn. Co. v. Sheeley*, 137 C. C. A. 471, 221 Fed. 901.

An assignment that the court erred in overruling a motion for a new trial on the ground of the excessiveness of the verdict in an action under the Federal Employers' Liability Act, is too general to be considered by an appellate court. *St. Louis, S. F. & T. R. Co. v. Geer*, — *Tex. Civ. App.* —, 149 S. W. 1178.

An assignment of error that the court did not define the scope of a brakeman's employment in an instruction in an action under the Federal Employers' Liability Act, is not within an exception to that portion of the court's charge which told the jury that if they found that a coupler would not uncouple by an effort of the plaintiff, and if such failure contributed to his injury, he might recover. *Fletcher v. South Dakota C. R. Co.*, — *S. D.* —, 155 N. W. 3.

### **2. Appeal from Portion of Judgment.**

#### **Error in Portion Not Appealed from.**

Where, in an action based on the Federal Employers' Liability Act for the death of an employee, as well as for his conscious pain and suffering, the defendant did not appeal from the recovery for the benefit of the next of kin, it cannot be urged on appeal that there could not be a recovery in the same action on both grounds. *St. Louis, I. M. & S. R. Co. v. Craft*, 115 Ark. 483, 171 S. W. 1185, *L. R. A.* 1916 C. 817, affirmed 237 U. S. 648, 59 L. ed. 1160, 35 Sup. Ct. Rep. 704.

### **3. Questions Not Raised Below.**

#### **In General.**

The defendant, in an action predicated on the Federal Employers' Liability Act,

cannot urge on appeal that the complaint did not allege that a branch line on which the plaintiff was employed at the time of his injury, was used in interstate commerce by an interstate carrier, where the case was tried throughout in the lower court on the theory that such branch was used in such commerce, and the contrary was suggested for the first time on a motion to direct a verdict for the defendant. *Smith v. Northern P. R. Co.*, 79 Wash. 448, 140 Pac. 685, 5 N. C. C. A. 947.

#### **Applicability of Federal Act.**

Where the defendant's contention, on the removal of an action from a state to a Federal Court, that it was governed by the state law and not the Federal Employers' Liability Act, was sustained, it cannot, on appeal, question the correctness of such holding which it insisted upon until the close of the trial. *Illinois C. R. Co. v. Egan*, 122 C. C. A. 239, 203 Fed. 937.

The objection that an action for injuries to a railway employee was governed by the Federal Employers' Liability Act instead of a state law, was waived by the defendant, when interposed for the first time during the oral argument in a court of last resort. *Leora v. Minneapolis, St. P. & S. S. M. R. Co.*, 156 Wis. 386, 146 N. W. 520, 8 N. C. C. A. 108, writ of error dismissed 235 U. S. 693, 59 L. ed. 429, 35 Sup. Ct. Rep. 208; *Hanson v. Chicago, M. & St. P. R. Co.*, 157 Wis. 455, 146 N. W. 524, writ of error dismissed 235 U. S. 694, 59 L. ed. 429, 35 Sup. Ct. Rep. 206.

Where the only cause of action shown by a complaint was under the Federal Employers' Liability Act, but the suit was erroneously tried as a common-law action, which was more favorable to the defendant than would have been a trial under the Federal act, and the plaintiff was required to prove all facts essential to a recovery under that act, such error will be regarded merely as an irregularity where it was not noticed in the briefs and was questioned for the first time in the argument on appeal. *Southern R. Co. v. Howerton*, 182 Ind. 208, 232, 106 N. E. 369, 105 N. E. 1025, reversing — *Ind. App.* —, 101 N. E. 121, 103 N. E. 121.

That an action was governed by the Federal Employers' Liability Act will not be considered when questioned for the first time on appeal, where neither the pleadings nor the evidence presented such question. *St. Louis, I. M. & S. R. Co. v. Coke*, 118 Ark. 49, 175 S. W. 1177.

Where it was not contended at the trial, by the pleadings or otherwise, that the Federal Employers' Liability Act governs an action for the death of an employee, the defendant cannot raise such question for the first time on appeal. *Rogers v. New York C. & H. R. R. Co.*, — *App. Div.* —, 157 N. Y. Supp. 83.

Where an action for the death of an employee was tried in the lower court on the theory that it was governed by a state law, the defendant cannot on appeal contend that in fact the Federal Employers' Liability Act controlled. *Chicago, R. I. & P. R. Co. v. McBee*, — Okla. —, 145 Pac. 331.

That an action for the death of an employee was governed by the Federal Employers' Liability Act instead of a state law under which it was prosecuted, cannot be contended by the defendant for the first time on appeal, where there was nothing in the pleadings or the evidence to bring the case within the Federal Act. *Chicago, R. I. & P. R. Co. v. Holliday*, — Okla. —, 145 Pac. 786.

Where an action for injuries to a railway employee was tried on the theory that a state law governed, the question whether in fact the Federal Employers' Liability Act controlled will not be considered when raised for the first time on appeal. *Chicago, R. I. & P. R. Co. v. Rogers*, — Tex. Civ. App. —, 150 S. W. 281.

A defendant who contended at the trial that the law of the forum controlled an action for injuries received by an employee, cannot urge on appeal that the suit was improperly submitted under a state law and that the Federal Employers' Liability Act governed where its applicability was denied in the trial court. *Chicago, R. I. & P. R. Co. v. Trout*, — Tex. Civ. App. —, 152 S. W. 1137.

Where the right to recover for the death of an employee who was killed in another state, was predicated on the Federal Employers' Liability Act if he was engaged in interstate commerce and if not a recovery was sought independently of such act, and a verdict was directed for the defendant on the ground that the Federal law did not apply, as well as that the decedent assumed the risk and was guilty of contributory negligence, the plaintiff may contend in an appellate court that his right to recover was not based exclusively on the Federal act so as to exclude a common-law recovery, where both parties introduced evidence of negligence and contributory negligence. *Grow v. Oregon S. L. R. Co.*, 44 Utah 160, 138 Pac. 398, Ann. Cas. 1915 B. 481.

Where the defendant, in an action based on a state statute for the death of a railway employee, defended on the ground of contributory negligence, and the Federal Employers' Liability Act was not set up in the defendant's answer and its application was not decided by the trial court, the defendant cannot on the oral argument in an appellate court contend for the first time that the decedent was engaged in interstate commerce at the time he was killed. *Taber v. Missouri P. R. Co.*, — Mo. —, 186 S. W. 688.

#### **Failure to Apportion Damages.**

That the jury in an action under the Federal Employers' Liability Act for the benefit of the widow and child of an employee, was erroneously instructed that a verdict might be rendered for a lump sum, cannot be questioned by the defendant for the first time in an appellate court where no objection was made in the trial court to such instruction. *Doichinoff v. Chicago, M. & St. P. R. Co.*, — Mont. —, 154 Pac. 924.

#### **Failure to Request Instructions.**

The defendant, in an action founded on the Federal Employers' Liability Act, cannot on appeal complain of the failure to instruct the jury that damages could not be awarded in favor of the decedent's adult daughter, who was not shown to have received pecuniary assistance from him, where the defendant did not request an instruction to that effect other than to require the jury to apportion by their verdict the damages allowed for the decedent's pain and suffering from those awarded for the pecuniary loss of the widow and next of kin. *St. Louis, I. M. & S. R. Co. v. Rodgers*, 118 Ark. 263, 176 S. W. 696.

The failure of the defendant in an action based on the Federal Employers' Liability Act, to request a proper instruction as to the measure of damages, does not estop it from questioning on appeal an erroneous instruction on the subject to which exception was duly taken. *Chesapeake & O. R. Co. v. Dwyer*, 157 Ky. 590, 163 S. W. 752, reversed on other grounds 241 U. S. 494, 60 L. ed. —, 36 Sup. Ct. Rep. 633.

#### **Joinder of Counts for Pecuniary Loss and Suffering of Decedent.**

The question whether there may be a joinder of counts for the pecuniary loss suffered by the surviving parents of a deceased unmarried employee, as well as for the latter's mental and physical suffering before his death, in an action by a personal representative under the Federal Employers' Liability Act, cannot be raised by the defendant for the first time on appeal. *Louisville & N. R. Co. v. Fleming*, — Ala. —, 69 So. 125.

#### **Right of Beneficiary to Sue.**

Since a total absence of right of action may be urged at any stage of a cause, the objection that the right to recover for the death of a husband was not in his widow but in his personal representative, in an action under the Federal Employers' Liability Act, may be made for the first time in an appellate court. *La Casse v. New Orleans, T. & M. R. Co.*, 135 La. 129, 64 So. 1012.



**Variance.**

Whether there was a variance between a declaration and the proof in an action under the Federal Employers' Liability Act, will not be considered on a writ of error where the variance was not called to the attention of the trial court and could not have misled the defendant. *Law v. Illinois C. R. Co.*, 126 C. C. A. 27, 208 Fed. 869, L. R. A. 1915 C. 17.

**Question Not Raised in Intermediate Court.**

The failure of the jury to apportion between a widow and child of a deceased railway employee the damages awarded under the Federal Employers' Liability Act, will not be considered by the highest court of a state when not raised in an intermediate appellate court. *Devine v. Chicago, R. I. & P. R. Co.*, 266 Ill. 248, 107 N. E. 595, Ann. Cas. 1916 B. 481, affirming 185 Ill. App. 488, affirmed 239 U. S. 52, 60 L. ed. —, 36 Sup. Ct. Rep. 27.

**4. Estoppel to Raise Questions.**

Estoppel by pleading to merits to question capacity of plaintiff to sue, see *supra* XVI, H, 2, (c).

**Applicability of Federal Act.**

The fact that the defendant, in an action for injuries to a railway employee, objected to the introduction in evidence of a state law governing such actions and urged in support of a motion for a directed verdict that such law was superseded by the Federal Employers' Liability Act, does not estop the defendant from asserting on appeal that the question of its liability under the Federal act was improperly submitted to the jury. *Creteau v. Chicago & N. W. R. Co.*, 113 Minn. 418, 129 N. W. 855.

When both parties try an action under the Federal Employers' Liability Act, on the theory that contributory negligence, which was not pleaded, was not an issue, they will be held to that theory on appeal. *Delano v. Roberts*, — Mo. App. —, 182 S. W. 771.

**Effect of Consent of Successful Party to New Trial.**

The defendant in an action founded on the Federal Employers' Liability Act, cannot be deprived of the right to allege error on the issue of damages by reason of the fact that after judgment the plaintiff served notice consenting to a new trial on such issue. *Kenney v. Seaboard A. L. R. Co.*, 165 N. C. 99, 80 S. E. 1078.

**Accepting Improper Removal From State Court.**

That an action founded on the Federal Employers' Liability Act was improperly

removed by the defendant from a state court to a Federal court of a district in which it did not reside, cannot be considered on appeal, where both parties accepted the jurisdiction of the latter court. *Garrett v. Louisville & N. R. Co.*, 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769, affirmed on other grounds 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32.

**Waiver.**

**— By Introduction of Testimony.**

Whether a motion to direct a verdict for the defendant was improperly refused at the close of the plaintiff's case, in an action based on the Federal Employers' Liability Act, will not be considered on writ of error, where the defendant introduced testimony on the merits after the denial of its motion, which was not renewed at the close of all the testimony. *Arizona & N. M. R. Co. v. Clark*, 125 C. C. A. 305, 207 Fed. 817, affirmed on other grounds 235 U. S. 669, 59 L. ed. 415, 35 Sup. Ct. Rep. 210.

In an action by a widow in her own name for the death of her husband where there can be a recovery only under the Federal Employers' Liability Act, and an allegation of the defendant's answer that both it and the decedent were engaged in interstate commerce at the time of his death, was not put in issue, and the defendant moved for a judgment on the pleadings, objected to the introduction of any evidence, demurred to the evidence and asked for a peremptory instruction in its favor, the latter did not waive the right to insist on appeal that the action could not be maintained by the widow. *Missouri, K. & T. R. Co. v. Lenahan*, 39 Okla. 283, 135 Pac. 383.

**5. Law of Case.**

**On Second Appeal.**

On a second appeal in an action under the Federal Employers' Liability Act, where the facts are substantially the same as on a former appeal, they become the law of the case and will not be re-examined. *Woodruff v. Yazoo & M. V. R. Co.*, 137 C. C. A. 567, 222 Fed. 29, S. C. 127 C. C. A. 411, 210 Fed. 849.

**D. Reversible Error.**

**1. In General.**

**Credibility of Witnesses.**

Where there was sufficient evidence upon which to submit to the jury the issues in an action based on the Federal Employers' Liability Act, and proper instructions were given, the fact that credit was

given to one set of witnesses rather than to another is not reversible error. *Cincinnati, N. O. & T. P. R. Co. v. Goldston*, 163 Ky. 42, 173 S. W. 161, S. C. 156 Ky. 410, 161 S. W. 246.

## 2. Admission or Rejection of Evidence.

When reviewed by Federal Supreme Court, see *supra* XX, A, 4, (d).

### In General.

It was reversible error, in an action based on the Federal Employers' Liability Act for injuries received by an engineer when his engine was derailed at an unlocked switch, to submit to the jury the fact that a large number of children lived in the immediate vicinity of the switch, and that it was attractive to them, where it did not appear that any children were ever at or near the switch or that the switch was turned at the time of the accident, other than was inferable from the derailment of the engine at or near the switch. *Snyder v. Great N. R. Co.*, 88 Wash. 49, 152 Pac. 703.

### Destruction of Employee's Body by Fire.

Where the death of an engineer in a collision was admitted in an action based on the Federal Employers' Liability Act, and the only remaining questions were as to negligence and contributory negligence, it was prejudicial error to admit testimony that the decedent's body was burned in a fire which consumed the wreckage. *Louisville & N. R. Co. v. Holloway*, 163 Ky. 125, 173 S. W. 343, S. C. 168 Ky. 262, 181 S. W. 1126.

### Mental Anguish.

The admission of evidence, in an action under the Federal Employers' Liability Act, of mental anguish suffered by an injured employee by reason of the fact that his lack of income prevented him sending his child to school, constitutes reversible error. *Ferbee v. Norfolk & S. R. Co.*, 163 N. C. 351, 52 L. R. A. (N. S.) 1114, 79 S. E. 685, S. C. 167 N. C. 290, 83 S. E. 360, affirmed on other grounds, 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781.

### Records Showing Employment in Interstate Commerce.

The exclusion from a common law action for injuries to a brakeman, of testimony and records tending to show that the car he was moving at the time of his injury was engaged in interstate commerce, so as to bring the case within the Federal Employers' Liability Act, was reversible error. *Carpenter v. Central Vt. R. Co.*, — Vt. —, 90 Atl. 373.

### Curing Error by Admission of Similar Testimony Without Objection.

The admission over the defendant's objection, of the testimony of the widow, in an action under the Federal Employers' Liability Act for the death of her husband, that they had no property at the time of his death, was harmless error, where she subsequently testified without objection that the decedent provided well for her, that she did not want for anything, and that they were wholly dependent on his wages. *Ft. Worth & D. C. R. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279.

The improper admission, in an action based on the Federal Employers' Liability Act, of the evidence of lay witnesses as to the physical condition of an injured employee is not ground for the reversal of a judgment for the plaintiff, where such witnesses were allowed, without objection, to testify to substantially the same facts. *Texas & P. R. Co. v. Sherer*, — Tex. Civ. App. —, 183 S. W. 404.

Where a conductor testified without objection that he had charge of a train and the employees on it, the defendant cannot complain, in an action under the Federal Employers' Liability Act, of the subsequent admission of his testimony that brakemen and engineers were subject to the direction of the conductors of their trains, on the ground that the book of rules was the best evidence, where the defendant admitted that some matters might not be covered by its rules. *Lynch v. Central Vt. R. Co.*, — Vt. —, 95 Atl. 683.

The refusal of the trial court to strike out evidence is not reversible error where the same evidence was previously or subsequently admitted without objection in an action based on the Federal Employers' Liability Act. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

The refusal to strike out the testimony of the plaintiff, in an action based on the Federal Employers' Liability Act for injuries to his health caused by the continuous use of a paint sprayer or "gun," that he began using it in the fall of 1912 and continued to do so until September 6, 1913, was not reversible error, where he was previously permitted to give such testimony without objection, the defendant introducing testimony to the same effect and based its defense on the ground that the action was barred by limitation. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

## 3. Submission Under State or Federal Law.

### In General.

When an action is based on and tried under a state law it is reversible error to submit to the jury the question of liability

under the Federal Employers' Liability Act. *Creteau v. Chicago & N. W. R. Co.*, 113 Minn. 418, 129 N. W. 855.

**State and Federal Laws Similar.**

The submission of an action under a state law rather than the Federal Employers' Liability Act, is not prejudicial error where there is no material difference between the two, and the evidence was pertinent to the issue under the Federal Act. *Cole v. Atchison, T. & S. F. R. Co.*, 92 Kan. 132, 139 Pac. 1177.

An appellate court will not determine whether an action for injuries to an employee is governed by the Federal Employers' Liability Act or a state law, where the two laws are so similar as not to affect the liability of the defendant. *Kansas City W. R. Co. v. McAdow*, 240 U. S. 51, 60 L. ed. —, 36 Sup. Ct. Rep. 252, affirming — *Mo. App.* —, 164 S. W. 188.

**When Favorable to Defendant.**

Where the rule of damages applied in an action for injuries to an employee was more favorable to the defendant than that under the Federal Employers' Liability Act, the failure to apply the rule of the latter act was not prejudicial to the defendant. *Galveston, H. & S. A. R. Co. v. Averill*, — *Tex. Civ. App.* —, 136 S. W. 98.

Where the petition, in an action for injuries sustained by an employee, is based on a state law and its allegations do not show that the accident occurred while either the plaintiff or defendant were engaged in interstate commerce, it was error to submit the case to the jury without an amendment, when the evidence showed that the action was governed by the Federal Employers' Liability Act. *Cincinnati, N. O. & T. P. R. Co. v. Tucker*, 168 Ky. 144, 181 S. W. 940.

**4. Instructions.**

See generally Instructions, *supra* XIX, E.

**In General.**

It was held, in an action under the Federal Employers' Liability Act for the death of an employee, that the appellate court could not by an examination of the verdict or the size of the recovery, determine whether the defendant was prejudiced by an erroneous instruction as to the diminution of damages for contributory negligence. *Newkirk v. Pryor*, — *Mo. App.* —, 183 S. W. 682.

Whether the defendant was actually prejudiced by an erroneous instruction as to the diminution of the plaintiff's damages for his contributory negligence in an action under the Federal Employers' Liability Act, will not be determined by an ap-

pellate court where it has no means of ascertaining the comparison of negligence made by the jury. *Cross v. Chicago, B. & Q. R. Co.*, — *Mo. App.* —, 177 S. W. 1127.

**Interest.**

The giving of an instruction which was sufficient to permit the jury to allow interest on the amount of the verdict from the time of an employee's death to the date of the verdict, is reversible error in an action under the Federal Employers' Liability Act. *Grow v. Oregon S. L. R. Co.*, — *Utah* —, 150 Pac. 970.

**Failure to Instruct.**

**— Assumed Risk or Contributory Negligence.**

The failure to give an instruction as to assumed risk or contributory negligence in an action based on the Federal Employers' Liability Act, is not prejudicial to the defendant where there is no evidence that an employee was aware of the danger that caused his injury. *Riley v. Minneapolis & St. L. R. Co.*, — *Minn.* —, 156 N. W. 272.

**5. Verdict and Findings.**

**Findings of Fact.**

**— In General.**

An appellate court will not review the finding of the jury under conflicting testimony in an action based on the Federal Employers' Liability Act. *Baltimore & O. R. Co. v. Branson*, — *Md.* —, 98 Atl. 225.

An appellate court will not disturb a verdict in an action predicated on the Federal Employers' Liability Act, on the ground that the evidence is insufficient to support it, where the trial court held that the evidence to be sufficient. *Calhoun v. Great N. R. Co.*, — *Wis.* —, 156 N. W. 198.

**— Weight of Evidence.**

The jury's view of the weight of the evidence will be accepted by an appellate court, in an action based on the Federal Employers' Liability Act, when there is any substantial evidence tending to support the verdict. *Moore v. St. Joseph & G. I. R. Co.*, — *Mo.* —, 186 S. W. 1035.

In an action under the Federal Employers' Liability Act it was held that, even though the evidence tending to show negligence was weak, an appellate court was not disposed to hold it so clearly insufficient that a directed verdict for the defendant should be sustained on that ground, where it was not sustainable on the one assigned by the trial court. *Davis v. Chicago, R. I. & P. R. Co.*, — *Minn.* —, 158 N. W. 911.

**— Employment in Interstate Commerce.**

A finding by the Court of Appeals that

a railway employee was engaged in interstate commerce at the time he was injured is final and not reviewable by the Supreme Court. *Ex parte Atlantic C. L. R. Co.*, 190 Ala. 132, 67 So. 256.

A finding by the jury, in an action under the Federal Employers' Liability Act, that the plaintiff was engaged in interstate commerce at the time he was injured will not be disturbed by an appellate court when such finding was approved by the trial court on a motion for a new trial. *St. Louis & S. F. R. Co. v. Brown*, — Okla. —, 144 Pac. 1075, affirmed on other grounds 241 U. S. 223, 60 L. ed. —, 36 Sup. Ct. Rep. 602.

#### — Employment in Intrastate Commerce.

Where the appellate division of the Supreme Court unanimously affirmed a judgment for the plaintiff in an action based on a state law for the death of a railway employee, the court of appeals cannot, under the constitution of the State of New York, determine whether the action was governed by the Federal Employers' Liability Act, since that court must, if necessary to sustain the judgment, presume that the interstate was engaged exclusively in intrastate commerce. *Tyndall v. New York C. & H. R. R. Co.*, 213 N. Y. 691, 107 N. E. 577, affirming 162 App. Div. 920, 146 N. Y. Supp. 1115.

#### — Negligence.

A verdict for the plaintiff, in an action under the Federal Employers' Liability Act for injuries sustained by an employee through the negligence of a fellow servant while both were employed on a tug boat used by an interstate railroad company in continuing or completing interstate traffic, will not be disturbed by an appellate court when based on conflicting evidence from which fair minded men might reasonably draw different conclusions as to the negligence of the defendant and the contributory negligence of the plaintiff. *Erie R. Co. v. Jacobus*, 137 C. C. A. 151, 221 Fed. 335.

A finding, in an action founded on the Federal Employers' Liability Act for the death of an employee by the derailment of a train, that the ties were rotten at the place of the accident, will not be disturbed by an appellate court when sustained by the evidence. *St. Louis & S. F. R. Co. v. Duke*, 112 C. C. A. 564, 192 Fed. 306, affirming 172 Fed. 684.

A finding, in an action based on the Federal Employers' Liability Act for the death of an employee by the derailment of a freight train, that it was running at an excessive rate of speed at the time of the disaster, will not be disturbed by an appellate court when sustained by the evidence. *St. Louis & S. F. R. Co. v. Duke*,

112 C. C. A. 564, 192 Fed. 306, affirming 172 Fed. 684.

When the evidence as to the negligence of the defendant is conflicting in an action based on the Federal Employers' Liability Act, an appellate court will not disturb a judgment for the plaintiff if the instructions are correct. *Chesapeake & O. R. Co. v. Kelly*, 160 Ky. 296, 169 S. W. 736, reversed on other grounds 241 U. S. 485, 60 L. ed. —, 36 Sup. Ct. Rep. 630.

An appellate court will not disturb a verdict for the plaintiff in an action based on the Federal Employers' Liability Act for the death of an employee, where the question whether the accident was caused by the negligence of the defendant rested on conflicting evidence sufficient to show that the decedent's death was the proximate result of the disaster. *Louisville & N. R. Co. v. Stewart*, 163 Ky. 823, 174 S. W. 744, S. C. 156 Ky. 550, 161 S. W. 557, 157 Ky. 642, 163 S. W. 755, reversed on other grounds 241 U. S. 261, 60 L. ed. —, 36 Sup. Ct. Rep. 586.

Where the plaintiff, in an action under the Federal Employers' Liability Act for injuries sustained by a brakeman, testified that he was thrown from the top of a car by an alleged violent and unnecessary jerk while a train was moving at high speed, in which he was corroborated to some extent by the surrounding circumstances, a judgment for the plaintiff will not be disturbed by an appellate court, although three trainmen testified positively that the train was running less than nine miles an hour. *Hartman v. Western Md. R. Co.*, 246 Pa. 460, 92 Atl. 698.

#### — Assumed Risk.

A finding by the jury, in an action based on the Federal Employers' Liability Act, as to assumption of risk, when approved by the trial court on a motion for a new trial, will not be disturbed on appeal. *St. Louis & S. F. R. Co. v. Brown*, — Okla. —, 144 Pac. 1075.

Where a general verdict was given for the plaintiff in an action under the Federal Employers' Liability Act, and in answer to the special question whether the decedent "assumed the risk" of injury, the jury replied "no unusual risk," an appellate court will presume that the danger which caused the accident was an unusual one that the decedent did not assume. *Great N. R. Co. v. Mustell*, 138 C. C. A. 305, 222 Fed. 879.

#### — Dependency.

A finding by the jury that a parent was dependent within the meaning of the Federal Employers' Liability Act, will not be disturbed on appeal when supported by the evidence. *Calhoun v. Great N. R. Co.*, — Wis. —, 156 N. W. 198.

**— Incompetent Ground for Recovery.**

Since the amount of damages awarded in an action under the Federal Employers' Liability Act depends on the amount of negligence, a finding based on negligence for which there can be no recovery is prejudicial to the defendant, although another and sufficient ground for recovery was proven. *Louisville & N. R. Co. v. Heiniz*, 162 Ky. 14, 171 S. W. 853.

**Inconsistent Findings.**

A judgment for the plaintiff under the Federal Employers' Liability Act will be reversed where the answers of the jury to special questions leave it in doubt whether he was guilty of contributory negligence. *Cole v. Atchison, T. & S. F. R. Co.*, 92 Kan. 132, 139 Pac. 1177.

**6. Amount of Verdict.**

When amount of verdict reviewed by Federal Supreme Court, see *supra* XX, A, 4, (f).

**In General.**

The Circuit Court of Appeals cannot, on writ of error, determine whether excessive damages were awarded in an action based on the Federal Employers' Liability Act. *Arizona & N. M. R. Co. v. Clark*, 125 C. C. A. 305, 207 Fed. 817, affirmed on other grounds 235 U. S. 669, 59 L. ed. 415, 35 Sup. Ct. Rep. 210.

A Federal appellate court will not review a motion to set aside for excessiveness a verdict in an action under the Federal Employers' Liability Act, since that is a matter to be disposed of by the trial court on a motion for a new trial. *Chesapeake & O. R. Co. v. Proffitt*, 134 C. C. A. 37, 218 Fed. 23.

Whether the verdict in an action under the federal Employers' Liability Act is excessive will not be determined by an appellate court on conflicting evidence, where the trial court, in denying a new trial, held the recovery to be reasonable. *Atlantic C. L. R. Co. v. Whitney*, 65 Fla. 72, 61 So. 179, 3 N. C. C. A. 812, S. C. 62 Fla. 124, 56 So. 937.

An appellate court will not hold excessive a verdict for wrongful death in an action based on the Federal Employers' Liability Act, unless it is such as to strike the mind at first blush as so grossly excessive as to appear to have been the result of passion or prejudice. *Louisville & N. R. Co. v. Holloway*, 168 Ky. 262, 181 S. W. 1126, S. C. 163 Ky. 125, 173 S. W. 343.

Where the Tennessee Court of Civil Appeals affirmed the action of a trial court in reducing the amount of the plaintiff's judgment in an action under the Federal Employers' Liability Act, the Supreme Court will not interfere. *Carolina, C. &*

*O. R. Co. v. Shewalter*, 128 Tenn. 363, 161 S. W. 1136, Ann. Cas. 1915 C. 605, L. R. A. 1916 C. 964, affirmed without opinion 239 U. S. 630, — L. ed. —, 36 Sup. Ct. Rep. 166.

**Failure to Award Present Worth of Damages.**

It is reversible error to permit the jury, in an action under the Federal Employers' Liability Act for wrongful death, to award the aggregate amount of expected future benefits of which the beneficiaries have been deprived, since the amount awarded should be the present worth of such benefits. *Chesapeake & O. R. Co. v. Kelly*, 241 U. S. 485, 60 L. ed. —, 36 Sup. Ct. Rep. 630, reversing 160 Ky. 296, 169 S. W. 736, S. C. 161 Ky. 655, 171 S. W. 185; *Chesapeake & O. R. Co. v. Gainey, Adm. of Dwyer*, 241 U. S. 494, 60 L. ed. —, 36 Sup. Ct. Rep. 633, reversing 162 Ky. 427, 172 S. W. 918.

**When Damages Excessive as to One Parent.**

When the damages apportioned between divorced parents in an action under the Federal Employers' Liability Act for the death of a son, are excessive as to one of the parents, the defendant is entitled to a reversal of the entire judgment. *Pittsburgh, C. C. & St. L. R. Co. v. Collard*, — Ky. —, 185 S. W. 1108.

**Reduction for Contributory Negligence.**

Since the comparison of the negligence of an injured employee and of his employer and the making of a reduction for the contributory negligence of the former in an action predicated on the Federal Employers' Liability Act, is so peculiarly within the province of the jury, an appellate court cannot, by mere conjecture from the size of the verdict, reach the conclusion that the jury did not make a proper deduction for contributory negligence. *Cincinnati, N. O. & T. P. R. Co. v. Goode*, — Ky. —, 183 S. W. 264, S. C. 153 Ky. 247, 154 S. W. 941, 163 Ky. 60, 173 S. W. 329.

**Grant or Refusal of New Trial for Excessiveness.**

The granting or refusing by the trial court of a motion for a new trial for the excessiveness of the damages in an action founded on the Federal Employers' Liability Act, is a matter of discretion which is not reviewable by an appellate court. *Southern R. Co. v. White*, — C. C. A. —, 232 Fed. 144.

In an action under the Federal Employers' Liability Act an appellate court will not assume, when the ground for a motion for a new trial was the finding of inadequate damages as the result of passion and prejudice, that the jury did not find contributory negligence and reduce the dam-

ages therefor. *Burke v. Chicago & N. W. R. Co.*, 131 Minn. 209, 154 N. W. 960.

### 7. Harmless Error.

#### In General.

Where the liability of the defendant, in an action based on the Federal Employers' Liability Act, turns solely on the question whether a switch at which a train was wrecked and a fireman killed, was turned by the criminal act of a trespasser, the admission of evidence relating to other and independent matters will be treated as harmless. *Bowers v. Southern R. Co.*, 10 Ga. App. 367, 73 S. E. 677.

#### Statute Precluding Reversal for Harmless Error.

Since an action in a state court under the Federal Employers' Liability Act, may be tried according to the local rules of procedure, a state statute is applicable which forbids the reversal of a judgment because of the improper admission of evidence or the misdirection of the jury, where an examination of the entire record shows that the errors complained of do not affect the substantial rights of the objector. *Winters v. Minneapolis & St. L. R. Co.*, 126 Minn. 260, 148 N. W. 106.

If, in an action for an injury to an employee, the defendant is accorded all to which it is entitled under the Federal Employers' Liability Act, a judgment for the plaintiff will not be reversed because his petition did not plead the Federal act, where the evidence showed that he was engaged in interstate commerce at the time of the accident; since a reversal under such circumstances would violate a state statute forbidding the disturbance of judgments for errors not affecting the merits. *McIntosh v. St. Louis & S. F. R. Co.*, 182 Mo. App. 188, 168 S. W. 821.

### E. Remittitur.

#### Curing Error by.

In an action under the Federal Employers' Liability Act, where it is apparent that the jury did not make the proper apportionment of damages for the contributory negligence of the plaintiff, he was given an opportunity by an appellate court to remit one-third of his judgment or to take a new trial, where the evidence fairly showed that his negligence was not greater than one-third of the whole negligence. *Penn. Co. v. Sheeley*, 137 C. C. A. 471, 221 Fed. 901.

The prejudicial error in instructing the jury in an action based on the Federal Employers' Liability Act, to the effect that they might award a widow damages for

the deprivation of the companionship and association of her husband, cannot be cured in an appellate court by a remission of a portion of the judgment, since the amount awarded for such loss cannot be separated from that allowed for the injury to her means of support. *New York, C. & St. L. R. Co. v. Niebel*, 131 C. C. A. 248, 214 Fed. 952.

In an action under the Federal Employers' Liability Act, where the verdict is excessive because the jury did not substantially diminish the damages on account of the negligence of an injured employee, an appellate court will offer the plaintiff the option of accepting a new trial or a judgment for a lesser sum. *Saar v. Atchison, T. & S. F. R. Co.*, — Kan. —, 155 Pac. 954.

In an action based on the Federal Employers' Liability Act, where the court instructs the jury that contributory negligence has been shown, and the jury fails to make a proper deduction therefor, an appellate court may order such remittitur as seems proper under the evidence. *Hadley v. Union P. R. Co.*, 99 Neb. 349, 156 N. W. 765.

Where the amount awarded the plaintiff in an action under the Federal Employers' Liability Act was undoubtedly increased by the prejudicial argument of the plaintiff's counsel to the jury, an appellate court cannot order a remittitur and affirm the judgment. *Texas & P. R. Co. v. Rasmussen*, — Tex. Civ. App. —, 181 S. W. 212.

Where the appellate court, in an action predicated on the Federal Employers' Liability Act which was tried without a jury, find that the trial court erred in holding that the decedent was free from contributory negligence, and on the record it appeared that he and the defendant were equally at fault, the judgment was reduced 50 per cent. *Anset v. Columbia & P. S. R. Co.*, 89 Wash. 609, 154 Pac. 1100.

### F. Affirmance, Reversal and Remand.

#### 1. In General.

#### Interest on Obtaining Supersedeas.

When, in an action in a state court under the Federal Employers' Liability Act, the defendant obtains a supersedeas and the plaintiff's judgment is affirmed, 10 per cent damages may be awarded under a state statute, making such damages the penalty, on the affirmance of the judgment, to all persons obtaining a supersedeas. *Louisville & N. R. Co. v. Stewart*, 241 U. S. 261, 60 L. ed. —, 36 Sup. Ct. Rep. 586, affirming 163 Ky. 823, 174 S. W. 744, S. C. 156 Ky. 550, 161 S. W. 557, 157 Ky. 642, 163 S. W. 755.

**2. Affirmance.**  
(No decisions.)

**3. Reversal.**

**In General.**

The fact that in an action founded on the Federal Employers' Liability Act of 1906, the age and condition of health of the widow and child of a deceased employee were not shown, does not require the reversal of a judgment in their favor, where the jury saw the widow and had an opportunity of judging her age and condition of health. *Philadelphia, B. & W. R. Co. v. Tucker*, 35 App. D. C. 123, L. R. A. 1915 C. 39, affirmed 220 U. S. 608, 55 L. ed. 607, 31 Sup. Ct. Rep. 725.

**Judgment for Defendant.**

Where the finding of the jury that the plaintiff was injured while employed in interstate commerce precludes a recovery under the common-law counts of a declaration, an appellate court cannot, on reversing a judgment for the plaintiff because he was not within the Federal Employers' Liability Act, enter a final judgment for the defendant on the ground of the contributory negligence of the plaintiff. *Patry v. Chicago & W. I. R. Co.*, 265 Ill. 310, 106 N. E. 843, reversing 185 Ill. App. 361.

**4. Remand for New Trial.**

**In General.**

A case will not be remanded for a new trial where judgment was rendered against a personal representative, in an action brought under the Federal Employers' Liability Act for the benefit of the parents of a deceased employee, the plaintiff having refused, although permission had been given him, to amend his declaration so as to allege pecuniary loss to such beneficiaries. *Garrett v. Louisville & N. R. Co.*, 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32, affirming 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769.

Where liability is not established either under the Federal Employers' Liability Act or a state law in an action for the death of a railway employee, a judgment for the plaintiff will be reversed without a new trial, where every ground for a recovery was presented by the record, and there was no prejudicial error. *Norton v. Erie R. Co.*, 163 App. Div. 466, 148 N. Y. Supp. 769.

**To Permit Trial Under Federal Act.**

Where the case made by the pleadings, evidence and instructions in an action for injuries to a railway employee, was under a state law, the appellate court cannot define the rights and liabilities of the parties under the Federal Employers' Liability Act, but on a new trial the lower court may permit such amendments as may be desired, and hear and determine the matter under the Federal law. *Cincinnati, N. O. & T. P. R. Co. v. Goode*, 155 Ky. 153, 159 S. W. 695.

Where a state law was declared on in an action for injuries to an employee, and the proof established a liability under the Federal Employers' Liability Act, an appellate court cannot reverse a judgment in favor of the plaintiff and remand the action so as to permit him to amend his petition by setting up a cause of action under the Federal law and to go to trial thereon. *Moliter v. Wabash R. Co.*, 180 Mo. App. 84, 168 S. W. 250.

In an action by a widow in her own name for the death of her husband, where there can be a recovery only under the Federal Employers' Liability Act, and after submission of the case in the appellate court she applied for leave to be made a party as personal representative under an appointment by a court of another state made after the rendering of the judgment in the trial court, and the defendant by sworn denial put in issue her right and appointment as administratrix, the appellate court will not determine such issues of fact, but will remand the case without prejudice to such rights as the alleged personal representative may have. *Missouri, K. & T. R. Co. v. Lenahan*, 39 Okla. 283, 135 Pac. 383.

The reversal of a judgment in favor of a widow in her own name against a carrier for the death of her husband, on the ground that the proceeding was controlled by the Federal Employers' Liability Act and that a personal representative only could maintain the action, will be without prejudice to the latter's rights. *Cincinnati, N. O. & T. P. R. Co. v. Bonham*, 130 Tenn. 435, 171 S. W. 79.

On the reversal of a common law action for injuries to an employee it will be remanded and the parties may try it anew under the Federal Employers' Liability Act. *Carpenter v. Central Vt. R. Co.*, — Vt. —, 90 Atl. 373.

## HOURS OF LABOR ACT.

### FEDERAL

Act March 4, 1907, ch. 2939, 34 Stat. at Large 1415, U. S. Comp. Stat. Supp. 1911, p. 1321, U. S. Comp. Stat. 1913, §§ 8677-8680, Fed. Stat. Anno. 1909 Supp. p. 581.\*

#### I. VALIDITY AND CONSTRUCTION.

##### A. Validity.

###### 1. In General.

##### B. Construction.

###### 1. In General.

###### 2. Duty Imposed by Act.

###### 3. When Employee's Duty Begins.

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##### A. Civil.

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###### 2. Delay in Transportation.

##### B. Criminal.

(Will be covered in subsequent issues.)

#### V. APPEAL AND ERROR.

#### I. VALIDITY AND CONSTRUCTION.

##### A. Validity.

###### 1. In General.

##### Constitutionality.

The Federal Hours of Labor Act of March 4, 1907, is constitutional. *St. Louis, I. M. & S. R. Co. v. McWhirter*, 145 Ky. 427, 140 S. W. 672, reversed on other grounds 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858, *United States v. Kansas City S. R. Co.*, 189 Fed. 471.

The Federal Hours of Labor Act is a valid regulation of interstate commerce. *Baltimore & O. R. Co. v. Interstate Com. Comm.*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621.

The Federal Hours of Labor Act is valid when applied to employees engaged in interstate commerce. *State v. Chicago, M. & St. P. R. Co.*, 136 Wis. 409, 117 N. W. 686.

The fact that employees connected with the movement of interstate trains are of necessity also engaged in intrastate traffic does not render the Federal Hours of Labor Act unconstitutional. *Baltimore & O.*

*R. Co. v. Interstate Com. Comm.*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621.

The exception of employees from the operation of the Federal Hours of Labor Act in certain emergencies does not render the law unconstitutional. *Baltimore & O. R. Co. v. Interstate Com. Comm.*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621.

No unconstitutional discrimination was created by the fact that the Federal Hours of Labor Act provides different regulations for telegraph operators employed at stations open day and night and those at stations continuously operated only during the daytime. *United States v. St. Louis S. W. R. Co.*, 189 Fed. 954.

##### B. Construction.

###### 1. In General.

##### Purpose of Act.

The purpose of the Federal Hours of Service Act was not to subject a carrier to liability for all accidents which happen to its employees while working beyond the prescribed time irrespective of whether attributable to the fact of their working overtime. *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 857, reversing 145 Ky. 427, 140 S. W. 672.

###### 2. Duty Imposed by Act.

##### Absolute Duty.

The Federal Hours of Labor Act prohibiting carriers engaged in interstate commerce from requiring employees to remain on duty for more than 16 consecutive hours, is mandatory, and imposes an absolute duty on a carrier, the nonperformance of which cannot be excused by showing that notwithstanding the use of ordinary care or reasonable diligence it was unable to perform such statutory duty. *St. Louis, I. M. & S. R. Co. v. McWhirter*, 145 Ky. 427, 140 S. W. 672, reversed on other grounds, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858.

##### Effect of Unavoidable Delays.

The Federal Hours of Labor Act does not apply where casualty, unavoidable accident or the act of God compels an employee to work in violation of such law, nor where the delay of a train en route is the result of a cause not known to a carrier when an employee left a terminal and

\*See Appendix for text of act.



which could not have been foreseen. *Black v. Charleston & W. C. R. Co.*, 87 S. C. 241, 69 S. E. 230, 31 L. R. A. (N. S.) 1184.

### 3. When Employee's Duty Begins.

#### In General.

A brakeman's services do not begin, within the meaning of the Federal Hours of Labor Act, from the time he is called and while he is on his way to a station to report for duty. *Osborne v. Cincinnati, N. O. & T. P. R. Co.*, 158 Ky. 176, 164 S. W. 818, Ann. Cas. 1915 D. 448.

A brakeman's services do not begin, within the meaning of the Federal Hours of Labor Act, until, under the rules of a carrier, he has some duty to perform in connection with the movement of his train, although it has not actually started on its journey, since the computation of his hours of labor is not limited to the time his train is actually running. *Osborne v. Cincinnati, N. O. & T. P. R. Co.*, 158 Ky. 176, 164 S. W. 818, Ann. Cas. 1915, D. 448.

## II. WHAT CARRIERS WITHIN ACT.

(No decisions.)

## III. WHAT EMPLOYERS WITHIN ACT.

### A. In General.

#### Employee Loading Livestock.

An employee whose duty was to assist in unloading, feeding, watering, caring for and reloading livestock in the stock yards of an interstate carrier, and was killed after working fifty-four hours out of fifty-seven, by falling from a switch engine while on the way to procure cars of stock to be unloaded and cared for, was not within the Hours of Service Act, since he was not engaged in connection with the movement of any train at the time of his death. *Schweig v. Chicago, M. & St. P. R. Co.*, 132 C. C. A. 660, 216 Fed. 750, 7 N. C. C. A. 135, affirming 205 Fed. 96.

### B. Employees of Intrastate Carriers.

#### In General.

The Federal Hours of Labor Act does not apply to the employees of intrastate carriers or to employees engaged wholly in intrastate business. *Baltimore & O. R. Co. v. Interstate Com. Comm.*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621.

### C. Deadheading Employees.

#### In General.

The time during which a brakeman is deadheading under orders on a train with

the movement of which he has no duties to perform, is not to be computed as hours of service within the meaning of the Federal Hours of Labor Act. *Osborne v. Cincinnati, N. O. & T. P. R. Co.*, 158 Ky. 176, 164 S. W. 818, Ann. Cas. 1915 D. 448.

#### Assisting Crew of Train.

The conductor of an interstate freight train which was abandoned because of the Hours of Labor Act and consolidated with another train on which he was deadheading to a terminal point, was within the protection of the Federal Employers' Liability Act and did not act as a mere volunteer, where he was injured while assisting at the request of the conductor of the latter train, in switching en route. *Seaboard A. L. R. Co. v. McMichael*, 143 Ga. 689, 85 S. E. 891.

## IV. ACTIONS FOR VIOLATION.

### A. Civil.

#### 1. Personal Injuries.

#### In General.

Under the Federal Hours of Service Act a carrier does not become an insurer of the safety of its employees while working beyond the statutory sixteen-hour period. *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 857, reversing 145 Ky. 427, 140 S. W. 672.

#### Working Overtime as Negligence.

The violation by a carrier of the Federal Hours of Service Act does not create an unconditional liability for all accidents happening to employees during the period beyond the statutory time, irrespective of proof showing a connection between the accident and the fact of their working overtime. *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 857, reversing 145 Ky. 427, 140 S. W. 672.

The fact that an employee of an interstate carrier was killed a few minutes after the expiration of the sixteen hours of service prescribed by the Federal Hours of Service Act, does not show negligence per se to which as a matter of law the accident was attributable. *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 857, reversing 145 Ky. 427, 140 S. W. 672.

The fact that an employee had worked from five to seven minutes beyond the period prescribed by the Federal Hours of Service Act does not render a carrier liable for his death by falling in front of a slowly moving train as he was about to throw a switch, where no negligence was shown other than the permitting of the deceased to work overtime. *St. Louis, I. M.*

& *S. R. Co. v. McWhirter*, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 857, reversing 145 Ky. 427, 140 S. W. 672.

There can be no recovery for injuries sustained by a brakeman when compelled to work in violation of the Federal Hours of Labor Act, unless some act of negligence on the part of his employer is shown other than the mere violation of such act, which, concurring with or independent of such violation, contributed to his injury. *Osborne v. Cincinnati, N. O. & T. P. R. Co.*, 158 Ky. 176, 164 S. W. 818, Ann. Cas. 1915, D. 448.

The plaintiff cannot recover in an action based on the violation of the Federal Hours of Labor Act, in the absence of evidence of negligence on the part of the employer other than the violation of such act. *Bell v. Chesapeake & O. R. Co.*, 161 Ky. 466, 170 S. W. 1180.

In order to recover for injuries sustained by an employee while working in excess of 16 hours, something more than the violation by a carrier of the Federal Hours of Labor Act must be shown indicating that such infraction of the law was the proximate cause of the accident, and it must be both alleged and proved that the injury was directly attributable to the fact of working overtime. *Bjornsen v. Northern P. R. Co.*, 84 Wash. 220, 146 Pac. 575.

In order that an employee may recover for injuries received while working in excess of 16 hours, it must be alleged and proved that his injury was directly attributable to the act of working overtime in violation of the Federal Hours of Labor Act. *Bjornsen v. Northern P. R. Co.*, 84 Wash. 220, 146 Pac. 575.

The violation by a carrier of the absolute duty imposed by the Federal Hours of Labor Act, which prohibits carriers engaged in interstate commerce from requiring employees to remain on duty for more than 16 consecutive hours, is, when resulting in injury to an employee, negligence per se. *St. Louis, I. M. & S. R. Co. v. McWhirter*, 145 Ky. 427, 140 S. W. 672, reversed 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858.

A carrier is answerable where a flagman was killed while in the discharge of his duties after having been required to work continuously, in violation of the Federal Hours of Labor Act, for 16 hours and 5 minutes, since such violation amounted to negligence per se and was the proximate cause of the accident. *St. Louis, I. M. & S. R. Co. v. McWhirter*, 145 Ky. 427, 140 S. W. 672, reversed 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858.

#### Instructions.

It was reversible error, in an action under the Federal Employers' Liability Act for injuries sustained by a fireman who

was kept at work for 16 hours on a defective locomotive, to instruct the jury that if the breaking of a valve yoke which disabled the engine could have been guarded against or foreseen by the exercise of ordinary care, the law authorized an inference of negligence on the part of the defendant in requiring the plaintiff to work for such a length of time, and that if the jury found that the breaking of the yoke was not a casualty or such an unknown and unforeseeable cause, the defendant's plea of contributory negligence and assumed risk should be disregarded, since such instruction was not limited so as to deprive the defendant of the benefit of such defenses only in the event that the violation of the Hours of Service Act contributed to the injury of the plaintiff. *Atchison, T. & S. F. R. Co. v. Swearingen*, 239 U. S. 339, — L. ed. —, 36 Sup. Ct. Rep. 121.

## 2. Delay in Transportation.

### Passengers.

A carrier is answerable to a passenger on a mixed train for failure to carry him to his destination on schedule time as the result of the laying off of the train on the road in order to prevent the crew from working more than 16 hours in violation of the Federal Hours of Labor Act, where the delay was attributable to the negligence of the carrier. *Black v. Charleston & W. C. R. Co.*, 87 S. C. 241, 69 S. E. 230, 31 L. R. A. (N. S.) 1184.

A passenger cannot recover punitive damages for the failure of a carrier to transport him to his destination on a mixed train according to schedule, where without any rudeness, disrespect or wilful disregard of his rights as a passenger, the train was laid off en route in order to prevent a violation of the Federal Hours of Labor Act. *Black v. Charleston & W. C. R. Co.*, 87 S. C. 241, 69 S. E. 230, 31 L. R. A. (N. S.) 1184.

### B. Criminal.

(Will be covered in later issues.)

## V. APPEAL AND ERROR.

### From State to Federal Supreme Court. — When Federal Question Involved.

The denial by a state court of the contention of a carrier that the evidence did not disclose a liability for the death of an employee as the result of an alleged violation of the Federal Hours of Service Act, is reviewable by the Supreme Court of the United States on writ of error, since the operation and effect of such act was involved. *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 857, reversing 145 Ky.

427, 140 S. W. 672. (Pitney, J., dissenting.)

A decision of a state court that there was evidence sufficient to authorize the submission of a case on the ground of negligence aside from an alleged violation of the Federal Hours of Service Act, does not dispose of the action on a non-Federal

question so as to deprive the Supreme Court of the United States of jurisdiction to determine the matter on a writ of error. *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 857, reversing 145 Ky. 427, 140 S. W. 672. (Pitney, J., dissenting.)

## SAFETY APPLIANCE ACT.

### FEDERAL

Act of March 2, 1893, 27 Stat. at Large 531, ch. 196, Comp. Stat. 1913, §§ 8605-8622, 6 Fed. Stat. Anno., p. 752, amended April 1, 1896, 29 Stat. at Large 85, March 2, 1903, 32 Stat. at Large 943, ch. 976, 10 Fed. Stat. Anno., p. 375, April 14, 1910, 36 Stat. at Large 298, ch. 160, U. S. Comp. Stat. 1913, §§ 8605-8650.\*

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#### I. VALIDITY.

##### In General.

The Federal Safety Appliance Act is constitutional. *Chicago J. R. Co. v. King*, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79, affirming 94 C. C. A. 652, 169 Fed. 372; *Chicago, R. I. & P. R. Co. v. Brown*, 107 C. C. A. 300, 185 Fed. 80; *Wabash R. Co. v. United States*, 93 C. C. A. 393, 168 Fed. 1; *United States v. Wheeling & L. E. R. Co.*, 167 Fed. 198; *United States v. Atlantic C. L. R. Co.*, 153 Fed. 918; *Kelly v. Great N. R. Co.*, 152 Fed. 211; *Phila. & R. R. Co. v. Winkler*, 4 Penn. (Del. 387), 56 Atl. 112, affirming 4 Penn. (Del.) 80, 53 Atl. 90.

If the amendment of March 3, 1903, is unconstitutional because applying to cars and engines used by interstate carriers in intrastate commerce, it does not affect the validity of the original Safety Appliance

\*See Appendix for text of act.

Act. *United States v. Wheeling & L. E. R. Co.*, 167 Fed. 198.

The Federal Safety Appliance Act of March 2, 1893, as amended, requiring all interstate carriers to equip with the designated safety devices the cars and locomotives used in either interstate or intrastate commerce, is a valid enactment under the commerce clause of the constitution. *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, affirming 164 Fed. 347.

The Federal Safety Appliance Act of March 2, 1893, as amended March 3, 1903, is constitutional when construed as not applicable to cars actually devoted to intrastate use only, notwithstanding that they are generally used indiscriminately in both interstate and intrastate commerce. *Southern R. Co. v. Snyder*, 109 C. C. A. 344, 187 Fed. 492.

Legislative power was not unconstitutionally delegated by the Federal Safety Appliance Act to the Interstate Commerce Commission and the American Railway Association by the provision that after a designated date freight cars only equipped with drawbars of a uniform height fixed by such bodies should be moved in interstate commerce. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, reversing 83 Ark. 591, 95 S. W. 958, S. C. 71 Ark. 495, 78 S. W. 220.

#### **Effect of Creating Right of Action for Personal Injuries.**

It was within the constitutional power of Congress to create a right of action in favor of an employee who is injured while engaged in duties unconnected with interstate commerce, in consequence of a defect in a safety appliance which the Federal Safety Act, as amended, requires to be made secure. *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. ed. —, 36 Sup. Ct. Rep. 482, affirming 138 C. C. A. 51, 222 Fed. 221.

## **II. NATURE AND CONSTRUCTION.**

### **A. Nature.**

#### **Remedial.**

The Federal Safety Appliance Act is remedial in its nature. *Southern R. Co. v. Snyder*, 109 C. C. A. 344, 187 Fed. 492, 124 C. C. A. 60, 205 Fed. 868; *Gray v. Louisville & N. R. Co.*, 197 Fed. 874.

### **B. Construction.**

#### **In General.**

The Federal Safety Appliance Act is not to be construed so narrowly as to defeat the obvious intention of the legisla-

tion, since its object is remedial and its purpose humanitarian, that is, to protect the life and limb of employees. *Southern R. Co. v. Snyder*, 109 C. C. A. 344, 187 Fed. 492, S. C. 124 C. C. A. 60, 205 Fed. 868.

The Federal Safety Appliance Act should be given such a construction as will reasonably effect the purpose for which it was enacted, which was to relieve employees from the necessity of going between the ends of cars to couple or uncouple them. *Southern P. Co. v. Allen*, 48 Tex. Civ. App. 66, 106 S. W. 441.

#### **Effect on State Courts.**

The provisions of the Federal Safety Appliance Act, so far as they apply to interstate commerce, are binding on state courts. *Mobile, J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395.

In construing the Federal Safety Appliance Act a state court is bound by the construction placed thereon by the Federal courts. *Lukens v. Lake Shore & M. S. R. Co.*, 248 Ill. 377, 94 N. E. 175, 21 Ann. Cas. 82, affirming 154 Ill. App. 550.

### **C. Territorial Extent.**

#### **Porto Rico.**

By the amendment of March 2, 1903, 22 St. at L. 943, ch. 976, U. S. Comp. St. Supp. 1911, p. 1314, the Federal Safety Appliance Act was extended to Porto Rico. *American R. Co. v. Didricksen*, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224, reversing 5 Porto Rico Fed. Rep. 401, S. C. 5 id. 427.

### **D. Effect on State Laws.**

#### **Laws Aimed at Intrastate Carriers.**

A state statute requiring the use of automatic couplers and other safety devices on the cars of carriers engaged in intrastate traffic, does not conflict with the Federal Safety Appliance Act. *Lukens v. Lake Shore & M. S. R. Co.*, 248 Ill. 377, 94 N. E. 175, 21 Ann. Cas. 82; affirming 154 Ill. App. 550; *Detroit, T. & I. R. Co. v. State*, 82 Oh. St. 60, 91 N. E. 869; *Freeman v. Swan*, — Tex. Civ. App. —, 143 S. W. 724.

#### **Application of State Laws to Intrastate Traffic of Interstate Carriers.**

A state law requiring carriers in intrastate traffic to equip their cars with automatic coupling and other safety devices, is applicable to such traffic over an interstate railway, and does not conflict with the Federal Act. *Lukens v. Lake Shore & M. S. R. Co.*, 248 Ill. 377, 94 N. E. 175, 21 Ann. Cas. 82, affirming 154 Ill. App. 550.

## III. DUTY IMPOSED.

## A. In General.

**Absolute Duty.**

An absolute duty is imposed on interstate carriers by the Federal Safety Appliance Act. *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 580, 59 L. ed. 590, 31 Sup. Ct. Rep. 617, reversing 86 C. C. A. 95, 158 Fed. 931, 14 Ann. Cas. 233; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, reversing 83 Ark. 591, 98 S. W. 958, S. C. 71 Ark. 495, 78 S. W. 220; *Johnson v. Great N. R. Co.*, 102 C. C. A. 89, 178 Fed. 643; *Chicago & A. R. Co. v. Walters*, 217 Ill. 87, 75 N. E. 441, affirming 120 Ill. App. 152; *Lukens v. L. S. & M. S. R. Co.*, 248 Ill. 377, 94 N. E. 175, 21 Ann. Cas. 82, affirming 154 Ill. App. 550; *Brinkmeier v. Missouri P. R. Co.*, 81 Kan. 101, 105 Pac. 221, overruling 77 Kan. 15, 22, 93 Pac. 621, affirmed on other grounds 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412; *Coleman v. Illinois C. R. Co.*, — Minn. —, 155 N. W. 763; *Popplar v. Minn., St. P. & S. S. M. R. Co.*, 121 Minn. 413, 141 N. W. 798, Ann. Cas. 1914 D. 383, affirmed 237 U. S. 369, 59 L. ed. 1000, 35 Sup. Ct. Rep. 609; *Willet v. Illinois C. R. Co.*, 122 Minn. 513, 142 N. W. 883; *Burho v. Minneapolis & St. L. R. Co.*, 121 Minn. 326, 141 N. W. 300; *Galveston, H. & S. A. R. Co. v. Kurtz*, — Tex. Civ. App. —, 147 S. W. 658.

An absolute duty to equip and keep its cars equipped with the devices required by the Federal Safety Appliance Act is imposed on a carrier. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, reversing 83 Ark. 591, 98 S. W. 958, S. C. 71 Ark. 495, 78 S. W. 220.

The Federal Safety Appliance Act imposes an absolute and unqualified duty on interstate carriers to maintain the required safety devices in a secure condition. *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. ed. —, 36 Sup. Ct. Rep. 482, affirming 138 C. C. A. 51, 222 Fed. 221.

## B. Coupling Apparatus.

**In General.**

The requirements of the Federal Safety Appliance Act as to apparatus that will couple automatically by impact, changed a carrier's common-law duty of reasonable care into an absolute duty. *Noel v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 182 S. W. 787, writ of error dismissed 239 U. S. 652, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

The application of the Federal Safety Appliance Act to the coupling or uncoupling of cars is not limited to the instant of the moving of the rod or lever that raises

the coupling pin, but extends to the time when a switchman is taking a necessary position to uncouple a car. *Daly v. Illinois C. R. Co.*, 170 Ill. App. 185.

**Necessity That Devices Operate Automatically.****— In General.**

The Federal Safety Appliance Act requires not only that cars engaged in interstate commerce shall be equipped with automatic coupling devices, but also that they shall be in condition to work automatically while engaged in such commerce. *Phila. & R. R. Co. v. Winkler*, 4 Penn. (Del.) 387, 56 Atl. 112, affirming 4 Penn. (Del.) 80, 53 Atl. 90.

The Federal Safety Appliance Act imposes on a carrier the duty of seeing that no cars are hauled or used on its lines unless equipped according to the statutory requirements. *Chicago J. R. Co. v. King*, 94 C. C. A. 652, 169 Fed. 372, affirmed 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79.

An absolute duty to provide and to keep proper coupling apparatus at all times and under all circumstances upon cars moving in interstate commerce, irrespective of the exercise of care and diligence, is imposed on carriers by the Federal Safety Appliance Act. *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617, reversing 86 C. C. A. 95, 158 Fed. 931, 14 Ann. Cas. 233.

The duty imposed on a carrier by the Federal Safety Appliance Act is not entirely performed by providing couplers of standard make which will couple by impact, since such apparatus must be attached to cars and kept so attached that they will operate automatically by impact. *Noel v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 182 S. W. 787, writ of error dismissed 239 U. S. 652, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

A coupler which had become so worn as to permit of lateral motion enough to prevent it coupling by impact does not comply with the Federal Safety Appliance Act. *Noel v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 182 S. W. 787, writ of error dismissed 239 U. S. 652, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

The fact that couplers will operate automatically by impact when in line with each other and can be adjusted without the necessity of men going between the ends of cars, does not satisfy the Federal Safety Appliance Act, where such apparatus has become so worn as to permit lateral play enough to let the couplers pass each other. *Noel v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 182 S. W. 787, writ of error dismissed 239 U. S. 652, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

### — Coupling.

The Federal Safety Appliance Act imposes on carriers engaged in interstate commerce the absolute duty of equipping their cars with couplers that will at all times, when operated in an ordinary and reasonable manner, couple automatically by impact without the necessity of men going between the ends of cars. *Johnson v. Southern P. Co.*, 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, reversing 54 C. C. A. 508; 117 Fed. 462; *Johnson v. Great N. R. Co.*, 102 C. C. A. 89, 178 Fed. 643; *Hohenleitner v. Southern P. Co.*, 177 Fed. 796; *Chicago, M. & St. P. R. Co. v. Voelker*, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264, reversing 116 Fed. 867, *Chicago & A. R. Co. v. Walters*, 120 Ill. App. 152, affirming on other grounds 217 Ill. 87, 75 N. E. 441; *Willett v. Illinois C. R. Co.*, 122 Minn. 513, 142 N. W. 883; *Burho v. Minneapolis & St. L. R. Co.*, 121 Minn. 326, 141 N. W. 300.

Under the Federal Safety Appliance Act not only must cars be provided with couplers but they must be such that when used they will couple automatically. *Hohenleitner v. Southern P. Co.*, 177 Fed. 796.

Any design, kind or make of coupling device may be adopted by an interstate carrier provided that it will couple by impact without the necessity of men going between the ends of cars. *Hohenleitner v. Southern P. Co.*, 177 Fed. 796.

The Federal Safety Appliance Act requires that the couplers used on cars moved in interstate commerce, if of different patterns, shall be such as will couple automatically with each other. *Johnson v. Southern P. Co.*, 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 148, reversing 54 C. C. A. 508, 117 Fed. 462.

Where a locomotive and a car are provided with coupling apparatus of different designs which will not couple automatically with each other, the requirements of the Federal Safety Appliance Act are not satisfied. *Johnson v. Southern P. Co.*, 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, reversing 54 C. C. A. 508, 117 Fed. 462.

If the cars handled or used by an interstate carrier will not couple automatically by impact the Federal Safety Appliance Act is violated, irrespective of whether the failure is due to the character of the car, the kind of equipment used or the manner in which a track is located or built. *Hohenleitner v. Southern P. Co.*, 177 Fed. 796.

A carrier that uses cars which do not meet the requirements of the Federal Safety Appliance Act either because of never having been equipped with automatic couplers or because those supplied, although originally sufficient have, through neglect, become worn out and inopera-

tive, has not discharged the duty imposed by such act. *Voelker v. Chicago, M. & St. P. R. Co.*, 116 Fed. 867, reversed on other grounds 65 C. C. A. 226, 192 Fed. 522, 70 L. R. A. 264.

The Federal Safety Appliance Act is not satisfied with a coupler that can be made to work sporadically or only after extraordinary efforts, or by opening the knuckle with the hands, since a coupler which fails to work after an honest and reasonable effort under the circumstances and in the manner in which it was designed to operate, does not comply with such act. *Burho v. Minneapolis & St. L. R. Co.*, 121 Minn. 326, 141 N. W. 300.

Where, by reason of a yard track being built on a curve, cars will not couple automatically by impact without the necessity of men going between them, the Federal Safety Appliance Act is violated. *Hohenleitner v. Southern P. Co.*, 177 Fed. 796.

### — Uncoupling.

An absolute duty is imposed by the Federal Safety Appliance Act on an interstate railway company to have the couplers on its cars at all times in such condition that when operated in an ordinary and reasonable manner they can be uncoupled without requiring an employee to go between the ends of the cars. *Popplar v. Minneapolis, St. P. & S. M. R. Co.*, 121 Minn. 413, 141 N. W. 798, Ann. Cas. 1914 D. 383, affirmed 237 U. S. 369, 59 L. ed. 1000, 35 Sup. Ct. Rep. 609; *Johnson v. Southern P. Co.*, 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, reversing 54 C. C. A. 508, 117 Fed. 462; *Johnson v. Great N. R. Co.*, 102 C. C. A. 89, 178 Fed. 643; *Chicago, M. & St. P. R. Co. v. Voelker*, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264, reversing 116 Fed. 867; *Hohenleitner v. Southern P. Co.*, 177 Fed. 796; *Chicago & A. R. Co. v. Walters*, 120, Ill. App. 152, affirmed on other grounds 217 Ill. 87, 75 N. E. 441.

An interstate carrier may adopt any design, kind or make of coupler, provided that they may be uncoupled without the necessity of men going between cars. *Hohenleitner v. Southern P. Co.*, 177 Fed. 796.

### Necessity for Adjustment by Hand.

A coupler which will not couple by impact without previous adjustment by hand does not satisfy the requirements of the Federal Safety Appliance Act. *Grand Trunk W. R. Co. v. Poole*, 175 Ind. 567, 93 N. E. 26; *San Antonio & A. P. R. Co. v. Wagner*, — Tex. Civ. App. —, 166 S. W. 24.

The Federal Safety Appliance Act requires the use of couplers which can be prepared for the impact as distinct from the act of coupling, without the neces-

sity of men going between the ends of cars. *Chicago, M. & St. P. R. Co. v. Voelker*, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264, reversing 116 Fed. 867; *Southern R. Co. v. Simmons*, 105 Va. 651, 55 S. E. 459.

A coupler that will not couple automatically by impact unless the knuckle is first opened by hand does not satisfy the requirements of the Federal Safety Appliance Act. *Hurley v. Illinois C. R. Co.*, — Minn. —, 157 N. W. 1005.

#### Duty to Keep in Repair.

A common carrier engaged in interstate commerce is charged with the absolute duty of keeping in good repair the equipments required by the Federal Safety Appliance Act, irrespective of any question of negligence. *Brinkmeier v. Missouri P. Co.*, 81 Kan. 101, 105 Pac. 221 (overruling 77 Kan. 14, 23, 93 Pac. 621), affirmed on other grounds 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412.

An absolute duty is imposed on a carrier by the Federal Safety Appliance Act to equip and maintain its cars with necessary safety devices and to keep them in such condition and state of repair that they will operate in the manner and for the purpose for which intended. *Lukens v. Lake Shore & M. S. R. Co.*, 248 Ill. 377, 94 N. E. 175, 21 Ann. Cas. 82, affirming 154 Ill. App. 550.

It is the duty of a carrier under the Federal Safety Appliance Act, not only to provide its cars engaged in interstate commerce with automatic couplers, but also to keep them in repair for constant use. *Carson v. Southern R. Co.*, 68 S. C. 55, 46 S. E. 525, affirmed 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609.

#### Device to Prevent Recoupling of Cars.

The Federal Safety Appliance Act does not require the use of couplers so constructed that the knuckles when once opened can be closed automatically otherwise than by the use of the hand so as to prevent the recoupling of cars when they come together. *Weiss v. Belt R. of C.*, 186 Ill. App. 43.

#### Delegation of Duty.

The direct statutory duty imposed on a carrier by the Federal Safety Appliance Act cannot be evaded by delegating its enforcement to employees. *Chicago J. R. Co. v. King*, 94 C. C. A. 652, 169 Fed. 372, affirmed 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79.

A carrier cannot avoid the requirements of the Federal Safety Appliance Act by a rule requiring its employees to perform their work in a particular manner. *Chicago & A. R. Co. v. Walters*, 120 Ill. App.

152, affirmed on other grounds 217 Ill. 87, 73 N. E. 441.

#### C. Grabirons and Handholds.

##### In General.

Sections 2 and 3 of the Supplemental Safety Appliance Act of April 14, 1910, ch. 160, 36 St. 298, imposes the absolute duty on interstate carriers of maintaining the steps, ladders, brakes, handholds and other equipment designed for the use of employees in the discharge of their duties, in a secure and safe condition for use on and after July 1, 1911. *Coleman v. Illinois C. R. Co.*, — Minn. —, 155 N. W. 763.

The duty of an interstate carrier to supply and equip its cars with safe and secure handholds, as required by the Federal Safety Appliance Act, is absolute. *Cramer v. Chicago, M. & St. P. R. Co.*, — Minn. —, 158 N. W. 796.

The requirements of the Federal Safety Appliance Act as to the equipment of the ends and sides of cars used in interstate commerce with secure grabirons and handholds is an absolute command. *Moore v. St. Joseph & G. I. R. Co.*, — Mo. —, 186 S. W. 1035.

Under the Federal Safety Appliance Act it is the absolute duty of a carrier to have the freight cars used by it equipped with secure handholds and to keep them in that condition regardless of the exercise of reasonable care. *Galveston, H. & S. A. R. Co. v. Kurtz*, — Tex. Civ. App. —, 147 S. W. 658.

A handhold on the roof of a box car which forms the last rung of a ladder is within the Federal Safety Appliance Act. *Missouri, K. & T. R. Co. v. Barrington*, — Tex. Civ. App. —, 173 S. W. 595.

##### Substitutes.

The requirements of the Federal Safety Appliance Act as to the placing of secure grabirons and handholds on the sides and ends of cars and tenders used in interstate commerce does not permit the use of substitutes therefor. *Moore v. St. Joseph & G. I. R. Co.*, — Mo. —, 186 S. W. 1035.

An appliance on the end of a tender of a locomotive so constructed that it may serve as a substitute for a grabiron or handhold does not satisfy the requirements of the Federal Safety Appliance Act. *Moore v. St. Joseph & G. I. R. Co.*, — Mo. —, 186 S. W. 1035.

The construction of the pin-lifting lever or uncoupling rod of the tender of a locomotive so as to form a substitute for a grabiron or handhold does not comply with the requirements of the Federal Safety Appliance Act. *Moore v. St. Jo-*



soph & G. I. R. Co., — Mo. —, 186 S. W. 1035.

#### D. Power Brakes.

##### What Act Requires.

If fifty per centum of the cars of a freight train are equipped with air brakes so connected as to be under the control of the engineer, the requirements of the Federal Safety Appliance Act are satisfied. *Lyon v. Charleston & W. C. R. Co.*, 77 S. C. 328, 56 S. E. 18, S. C. — S. C. —, 58 S. E. 12.

The Federal Safety Appliance Act does not require that all of the cars equipped with air brakes in a freight train shall be coupled or associated together, but only that fifty per centum of them shall be. *Lyon v. Charleston & W. C. R. Co.*, 77 S. C. 328, 56 S. E. 18, S. C. — S. C. —, 58 S. E. 12.

The word "associated" in section two of the Federal Safety Appliance Act, providing that all power brake cars in a train "which are associated together" shall have their brakes connected so as to be under the control of the engineer, includes only cars immediately connected with the fifty per centum of the cars which the statute requires shall have their brakes connected. *Lyon v. Charleston & W. C. R. Co.*, — S. C. —, 56 S. E. 18, S. C. on rehearing 77 S. C. 328, 58 S. E. 12.

##### Switching or Making Up Trains.

See also *infra* VI, H.

The Safety Appliance Act does not require that the air brakes shall be coupled up on cars used in interstate commerce, while being made into trains in railway yards. *Whalley v. Phila. & R. R. Co.*, 248 Pa. 298, 93 Atl. 1016, affirming 23 Pa. Dist. Rep. 967, writ of error dismissed 241 U. S. 689, 60 L. ed. —, 36 Sup. Ct. Rep. 549.

##### Device for Disconnecting Air Hose.

The Federal Safety Appliance Act does not require cars to be equipped with a device for disconnecting the air hose of freight cars without the necessity of men going between the ends of cars. *Yost v. Union P. R. Co.*, 245 Mo. 219, 149 S. W. 577.

#### E. Handbrakes.

##### In General.

The duty imposed on a carrier by the Federal Safety Appliance Act with respect to equipping cars with efficient handbrakes, is absolute. *Thayer v. Denver & R. G. R. Co.*, — N. Mex. —, 154 Pac. 691.

#### F. Height of Drawbars.

##### In General.

A positive duty to maintain drawbars of freight cars at a standard height is imposed on carriers by the Federal Safety Appliance Act. *St. Louis, I. M. & S. R. Co. v. Neal*, 71 Ark. 445, 78 S. W. 220, S. C. 83 Ark. 591, 98 S. W. 958, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616.

The provision of the Federal Safety Appliance Act as to the standard height of drawbars of freight cars does not require that their draft lines shall be even. *St. Louis, I. M. & S. R. Co. v. Neal*, 71 Ark. 445, 78 S. W. 220, S. C. 83 Ark. 591, 98 S. W. 958, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616.

##### For Whose Benefit Power Brakes Required.

The duty imposed on carriers by the Federal Safety Appliance Act of keeping power brakes in proper order was for the benefit of employees as well as the passengers of an interstate electric train. *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. ed. —, 36 Sup. Ct. Rep. 683, affirming 133 C. C. A. 370, 217 Fed. 518.

##### Loaded Cars.

Section five of the Federal Safety Appliance Act does not require the drawbars of loaded freight cars to be of the uniform height prescribed by the American Railway Association and the Interstate Commerce Commission, but permits a variation not exceeding three inches between loaded and partly loaded cars. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, reversing 83 Ark. 591, 98 S. W. 958, S. C. 71 Ark. 495, 78 S. W. 220.

##### Empty Cars.

Section five of the Federal Safety Appliance Act requires that the drawbars of empty freight cars shall be of the uniform height prescribed by the American Railway Association and the Interstate Commerce Commission. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, reversing 83 Ark. 591, 98 S. W. 958, S. C. 71 Ark. 495, 78 S. W. 220.

#### G. Running Boards.

##### In General.

The Federal Safety Appliance Act, as amended, imposes an imperative duty on carriers to equip their cars with secure running boards. *Calhoun v. Great N. R. Co.*, — Wis. —, 156 N. W. 198.

## IV. WHAT CARRIERS WITHIN ACT.

A. In General.  
(No decisions.)

## B. Electric Railways.

## In General.

The Federal Safety Appliance Act requires interstate electric railways to equip with power brakes their electrically propelled engines and trains used in interstate commerce. *Campbell v. Spokane & I. E. R. Co.*, 133 C. C. A. 370, 217 Fed. 518, affirmed 241 U. S. 497, 60 L. ed. —, 36 Sup. Ct. Rep. 685.

## C. Lessors and Lessees.

## In General.

The lessor of a railway is answerable for injuries sustained by an employee of the lessor as the result of the latter's violation of the Federal Safety Appliance Act, where the lessor was indemnified against such liability, although the lease exempted the lessor from liability for the lessee's negligence. *Harden v. North Carolina R. Co.*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784.

The lessor of an interstate railway is answerable for injuries sustained by an employee of the lessee as the result of the latter's violation of the Federal Safety Appliance Act. *Lucas v. Peoria & E. R. Co.*, 171 Ill. App. 1.

## V. WHAT EMPLOYEES WITHIN ACT.

## In General.

The Federal Safety Appliance Act applies to all servants of a carrier who, in the performance of their duties in and about the operation of cars, may be injured as the proximate result of the movement of a car in interstate commerce with coupling devices that do not comply with such statute. *Johnson v. Great N. R. Co.*, 102 C. C. A. 89, 178 Fed. 643.

A switchman in the service of an interstate carrier, who was injured in consequence of a defect in a grabiron or handhold forming a part of the ladder on a freight car, was within the Federal Safety Appliance Act as amended, although at the time of his injury he was not engaged in interstate commerce. *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. ed. —, 36 Sup. Ct. Rep. 482, affirming 138 C. C. A. 51, 222 Fed. 221.

## Employee of Intrastate Carrier.

An employee of a purely intrastate railway company cannot invoke the Federal Safety Appliance Act in an action for in-

juries sustained as the result of a defective coupler, without showing that such car was loaded with freight from or for points without the state. *Rio Grande S. R. Co. v. Campbell*, 44 Colo. 1, 96 Pac. 986.

## Employee Weighing Empty Cars.

A brakeman who was injured while adjusting a defective coupler was engaged in interstate commerce within the meaning of the Federal Safety Appliance Act, where at the time he was weighing empty cars after the removal of interstate shipments, in order to determine the net weight thereof. *Wheeling Term. Co. v. Russell*, 126 C. C. A. 519, 209 Fed. 795.

## Employee on Way Home.

The Federal Safety Appliance Act is not applicable to an action for the death of a freight conductor who, after completing his run with an interstate train, and while on the engine of another train, riding a short distance towards his home, was killed by the derailment of the engine by a chain with which a car with a broken coupler had been moved, and which trailed from the rear of the decedent's train when it took a siding, and which he had negligently suspended on the rear of the car, since the movement of such car, in violation of the Federal act, had no casual connection with the accident which caused his death. *Dodge v. Chicago G. W. R. Co.*, 164 Ia. 627, 146 N. W. 14.

## VI. WHAT VEHICLES AND MOVEMENTS OF CARS WITHIN ACT.

## A. In General.

## Cars Moved by Interstate Carrier.

The Federal Safety Appliance Act applies to all trains of cars engaged in interstate commerce and to all vehicles used in connection therewith. *Lorick v. Seaboard A. L. R.*, 102 S. C. 276, 86 S. E. 675.

All cars used by an interstate carrier are within the purview of the Federal Safety Appliance Act. *Devine v. Illinois C. R. Co.*, 158 Ill. App. 369.

The operation of the Federal Safety Appliance Act is not limited to cars actually being used in moving interstate traffic at the moment an employee sustains an injury in consequence of a defective coupler. *Mobile, J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395.

The prohibited movement of a car need not be in interstate commerce in order to render a carrier liable to an employee under the Federal Safety Appliance Act, for injuries sustained in consequence of a defective coupler. *Texas & P. R. Co. v. Rigsby*, 138 C. C. A. 51, 222 Fed. 221, af-

affirmed 241 U. S. 33, 60 L. ed. —, 36 Sup. Ct. Rep. 482.

The hauling over the lines of an interstate carrier of a car which does not comply with the Federal Safety Appliance Act is within the prohibition of the act, although such movement does not constitute a use of such car in interstate commerce. *Texas & P. R. Co. v. Rigsby*, 138 C. C. A. 51, 222 Fed. 221, affirmed 241 U. S. 33, 60 L. ed. —, 36 Sup. Ct. Rep. 482.

A car is engaged in interstate commerce, within the meaning of the Federal Safety Appliance Act, while its interstate journey is temporarily interrupted, irrespective of whether its destination is near or remote. *Chicago, M. & St. P. R. Co. v. Voelker*, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264, reversing 116 Fed. 867.

The plaintiff need not prove that a car moved in interstate commerce with defective couplers, which caused an injury, was actually loaded with interstate traffic at the time of the accident. *Felt v. Denver & R. G. R. Co.*, 48 Colo. 249, 110 Pac. 215, 1136, 21 Ann. Cas. 379.

A carrier was not liable under the original Safety Appliance Act for injuries received by an employee from cars not used in moving interstate commerce. *Brinkmeier v. Missouri P. R. Co.*, 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412, affirming 81 Kan. 101, 105 Pac. 221, S. C. 77 Kan. 14, 22, 93 Pac. 97.

The requirements of the Federal Safety Appliance Act that carriers engaged in interstate commerce shall use automatic couplers and air brakes on their engines and cars, cannot be invoked in an action for injuries sustained in a collision with a switch engine and cars which the proof did not show were engaged in interstate commerce. *Rosney v. Erie R. Co.*, 68 C. C. A. 155, 135 Fed. 311.

It was error in an action for injuries received by a yard conductor in consequence of the absence of a drawbar from a freight car, to make the subjection of the case depend, not on the question of the commercial use of the car or its use in connection with vehicles themselves in commercial use in switchyards or elsewhere, but solely on the question of whether it was used at all on the road, even if wholly withdrawn from commercial use. *Southern R. Co. v. Snyder*, 109 C. C. A. 344, 187 Fed. 492, S. C. 124 C. C. A. 60, 205 Fed. 868.

The amendment of 1903 to the Federal Safety Appliance Act enlarged the scope of the original act so as to embrace all locomotives, cars and similar vehicles used on any railway that is a highway of interstate commerce, irrespective of whether the particular vehicles are employed in such commerce. *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 60 L. ed. —,

36 Sup. Ct. Rep. 626, affirming — *Tex. Civ. App.* —, 166 S. W. 24.

The test of the application of the requirements of the Federal Safety Appliance Act as to automatic couplers is the use of a car on a railway which is a highway of interstate commerce, rather than the actual use of the car in moving interstate traffic, since it is the car, and not the train, which is the unit in determining the application of the Act. *Hurley v. Illinois C. R. Co.*, — Minn. —, 157 N. W. 1005.

#### Electric Cars.

The scope of the original Federal Safety Appliance Act was enlarged by the amendment of 1903 so as to include electric motors and trains drawn by them in interstate commerce, and to bring them within the provisions of the act relative to power or train brakes. *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. ed. —, 36 Sup. Ct. Rep. 683, affirming 133 C. C. A. 370, 217 Fed. 518.

#### Foreign Cars.

The fact that a car, which was moved in violation of the Federal Safety Appliance Act, belonged to a foreign carrier will not relieve an employer from liability for an injury sustained by an employee in consequence of a defective coupler. *Crawford v. New York C. & H. R. R. Co.* (N. Y.), 10 Am. Neg. Rep. 166.

It is the duty of a carrier, under the Federal Safety Appliance Act, to maintain in safe condition the handholds on foreign cars moved by it, and that duty is not limited to inspecting such cars for defects. *Missouri, O. & G. R. Co. v. Plemmons*, — Tex. Civ. App. —, 171 S. W. 259.

#### Grabirons.

The grabirons which the Federal Safety Appliance Act as amended requires on cars were not intended solely for the use of employees while coupling or uncoupling cars, but included as well the use of a grabiron on the side of a caboose by a brakeman in boarding a moving train. *McNaney v. Chicago, R. I. & P. R. Co.*, — Minn. —, 157 N. W. 650.

#### Power Brakes.

The requirement of the Federal Safety Appliance Act that the brakes of a designated number of cars in a freight train shall be connected so that they may be controlled by the engineer, applies to a train on the main line of an interstate carrier, irrespective of whether it is moving anything in interstate commerce. *Stearns v. Chicago, R. I. & P. R. Co.*, 166 Ia. 566, 148 N. W. 128.

#### Cars Containing Yard Waste.

While hauling cars containing waste from a factory to a dump within its grounds, a railway company is engaged in interstate commerce within the meaning of the Federal Safety Appliance Act, where, although the company did not move cars beyond the factory enclosure, it received from and delivered to connecting carriers cars moving in interstate commerce. *Devine v. Chicago & C. R. R. Co.*, 259 Ill. 449, 102 N. E. 803, Ann. Cas. 1916 B. 481, reversing 174 Ill. App. 324.

### B. Engines.

#### In General.

A locomotive is within the term "any car," as used in the Federal Safety Appliance Act prohibiting the movement of any car in interstate commerce unless equipped with automatic couplers. *Johnson v. Southern P. Co.*, 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, reversing 54 C. C. A. 508, 117 Fed. 462.

#### Drawbars.

The orders of the Interstate Commerce Commission made under the Federal Safety Appliance Act, as to the standard height of drawbars, applies to locomotives as well as to freight cars. *Southern R. Co. v. Crockett*, 234 U. S. 725, 58 L. ed. 1564, 34 Sup. Ct. Rep. 897.

#### Switch Engines.

A switch engine is within the Federal Safety Appliance Act when constantly used by an interstate carrier in handling interstate traffic, although it was not so engaged at the moment a switchman was injured by reason of the absence of grabirons or handholds from the end and sides of the tender of such engine. *Daly v. Illinois C. R. Co.*, 170 Ill. App. 185.

### C. Tenders.

#### In General.

A tender used for carrying fuel and water for a locomotive is a car within the meaning of the Federal Safety Appliance Act, with respect to the use of automatic couplers. *Phila. & R. R. Co. v. Winkler*, 4 Penn. (Del.) 387, 56 Atl. 112, affirming 4 Penn. 80, 53 Atl. 90.

The tender of a locomotive was held not to be a car within the meaning of a statute identical in terms with the Federal Safety Appliance Act. *Larabee v. New York, N. H. & H. R. Co.*, 182 Mass. 348, 66 N. E. 1032.

The term "car," as used in the requirement of the Federal Safety Appliance Act that the ends and sides of cars used in interstate commerce shall be equipped with secure grabirons and handholds, includes the tenders of locomotives. *Moore v. St.*

*Joseph & G. I. R. Co.*, — Mo. —, 186 S. W. 1035.

### Couplers Between Engines and Tenders.

Neither the Federal Safety Appliance Act nor its amendments require automatic couplers to be placed between locomotives and their tenders. *Pennell v. Phila. & R. R. Co.*, 231 U. S. 675, 58 L. ed. 430, 34 Sup. Ct. Rep. 220, affirming 122 C. C. A. 77, 203 Fed. 681.

### Grabirons and Handholds.

The Federal Safety Appliance Act requires grabirons or handholds to be placed on the ends and sides of locomotive tenders. *Daly v. Illinois C. R. Co.*, 170 Ill. App. 185.

### D. Dining Cars.

#### In General.

A dining car constantly used between interstate points, is engaged in interstate commerce within the meaning of the Federal Safety Appliance Act with regard to automatic couplers, while such car is lying at a station awaiting the arrival of the train on which it made its return journey. *Johnson v. Southern P. Co.*, 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, reversing 54 C. C. A. 508, 117 Fed. 462.

### E. Shovel Cars.

#### In General.

A shovel car when moved in interstate commerce, is within the requirements of the Federal Safety Appliance Act as to automatic coupling apparatus. *Schlemmet v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407, reversing 207 Pa. 198, 56 Atl. 417, S. C. 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561, affirming 222 Pa. 470, 71 Atl. 1053.

### F. Empty Cars.

#### In General.

The Federal Safety Appliance Act requires that all cars, loaded or empty, used by a carrier engaged in interstate commerce, as well as other cars used in connection therewith, shall couple automatically by impact, and shall also uncouple without the necessity of men going between the ends of cars, although such cars are not actually employed in such commerce at the time. *Hohenleitner v. Southern P. Co.*, 177 Fed. 796.

### Empty Cars Moved in Interstate Traffic.—Coupling Apparatus.

An empty freight car is within the Federal Safety Appliance Act when moved by a carrier in interstate traffic. *Voelker v. Chicago, M. & St. P. R. Co.*, 116 Fed. 867.

reversed on other grounds 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264.

The fact that an empty freight car is not itself engaged in the movement of interstate commerce does not take it out of the operation of the Federal Safety Appliance Act when moved in a train containing interstate traffic. *Southern R. Co. v. Snyder*, 109 C. C. A. 344, 187 Fed. 492, S. C. 124 C. C. A. 60, 205 Fed. 868.

An empty freight car not used in interstate commerce at the time when, with a defective coupler, it was brought into a yard in a train containing interstate traffic, and moved out the following day in a similar train, was within the purview of the Federal Safety Appliance Act while standing on a switch track in such yard. *Erie R. Co. v. Russell*, 106 C. C. A. 160, 183 Fed. 722, writ of error dismissed 220 U. S. 607, 57 L. ed. 607, 31 Sup. Ct. Rep. 722.

#### — Grabirons and Handholds.

The requirements of the Federal Safety Appliance Act as to handholds and grabirons apply to empty cars moving in interstate commerce. *Malott v. Hood*, 201 Ill. 202, 66 N. E. 247, affirming 99 Ill. App. 360.

#### Empty Car Moved for Loading With Interstate Traffic.

An empty car with defective couplers, is within the Federal Safety Appliance Act when moved from a storage track with a number of others, in order to place another car on a different track so that it might be loaded with merchandise for shipment in interstate traffic. *Breske v. Minneapolis & St. L. R. Co.*, 115 Minn. 386, 132 N. W. 337.

#### Cars From Which Interstate Shipments Removed.

A freight car which came into a state loaded with merchandise, after being unloaded and while awaiting another cargo to be moved in interstate commerce, is within the Federal Safety Appliance Act while being removed from one yard to another in the same city. *Moyer v. Penn. R. Co.*, 247 Pa. 210, 93 Atl. 282.

A car owned by a foreign carrier was engaged in interstate commerce within the meaning of the Federal Safety Appliance Act, while after its cargo from another state had been delivered to the consignee, it was on a sidetrack being made up into a train for return empty to its home state. *Johnson v. Great N. R. Co.*, 102 C. C. A. 89, 178 Fed. 643.

A car which came into a state loaded with interstate traffic, when unloaded and while under orders to be moved to a point within the state to be held for use in interstate commerce when required, and

which had not been segregated from cars moving in such traffic, is within the Federal Safety Appliance Act. *Felt v. Denver & R. G. R. Co.*, 48 Colo. 249, 110 Pac. 215, 1136, 21 Ann. Cas. 379.

A car moved in interstate commerce is within the Federal Safety Appliance Act after having been unloaded and while standing on the private sidetrack of the consignee. *Gray v. Louisville & N. R. Co.*, 197 Fed. 874.

While empty freight cars, after having been unloaded, are being weighed in order to determine the net weight of interstate shipments, they are engaged in interstate commerce within the meaning of the Federal Safety Appliance Act. *Wheeling Term. Co. v. Russell*, 126 C. C. A. 519, 209 Fed. 795.

#### G. Cars Used for Both Interstate and Intrastate Traffic.

##### In General.

The cars of an interstate railway system, which are generally used interchangeably and indiscriminately in both interstate and intrastate traffic, are subject to the Federal Safety Appliance Act while employed commercially in such indiscriminate use. *Southern R. Co. v. Snyder*, 109 C. C. A. 344, 187 Fed. 492, S. C. 124 C. C. A. 60, 205 Fed. 868.

Evidence that an interstate carrier did not keep any particular cars for use in intrastate traffic, but that all its cars were commonly used in both interstate and intrastate commerce, is a prima facie showing that all of its cars were within the Federal Safety Appliance Act. *Devine v. Illinois C. R. Co.*, 156 Ill. App. 369.

The cars of an interstate carrier, although generally used interchangeably and indiscriminately in both interstate and intrastate traffic, are not subject to the Federal Safety Appliance Act while actually devoted to purely intrastate use, even though not set apart solely and specifically therefor. *Southern R. Co. v. Snyder*, 109 C. C. A. 344, 187 Fed. 492, but see S. C. 124 C. C. A. 60, 205 Fed. 868.

#### H. Switching and Making Up Trains.

##### In General.

The Federal Safety Appliance Act is applicable where an employee sustains an injury in consequence of a defective coupling device while he was making up a freight train for movement in interstate commerce. *Mobile, J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395.

The switching, on the tracks of a railway yard used generally for the making up and transferring of interstate cars, of a car having a defective coupling apparatus, is within the Federal Safety Appliance Act.

*Hurley v. Illinois C. R. Co.*, — Minn. —, 157 N. W. 1005.

A switching movement of interstate cars is within the Federal Safety Appliance Act, when it includes the use on an interstate railway, which is a highway of interstate commerce, of a car not actually in use at the time in moving interstate traffic. *Hurley v. Illinois C. R. Co.*, — Minn. —, 157 N. W. 1005.

A switchman who, while descending from the roof of a car after setting the hand brakes, was injured owing to a defect in one of the grabirons or handholds forming rungs of the ladder, was within the protection of the Federal Safety Appliance Act as amended, requiring secure ladders on cars. *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. ed. —, 36 Sup. Ct. Rep. 482, affirming 138 C. C. A. 51, 222 Fed. 221.

A freight car with defective couplers, containing intrastate freight, is within the Federal Safety Appliance Act while being removed from a sidetrack by a freight engine for transportation in a train containing interstate traffic. *Thornboro v. Kansas City, M. & O. R. Co.*, 91 Kan. 684, 139 Pac. 410, Ann. Cas. 1916 D. 314, affirmed on rehearing 92 Kan. 681, 142 Pac. 250.

The Federal Safety Appliance Act applies to cars while being made into a train in a railway yard for movement in interstate commerce. *Crawford v. New York C. & H. R. R. Co.* (N. Y.), 10 Am. Neg. Rep. 166.

#### Connection of Power Brakes.

The requirements of the Federal Safety Appliance Act as to the connection of air brakes on freight trains does not apply to the switching of cars in railway yards. *Farrell v. Penn. R. Co.*, 87 N. J. L. 78, 93 Atl. 682.

The requirements of the Federal Safety Appliance Act as to connecting the air brakes of the cars in freight trains does not apply to switching operations in railway yards and terminals, *Worley v. Southern R. Co.*, 169 N. C. 105, 85 S. E. 397.

The Federal Safety Appliance Act does not require that the air brakes on an interstate freight train shall be coupled while such train is engaged in switching in a terminal yard. *Whalley v. Penn. R. Co.*, 248 Pa. 298, 93 Atl. 1016, affirming 23 Pa. Dist. Ct. Rep. 961, writ of error dismissed 241 U. S. 689, 60 L. ed. —, 36 Sup. Ct. Rep. 549.

The only exception to the requirement of the Federal Safety Appliance Act as to having the brakes on a designated number of cars in a freight train connected so that they may be controlled by the engineer, is when cars are actually being

switched or spotted within a railway yard. *Stearns v. Chicago, R. I. & P. R. Co.*, 166 Ia. 566, 148 N. W. 128.

Freight cars being moved over the main track of an interstate carrier from a railway yard to a freight house a mile away, are within the requirements of the Federal Safety Appliance Act as to connecting the brakes of a designated number of cars so that they may be controlled by the engineer. *Stearns v. Chicago, R. I. & P. R. Co.*, 166 Ia. 566, 148 N. W. 128.

The requirements of the Federal Safety Appliance Act as to the connection of the air brakes on freight trains, apply to a number of cars containing freight consigned to another state, when moved by a switch engine from the yard of a railway transfer company for more than half a mile across a number of switches and along and across two parallel main tracks and into the yards of the company to whom such cars belonged. *La Mere v. Railway Trans. Co.*, 125 Minn. 159, 145 N. W. 1068, Ann. Cas. 1915 C. 667, writ of error dismissed 239 U. S. 651, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

#### Defective Hand Brakes.

There can be no recovery under the Federal Employers' Liability Act for injuries sustained by an employee from a defective hand brake on a freight car, while he was switching cars in a railway yard, since the Safety Appliance Act does not apply to such movements. *Farrell v. Penn. R. Co.*, 87 N. J. L. 78, 93 Atl. 682.

#### I. Moving Cars for Repairs.

##### In General.

A switchman who was injured by a defect in a grabiron or handhold forming part of the ladder of a freight car was within the protection of the Federal Safety Appliance Act as amended, where the accident occurred as he was taking a bad order car from a storage track to a repair shop. *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. ed. —, 36 Sup. Ct. Rep. 482, affirming 138 C. C. A. 51, 222 Fed. 221.

A loaded freight car, in process of transportation from one state to another, is in transit and in use in interstate commerce, within the meaning of the Federal Safety Appliance Act, although it is to be removed to a repair track in order to replace a defective coupler. *Otos v. Great N. R. Co.*, 128 Minn. 283, 150 N. W. 922, affirmed 239 U. S. 349, — L. ed. —, 36 Sup. Ct. Rep. 124.

A car with defective coupling apparatus was not within the Federal Safety Appliance Act while being hauled in a purely intrastate train composed of cars being moved to a shop exclusively for repairs, or while such car was retained on a re-

pair track, disconnected from cars in commercial use. *Southern R. Co. v. Snyder*, 109 C. C. A. 344, 187 Fed. 492, S. C. 124 C. C. A. 60, 205 Fed. 868.

A loaded freight car, containing an interstate shipment, is within the meaning of the Federal Safety Appliance Act, used in moving interstate commerce while it is in a railway yard awaiting minor repairs to its coupling apparatus. *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617, reversing 86 C. C. A. 95, 158 Fed. 931, 14 Ann. Cas. 233.

A carrier, when engaged in an honest effort to meet the requirements of the Federal Safety Appliance Act, may, without violating its terms, move empty cars by themselves to a repair shop, but they must be wholly excluded from commercial use or connection with other cars commercially employed. *Southern R. Co. v. Snyder*, 109 C. C. A. 344, 187 Fed. 492, S. C. 124 C. C. A. 60, 205 Fed. 868.

It is a violation of the Federal Safety Appliance Act for a carrier to move to a repair shop an interstate car having a broken coupler knuckle when a new one could have been obtained and inserted at the place where the defect was first discovered. *Chicago J. R. Co. v. King*, 94 C. C. A. 652, 169 Fed. 372, affirmed 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79.

An empty freight car which had lost its drawbar was within the Federal Safety Appliance Act while standing on a transfer track containing cars commercially engaged in both interstate and intrastate commerce. *Southern R. Co. v. Snyder*, 109 C. C. A. 344, 187 Fed. 492, S. C. 124 C. C. A. 60, 205 Fed. 868.

Where an empty car moving in interstate commerce was placed on a repair track to have its draft timbers repaired, when it was discovered that heavy repairs were necessary, the car was not within the Federal Safety Appliance Act while being removed to another track for subsequent removal to a repair shop. *Siegel v. New York C. & H. R. Co.*, 178 Fed. 873.

Where a freight car containing interstate freight lost one of its couplers after arriving at its destination, in which condition it was placed on the private switch track of the consignee and after it had been unloaded, a switchman was killed while attempting to attach the car with a chain to another car so that it could be removed from such track to a repair shop, such movement was in violation of the Federal Safety Appliance Act. *Gray v. Louisville & N. R. Co.*, 197 Fed. 874.

Where a loaded car during an interstate journey, was returned to another state to be equipped with a new drawbar and coupling apparatus, and, after being unloaded and while it was being moved

from a storage track to a repair track, it was left for a short time on a main track when a switchman riding on the footboard of an engine was injured in a collision with such car, it was held, in an action under the Federal Employers' Liability Act, to have been still engaged in interstate commerce within the meaning of the Federal Safety Appliance Act. *St. Louis & S. F. R. Co. v. Conarty*, 106 Ark. 421, 155 S. W. 93, reversed on other grounds 238 U. S. 243, 59 L. ed. 1290, 35 Sup. Ct. Rep. 785.

## VII. LIABILITY FOR PERSONAL INJURIES.

### A. In General.

#### Action for Death.

A right of action is created by the Federal Safety Appliance Act in favor of an employee who is injured by a defect in an appliance that the act, as amended, requires to be secure. *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. ed. —, 36 Sup. Ct. Rep. 482, affirming 138 C. C. A. 51, 222 Fed. 221.

There may be a recovery under the Federal Safety Appliance Act for the death of an employee caused by a carrier's violation of such act, since its application is not limited to cases of personal injuries. *Mobile, J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395.

There may be a recovery under a state death act for a violation of the Federal Safety Appliance Act resulting in the death of an employee. *Mobile, J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395.

#### Failure to Provide Safety Appliances as Negligence.

In an action founded on the Federal Employers' Liability Act, evidence that the plaintiff's injuries resulted from the defendant's violation of the Federal Safety Appliance Act shows negligence per se. *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 60 L. ed. —, 36 Sup. Ct. Rep. 626, affirming — Tex. Civ. App. —, 166 S. W. 24.

The use by a carrier of a car that does not satisfy the requirements of the Federal Safety Appliance Act is negligence per se. *Austin v. Cent. of Ga. R. Co.*, 3 Ga. App. 775, 61 S. E. 998.

It is negligence per se for a carrier to use in interstate commerce a car not equipped with an automatic coupler. *Phila. & R. R. Co. v. Winkler*, 4 Penn. (Del.) 387, 56 Atl. 112, affirming 4 Penn. 80, 53 Atl. 90.

The failure of a carrier to equip its cars with automatic couplers is negligence per

se. *Greenlee v. Southern R. Co.*, 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580.

It is negligence per se to equip cars with couplers that will not couple automatically by impact without previous adjustment by hand. *San Antonio & A. P. R. Co. v. Wagner*, — Tex. Civ. App. —, 166 S. W. 24, affirmed 241 U. S. 476, 60 L. ed. —, 36 Sup. Ct. Rep. 626.

The violation of the Federal Safety Appliance Act is negligence per se when resulting in injury to an employee. *Texas & P. R. Co., v. Sherer*, — Tex. Civ. App. —, 183 S. W. 404.

The failure of a carrier to equip a car with automatic couplers which will operate automatically by impact is negligence which will render it answerable to an employee for injuries proximately resulting from such neglect. *Carson v. Southern R. Co.*, 68 S. C. 55, 46 S. E. 525, affirmed 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609.

The failure of a carrier to equip a locomotive with automatic couplers is negligence. *Fleming v. Southern R. Co.*, 131 N. C. 476, 42 S. E. 905.

The failure of a carrier to equip its cars with automatic couplers is continuing negligence. *Montgomery v. Carolina & N. W. R. Co.*, 163 N. C. 597, 80 S. E. 83, S. C. 169 N. C. 249, 85 S. E. 139.

The failure of a carrier to equip a locomotive with automatic couplers is continuing negligence rendering it answerable for injuries sustained by an employee irrespective of his contributory negligence, in consequence of such violation. *Fleming v. Southern R. Co.*, 131 N. C. 476, 42 S. E. 905.

The violation by a carrier of the Federal Safety Appliance Act may be considered by the jury on the question of its negligence in an action for injuries sustained by an employee from such violation. *Crawford v. New York C. & H. R. Co.*, (N. Y.) 10 Am. Neg. Rep. 166.

The plaintiff need not prove the defendant's negligence in an action under the Federal Employers' Liability Act, when it appears that his injuries were due to the defendant's violation of the Federal Safety Appliance Act, since, as the former act creates a liability for any injury due to "any defects or insufficiencies, due to (the carrier's) negligence, in its cars, engines, appliances," etc., it clearly shows a legislative intent to treat a violation of the Safety Appliance Act as negligence. *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 60 L. ed. —, 36 Sup. Ct. Rep. 626, affirming — Tex. Civ. App. —, 166 S. W. 24.

#### Injuries Due to Noncompliance with Act.

A carrier that uses cars which do not comply with the requirements of the Federal Safety Appliance Act is answerable for injuries resulting to its employees from such neglect. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, reversing 83 Ark. 591, 98 S. W. 958, S. C. 71 Ark. 495, 78 S. W. 220.

A carrier that uses cars not conforming to the requirement of the Federal Safety Appliance Act either because of never having been equipped with automatic couplers or because such appliances, although originally sufficient, have, through neglect, become worn out and inoperative, has not discharged the duty imposed by such act, and it is answerable to an employee for injuries sustained as the result of using an improperly equipped car. *Voelker v. Chicago, M. & St. P. R. Co.*, 116 Fed. 867, reversed on other grounds 65 C. C. A. 229, 129 Fed. 522, 70 L. R. A. 264.

The civil liability which may arise from the violation by a carrier of the Federal Safety Appliance Act, attaches where the movement of a car is a prohibited one, although not such as to subject the carrier to the penalty prescribed by the act. *Texas & P. R. Co. v. Rigsby*, 138 C. C. A. 51, 222 Fed. 221, affirmed 241 U. S. 33, 60 L. ed. —, 36 Sup. Ct. Rep. 482.

The liability of a carrier for injuries sustained by an employee in consequence of the former's violation of the Federal Safety Appliance Act, is absolute and not dependent in any degree upon the carrier's negligence. *Donegan v. Baltimore & N. Y. R. Co.*, 91 C. C. A. 555, 165 Fed. 869.

An interstate carrier is liable for injuries caused an employee while coupling cars equipped with link and pin couplers in defiance of the Federal Safety Appliance Act. *Harden v. North Carolina R. Co.*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784.

A carrier is answerable for any injury to an employee occurring by reason of its failure to equip cars used in interstate commerce with automatic couplers as required by the Federal Safety Appliance Act. *Mobile, J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395.

The fact that an employee is entitled to rely upon the negligent movement of an engine without signal will not defeat his right to rely also upon concurrent and negligent noncompliance with the Federal Safety Appliance Act. *Moore v. St. Joseph & G. I. R. Co.*, — Mo. —, 186 S. W. 1035.

#### Use of Stub Pilot as Negligence.

The substitution of a short or "stub" pilot for a long one on a locomotive em-



ployed in interstate commerce so as to permit the use of an automatic coupler as required by the Federal Safety Appliance Act, is not negligence which will render a carrier answerable for the death of a fireman caused by the derailment of such engine when it struck a large herd of cattle, on the theory that the employer failed to provide a pilot suitable to throw the cattle from the track. *Briggs v. Chicago, & N. W. R. Co.*, 60 C. C. A. 513, 125 Fed. 745.

#### **Effect on Liability of Extension of Time for Equipping Cars.**

An order of the Interstate Commission made under the Supplemental Safety Appliance Act of April 14, 1910, ch. 160, 36 St. 298, extending the time in which uniform safety devices should be applied to freight cars, did not suspend the provisions of the act as to cars actually in use so as to relieve a carrier from liability for injuries sustained by an employee in consequence of defective and worn out devices on an old car. *Coleman v. Illinois C. R. Co.*, — Minn. —, 155 N. W. 763.

A carrier is not relieved from liability for injuries received by an employee as the result of its failure to equip a car with automatic couplers, by reason of an extension by the Interstate Commerce Commission of the time for placing safety equipments on cars, since the effect of such order was only to relieve the carrier from liability for the statutory penalty. *Greenlee v. Southern R. Co.*, 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580.

The order of the Interstate Commerce Commission made March 13, 1911, by virtue of section 3 of the Federal Safety Appliance Act as amended March 14, 1910, and March 4, 1911, extending for 5 years the time in which to equip cars with the safety appliances required by section 2 of the act, did not relieve a carrier of the duty of maintaining secure handholds and grabirons on the roofs of freight cars until the expiration of such period, since the extension related only to changing existing handholds so as to comply with the standard established by the Commission. *Cook v. Union P. R. Co.*, — Ia. —, 158 N. W. 521.

Under the Federal Safety Appliance Act a carrier is answerable for the death of a brakeman from the giving away of an insecure handhold or grabiron on the roof of a freight car, notwithstanding that the period of time granted by the Interstate Commerce Commission for equipping cars with safety devices of the standard designated by the commission had not expired; since such extension did not absolve the carrier from the duty cast on it by the act of maintaining secure safety devices, but merely extended the time in which cars

should be equipped with the safety appliance of the standard designated by the Commission. *Cook v. Union P. R. Co.*, — Ia. —, 158 N. W. 521.

#### **Duty of Employee to Use Due Care.**

The failure of a carrier to comply with the Federal Safety Appliance Act does not absolve an employee from the duty of using ordinary care for his own protection. *Schlemmer v. Buffalo, R. & P. R. Co.*, 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561, affirming 222 Pa. 470, 71 Atl. 1053, S. C. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407, reversing 207 Pa. 198, 56 Atl. 417.

Section eight of the Federal Safety Appliance Act does not relieve an employee from the duty of exercising ordinary care for his own protection while using cars not equipped with proper safety devices. *Cleveland, C. C. & St. L. R. Co. v. Curtis*, 134 Ill. App. 565.

If a carrier's violation of the Federal Safety Appliance Act results in the injury of an employee, the question of the former's negligence in the general sense of want of care is immaterial in an action based on the Federal Employers' Liability Act. *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 60 L. ed. —, 36 Sup. Ct. Rep. 626, affirming — Tex. Civ. App. —, 166 S. W. 24.

#### **Employee's Knowledge of Defects.**

The fact that an employee has knowledge of a defective safety appliance that caused his injury does not bar an action therefor, since by the terms of the Federal Safety Appliance Act he is not deemed to have assumed the risk of injury by continuing in the employment of a carrier with notice of the use of a car that violates such act. *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. ed. —, 36 Sup. Ct. Rep. 482, affirming 138 C. C. A. 51, 222 Fed. 221.

#### **Violation of Train Orders.**

A motorman's right of action under the Federal Employers' Liability Act for injuries sustained in a collision in consequence of the failure of the air brakes to work is not affected by the fact that his violation of a train order brought him within a statute which imposed a criminal liability on him for endangering the lives of the passengers on his car. *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. ed. —, 36 Sup. Ct. Rep. 683, affirming 133 C. C. A. 370, 217 Fed. 518.

#### **B. Injuries Due to Defective Coupling Apparatus.**

##### **In General.**

The failure of a coupler to operate automatically by impact at any time sustains

a charge of negligence in an action for injuries sustained by an employee who went between cars to operate the coupling device. *Noel v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 182 S. W. 787, writ of error dismissed 239 U. S. 652, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

The fact that a defective coupler created a condition which, by the intervention of some other disconnected cause, made possible the death of a brakeman, does not make such defect the proximate cause of the accident. *Devine v. Chicago & C. R. R. Co.*, 259 Ill. 449, 102 N. E. 803, reversing 174 Ill. App. 324.

A defective coupler of a switch engine which had to be opened by hand, was not the proximate cause of the death of a switchman, who, while riding on the footboard of the engine, was killed when it was derailed while kicking a car, where the decedent would have been in such position had the coupler been in perfect condition. *Devine v. Chicago & C. R. R. Co.*, 259 Ill. 449, 102 N. E. 803, reversing 174 Ill. App. 324.

Where for a year prior to the failure of a coupler with several inches of lateral play to couple by impact on a curve, coupling had been successfully made daily at the same spot, it cannot be said as a matter of law, in an action for injuries sustained by a brakeman while attempting to push one of such couplers into line with his foot, that they were not defective within the meaning of the Federal Safety Appliance Act. *Willett v. Illinois C. R. Co.*, 122 Minn. 513, 142 N. W. 883.

Where for a year previous to the failure of couplers with several inches of lateral play to couple by impact on a curve, couplings had been successfully made daily at the same place, it cannot be said as a matter of law, in an action for injuries sustained by a brakeman when he attempted to push one of such couplers into place with his foot, that he attempted to make the coupling at an improper place. *Willett v. Illinois C. R. Co.*, 122 Minn. 513, 142 N. W. 883.

An employee who was injured by reason of a defective coupling apparatus on an interstate car, may recover under the Federal Employers' Liability Act, unless his negligence was the sole cause of his injury. *Smith v. Atlantic C. L. R. Co.*, 127 C. C. A. 311, 210 Fed. 761.

The failure of a carrier to comply with the Safety Appliance Act renders it liable under the Federal Employers' Liability Act, where a brakeman's arm was crushed by the movement of an engine when he reached between the tender and a car to adjust a coupler which would not operate automatically by impact. *Parker v. Atlantic C. R. Co.*, 87 N. J. L. 148, 93 Atl. 574.

Where a brakeman's arm was crushed between the tender of a locomotive and a car when he reached in to adjust a coupler which would not operate automatically by impact, the fact that it would have so operated had the train been standing on a straight track instead of a curve, is no defense to an action based on the Federal Employers' Liability Act, since the failure of such apparatus to work at any time constituted negligence on the part of the defendant. *Parker v. Atlantic C. R. Co.*, 87 N. J. L. 148, 93 Atl. 574.

Where a railway employee while making a coupling was injured by reason of a coupler which did not comply with the Safety Appliance Act, the sole question, in an action based on the Federal Employers' Liability Act, is whether such defective device contributed in whole or in part to his injury. *Smith v. Atlantic C. L. R. Co.*, 127 C. C. A. 311, 210 Fed. 761.

A violation of the Federal Safety Appliance Act is not shown by evidence that a switchman was injured while attempting, from the footboard of a switch engine, to kick into line a coupler that he thought had too much lateral play, but which coupled properly by impact, the fact that the coupler had too much lateral movement did not show a violation of the act. *Morris v. St. Louis S. W. R. Co.*, — Tex. Civ. App. —, 158 S. W. 1055.

Where the defective condition of the coupling apparatus on an interstate car, together with the negligent act of a brakeman, co-operated in bringing about his injury, he may recover therefor under the Federal Employers' Liability Act. *Smith v. Atlantic C. L. R. Co.*, 127 C. C. A. 311, 210 Fed. 761.

A finding that a switchman's death was caused by a coupler which did not comply with the Federal Safety Appliance Act is justified by evidence tending to show that, without warning and contrary to custom, cars were kicked by other employees, with knowledge of the decedent's position, against those between which he was opening a defective coupler with his hands or attending to the air line. *Hurley v. Illinois C. R. Co.*, — Minn. —, 157 N. W. 1005.

A finding, in an action based on the Federal Safety Appliance Act, for the death of a switchman who was caught between cars while adjusting a coupler, that it was defective, is justified by evidence that it could not be opened except by hand. *Hurley v. Illinois C. R. Co.*, — Minn. —, 157 N. W. 1005.

An employee may recover for injuries sustained while between a car and an engine adjusting a defective coupler. *Moore v. St. Joseph & G. I. R. Co.*, — Mo. —, 186 S. W. 1035.

Where a switchman at night went between a switch engine and cars to adjust a

coupler that would not operate automatically by impact, and was injured when the cars either ran against him by gravity or were moved by another engine, he may recover for his injuries where the proximate cause was the failure of the coupling apparatus, either because of a defect or want of repair, to comply with the Federal Safety Appliance Act. *Clark v. Erie R. Co.*, 230 Fed. 478.

#### **Failure to Keep in Repair.**

It is actionable negligence for a carrier to permit coupling apparatus to become so defective that it cannot be prepared for coupling by impact without the necessity of men placing their entire bodies between the ends of cars. *Chicago, M. & St. P. R. Co. v. Voelker*, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264, reversing 116 Fed. 867.

The plaintiff is not bound to show, in an action for injuries received as the result of a coupling device which did not comply with the Federal Safety Appliance Act, that the defendant did not exercise reasonable care to maintain it in good condition and repair, since the latter's duty to do so was absolute. *Lukens v. Lake Shore & M. S. R. Co.*, 248 Ill. 377, 94 N. E. 175, 21 Ann. Cas. 82, affirming 154 Ill. App. 550.

#### **Defect Due to Wearing of Cross-Beam.**

Where the failure of a coupler to operate by impact was not due to any fault in its construction but to the wearing of the hole in the cross-beam through which the drawbar passed, so as to permit lateral play enough to let couplers pass each other, a carrier's negligence is shown in an action based on the Federal Safety Appliance Act for injuries received by a brakeman while attempting to operate such coupler. *Noel v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 182 S. W. 787, writ of error dismissed 239 U. S. 652, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

#### **Injury in Collision Due to Absence of Coupler.**

Where a switchman was killed at night in a collision between a switch engine on which he was riding and a car, moved in interstate commerce, that had lost its coupler and drawbar, the failure of a carrier to equip the car with the standard safety appliances was not negligence which would render it answerable for the result of the accident, where, at the time it occurred, the decedent was not intending to couple or uncouple such car, notwithstanding that if it had been equipped with such appliances the decedent would not have been killed. *St. Louis & S. F. R. Co. v. Conarty*, 238 U. S. 243, 59 L. ed. 1290, 35

Sup. Ct. Rep. 785, reversing 106 Ark. 421, 155 S. W. 93.

#### **Cars Moved for Repairs.**

Section 4 of the Federal Safety Appliance Act, as amended by Act of April 14, 1910, ch. 16, relieving a carrier from the statutory penalty while moving defective cars to the nearest available point for repairs, does not absolve it from liability to an employee for injuries sustained by reason of a defective coupler while moving such cars. *Great N. R. Co. v. Otos*, 239 U. S. 349, — L. ed. —, 36 Sup. Ct. Rep. 124, affirming 128 Minn. 283, 150 N. W. 922.

Where an empty freight car which had lost its drawbar stood on a transfer track containing cars engaged in commercial use in both interstate and intrastate traffic and an employee while coupling the disabled car to another with a chain for removal to a repair track, was injured when other cars were shoved against the disabled one, the Federal Safety Appliance Act applies, although the defective car might have been removed from such track without being connected with or without the movement of other cars standing thereon. *Southern R. Co. v. Snyder*, 109 C. C. A. 344, 187 Fed. 492, S. C. 124 C. C. A. 60, 205 Fed. 868.

Where, while coupling an empty car which had lost its drawbar, to another car with a chain for removal to a repair track from a transfer track which contained cars in commercial use in interstate traffic, an employee was injured when other cars were shoved against the disabled one, a carrier is answerable under the Federal Safety Appliance Act, since the employee could not perform his duties without subjecting himself to the danger of a collision through the wrongful association of the disabled car with the general commercial operation of a railway yard. *Southern R. Co. v. Snyder*, 124 C. C. A. 60, 205 Fed. 868, S. C. 109 C. C. A. 344, 187 Fed. 492.

Where the draft timbers of an empty car moving in interstate commerce, were found to be defective and it was placed on a track in a yard where light repairs were usually made, but on the discovery that heavy repairs were necessary, the car was "shop marked," and while a switch crew, under the impression that the repairs had been made, were moving the car, which was coupled with a chain to other cars, the drawhead pulled out, and after it was placed on a track where crippled cars were stored for removal to a shop, a switchman was killed while uncoupling the disabled car, in consequence of the absence of the drawbar, the carrier is not answerable under the Federal Safety Appliance Act, since at the time of the accident the car was withdrawn from com-

mercial use. *Siegel v. New York C. & H. R. R. Co.*, 178 Fed. 873.

#### **Injury to Car Repairer.**

A carrier is answerable under the Federal Safety Appliance Act for injuries sustained by a car repairer while lifting into place the coupler, which had dropped below standard height, of a car moving in interstate commerce, while temporarily stopped for repairs before being delivered to a connecting carrier. *Lorick v. Seaboard A. L. R.*, 102 S. C. 276, 86 S. E. 675.

#### **Effect of Rules.**

Rules of a carrier of which an employee has notice will not affect his right to recover for injuries sustained in consequence of a coupler that would not operate automatically by impact, where the effect of such rules would be to nullify the Federal Safety Appliance Act. *Noel v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 182 S. W. 787.

#### **Due Care and Knowledge on Part of Carrier.**

##### **— Due Care.**

A carrier is absolutely liable under the Federal Employers' Liability Act, irrespective of the exercise of due care and diligence, for injuries sustained by an employee while coupling cars when such injuries were proximately caused by coupling apparatus which did not comply with the Safety Appliance Act. *Steele v. Atlantic C. L. R. Co.*, — S. C. —, 87 S. E. 639.

If the safety appliance on a car were defective or out of repair, the question whether it was attributable to the defendant's fault is immaterial in an action on the Federal Employers' Liability Act for resulting injuries. *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. ed. —, 36 Sup. Ct. Rep. 683, affirming 133 C. C. A. 370, 217 Fed. 518.

##### **— Knowledge.**

Knowledge on the part of a carrier of the defective condition of a coupler is not essential to a recovery for the death of an employee as the proximate result of the violation by the carrier of the Federal Safety Appliance Act. *St. Louis, I. M. & S. R. Co. v. Neal*, 71 Ark. 445, 78 S. W. 220, S. C. 83 Ark. 591, 98 S. W. 958, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616.

It is not necessary for the plaintiff, in an action for injuries caused by a defective coupler, to show actual notice on the part of a carrier of its condition, or that notice was given to a person designated by its rules, since the duty of the carrier to inspect its cars to see that they complied with the Federal Safety Appliance Act was an absolute one. *Chicago & A. R. Co.*

*v. Walters*, 217 Ill. 87, 75 N. E. 441, affirming 120 Ill. App. 152.

#### **Failure to Give Warning of Danger.**

Since the prohibition of the Federal Safety Appliance Act against the movement in interstate commerce of cars not properly equipped with automatic coupling devices is a positive one, in an action by an employee for injuries received from a defective coupler, the question whether a carrier was negligent, as measured by the common law, in not warning the employee of the defect, is wholly immaterial. *Johnson v. Great N. R. Co.*, 102 C. C. A. 89, 178 Fed. 643.

#### **C. Defective Grabirons, Handholds, Ladders and Running Boards.**

##### **Grabirons and Handholds.**

A carrier is answerable under the Federal Safety Appliance Act for injuries sustained by a brakeman from the giving away of a grabiron on the side of the caboose of an interstate freight train which he attempted to board while it was in motion. *McNaney v. Chicago, R. I. & P. R. Co.*, — Minn. —, 157 N. W. 650.

The failure of an interstate carrier to supply and equip its cars with safe and secure handholds as required by the Federal Safety Appliance Act, renders it liable to an employee who suffers injury in consequence of the failure to perform such absolute duty. *Cramer v. Chicago, M. & St. P. R. Co.*, — Minn. —, 158 N. W. 796.

An employee may recover for injuries sustained while between a car and a tender adjusting a defective coupler, in consequence of the absence from the tender of the grabirons or handholds required by the Federal Safety Appliance Act. *Moore v. St. Joseph & G. I. R. Co.*, — Mo. —, 186 S. W. 1035.

##### **Ladders.**

An interstate carrier is answerable under the Federal Employers' Liability Act for injuries sustained by an employee from the absence of the lower rung of the ladder of a freight car, which constituted a violation of the duty imposed on the carrier by the Safety Appliance Act. *Cramer v. Chicago, M. & St. P. R. Co.*, — Minn. —, 158 N. W. 796.

Under the Federal Safety Appliance Act a carrier is liable, irrespective of negligence, for injuries sustained by an employee in consequence of a defective grabiron or handhold forming part of the ladder of a bad order freight car which he was moving from a storage track to a repair shop. *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. ed. —, 36 Sup. Ct. Rep. 482, affirming 138 C. C. A. 51, 222 Fed. 221.

##### **Grabirons and Handholds.**

Under the Federal Safety Appliance Act

carriers are required to exercise a high degree of care to have and maintain secure handholds on the cars moved by them, and to do all things that are possible to that end; and there seems to be no defense available unless an injured employee himself deliberately produced the insecurity of the handhold which caused his injury. *Galveston, H. & S. A. R. Co. v. Kurtz*, — Tex. Civ. App. —, 147 S. W. 658.

A carrier is answerable under the Federal Safety Appliance Act, for injuries sustained by an employee from the giving away of a handhold on a foreign box car, as the result of a latent defect. *Missouri, K. & T. R. Co. v. Barrington*, — Tex. Civ. App. —, 173 S. W. 595.

A carrier is answerable, under the Federal Safety Appliance Act, for injuries received by a switchman from the giving away of a handhold on a foreign freight car although it had just been received by the employer, and the defect was one that the usual inspection would not have disclosed. *Texas & P. R. Co. v. Sherer*, — Texas Civ. App. —, 183 S. W. 404.

A rule requiring brakemen to examine cars in their trains and to report defects to their conductors, does not apply to a defective handhold due to the rottenness of a car sill which was concealed from view. *Cincinnati, N. O. & T. P. R. Co. v. Nolan*, 161 Ky. 205, 170 S. W. 650, S. C. 167 Ky. 11, 179 S. W. 1046, 10 N. C. C. A. 812.

In an action founded on the Federal Employers' Liability Act for the death of a brakeman from the alleged negligence of the defendant in not providing ladders and handholds on the ends of its cars, it cannot be shown that the rules of the interstate Commerce Commission did not require until a future date that handholds to be placed on cars except those shopped for general repairs, since as the Commission could not exempt carriers from liability for their own negligence, such rule did not relieve the defendant from the duty of exercising due care in furnishing its employees with safe appliances and places to work. *Kansas City S. R. Co. v. Leslie*, 113 Ark. 305, 167 S. W. 83, Ann. Cas. 1915 B. 834, reversed on other grounds 238 U. S. 599, — L. ed. —, 35 Sup. Ct. Rep. 844.

#### Ladders.

Where a switchman employed by an interstate carrier, while making a necessary switching movement in order to remove a defective car from a main track to a repair shop, was injured in consequence of a defective grabiron or rung which constituted the ladder to the top of a box car, he may recover under the Federal Safety Appliance Act when such defect could have been repaired or removed before the car was moved. *Texas*

*& P. R. Co. v. Rigsby*, 138 C. C. A. 51, 222 Fed. 221, affirmed 241 U. S. 33, 60 L. ed. —, 36 Sup. Ct. Rep. 482.

#### Running Boards.

A carrier is answerable under the Federal Employers' Liability Act, if a running board that does not comply with the Safety Appliance Act contributed in any manner to the death of a switchman. *Calhoun v. Great N. R. Co.*, — Wis. —, 156 N. W. 198.

Where, on the trial of an action under the Federal Employers' Liability Act for injuries received by a switchman from a defective footboard on the tender of an engine, it was indiscriminately called a "footboard" and a "running board" without evidence of the distinction, it cannot be held that such defect was not a breach of any Federal statute enacted for the safety of employees (Safety Appliance Act). *Bramlett v. Southern R. Co.*, 98 S. C. 319, 82 S. E. 501.

#### Inspection.

The fact that a carrier made a proper inspection of a car is no defense to an action under the Federal Employers' Liability Act for the death of an employee in consequence of a defective running board on a freight car which did not comply with the Safety Appliance Act. *Calhoun v. Great N. R. Co.*, — Wis. —, 156 N. W. 198.

#### Due Care on Part of Carrier.

Since an absolute unqualified duty to maintain secure handholds and grabirons on the roofs of freight cars is imposed on carriers by the Federal Safety Appliance Act, the question whether a defect was due to negligence is immaterial in an action for injuries sustained by an employee from the giving away of an insecure handhold. *Cook v. Union P. R. Co.*, — Ia. —, 158 N. W. 521.

The fact that a carrier uses reasonable care to equip cars with secure grabirons and handholds does not satisfy the requirements of the Federal Safety Appliance Act. *Moore v. St. Joseph & G. I. R. Co.*, — Mo. —, 186 S. W. 1035.

#### D. Absence of or Defects in Power Brakes.

##### Defective Brakes.

The jury was warranted, in an action based on the Federal Employers' Liability Act for injuries sustained by a motorman in a collision between electric cars, in finding that the air brake equipment of the plaintiff's car was defective or out of repair, where it appeared that he applied the brakes when a sufficient distance from the other car so as to have enabled him to have stopped his car, and, after holding for a

moment the brakes released and refused to work, and it further appeared that the accident could have been averted had the brakes been in proper order. *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. ed. —, 36 Sup. Ct. Rep. 683, affirming 133 C. C. A. 370, 217 Fed. 518.

#### **Failure to Connect Brakes.**

Where the brakes on seventy-five per cent of the cars of a freight train were connected and supplied with power as required by the rules and regulations of the Interstate Commerce Commission, and an engineer made every effort to stop his slowly moving train and did so within 100 feet after an accident occurred, the fact that the brakes were not in operation on all of the cars will not render a carrier liable for injuries sustained by a brakeman who missed his footing and fell as he attempted to board the pilot of the engine. *Yazoo & M. V. R. Co. v. Hawkins*, 104 Miss. 55, 61 So. 161.

The failure of a carrier to have the air brakes in operation, as required by the Federal Safety Appliance Act, in an interstate movement of freight cars renders it answerable for injuries proximately resulting to an employee from such neglect, regardless of actual negligence. *La Mere v. Railway Trans. Co.*, 125 Minn. 159, 145 N. W. 1068, Ann. Cas. 1915 C. 667.

Where the power brakes of fifty per centum of the cars of a freight train were connected together and under the control of the engineer, the failure to have the remainder of the cars so connected was not negligence rendering a carrier answerable for injuries sustained by a brakeman by being thrown from a car while attempting to uncouple cars by hand in a dangerous manner, when the connection of the brakes on all of the cars would not have prevented the accident. *Lyon v. Charleston & W. C. R. Co.*, 77 S. C. 328, 56 S. E. 18, 58 S. E. 12.

The failure to have all the power brake cars in a freight train connected together and under the control of the engineer, is not evidence of negligence, in an action for injuries sustained by an employee, where fifty per centum of such cars were connected as required by the Federal Safety Appliance Act. *Lyon v. Charleston & W. C. R. Co.*, 77 S. C. 328, 56 S. E. 18, 58 S. E. 12.

The failure of a carrier to have the air brakes connected on the proportion of cars of a freight train required by the Federal Safety Appliance Act and orders of the Interstate Commerce Commission, is not actionable negligence where a compliance with such requirement would have prevented the accident by which an employee was injured. *Campbell v. Canadian N. R. Co.*, 124 Minn. 245, 144 N. W. 772.

#### **Custom to Disregard Requirements of Act.**

A custom of the employees of a carrier while moving cars in switching on the main line of an interstate carrier, to disregard the requirements of the Federal Safety Appliance Act as to coupling the brakes on a designated number of cars so that they could be controlled by the engineer, will not relieve the carrier from liability for injuries sustained by an employee in consequence of such custom. *Stearns v. Chicago, R. I. & P. R. Co.*, 166 Ia. 566, 148 N. W. 128.

#### **Proximate Cause.**

The failure of a carrier to have the air brakes connected as required by the Federal Safety Appliance Act, when moving freight cars in interstate traffic, was the proximate cause of injuries sustained by a brakeman when the stopping of the engine in an emergency gave the train a much harder shock or jerk than would have occurred had the air brakes been in operation. *La Mere v. Railway Trans. Co.*, 125 Minn. 159, 145 N. W. 1068, Ann. Cas. 1915 C. 667, writ of error dismissed 239 U. S. 651, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

#### **E. Drawbars of Unequal Height.**

##### **In General.**

The requirements of the Federal Safety Appliance Act as to couplers which operate automatically by impact, was not intended for the protection of employees from injury resulting from the difference in height of the couplers of colliding trains, although the plaintiff might not have been injured had such act been observed. *Campbell v. Spokane & I. E. R. Co.*, 188 Fed. 516, affirmed, 133 C. C. A. 370, 217 Fed. 518, affirmed on other grounds 241 U. S. 497, 60 L. ed. —, 36 Sup. Ct. Rep. 685.

A carrier is not relieved from liability for injuries sustained by a brakeman in consequence of a drawbar of a freight car not being of the standard height, by having provided its freight crews with iron wedges or shims to use in raising drawbars when they dropped below the standard height. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, reversing 83 Ark. 591, 98 S. W. 958, S. C. 71 Ark. 495, 78 S. W. 220.

#### **F. Going Between Cars.**

Going between cars as assumption of risk, see *infra* VII, G, and as contributory negligence, see *infra* VII, H, 1, and 2.

#### **To Operate Couplers.**

A switchman cannot recover under the

Federal Safety Appliance Act for injuries sustained while between cars uncoupling them, where the evidence shows that the coupler was in good order and could have been operated from the side of a car. *Weiss v. Belt R. of C.*, 186 Ill. App. 43.

There can be no recovery under the Federal Safety Appliance Act for injuries sustained by a switchman who went between moving cars to open a coupler, where, after the accident, the coupling apparatus was found in good condition and workable from the side of the car. *Union P. R. Co. v. Brady*, 88 C. C. A. 579, 161 Fed. 719.

A judgment for the plaintiff cannot be sustained, in an action based on the Federal Employers' Liability Act, for the death of a freight conductor who was killed when he went between cars after trying the lifting lever of a coupler, where it appeared that the coupler was in good order and operated properly immediately after the accident, since a finding that it would not operate automatically by impact was not supported by the evidence. *Midland V. R. Co. v. Fulgham*, 104 C. C. A. 151, 181 Fed. 91, reversing 167 Fed. 660.

A violation of the Federal Safety Appliance Act is shown by evidence that a switchman was killed when compelled to go between cars to uncouple them on the failure of the automatic coupler, by reason of a defect, to open from the side of a car. *Lucas v. Peoria & E. R. Co.*, 171 Ill. App. 1.

A carrier is answerable to an employee for injuries sustained by the movement of cars while he was between them attempting to open a coupler which, by reason of a defect, could not be operated from the side of a car. *Gordon v. New Orleans G. N. R. Co.*, 135 La. 137, 64 So. 1014.

The proximate cause of the death of a switchman was the violation by a carrier of the Federal Safety Appliance Act, where the accident occurred while he was between the cars uncoupling them by hand on the failure of the coupling device to open from the side of a car. *Lucas v. Peoria & E. R. Co.*, 171 Ill. App. 1.

It cannot be said as a matter of law that the violation of the Federal Safety Appliance Act was not the proximate cause of a brakeman's injury, where, on the failure of a coupler to open from the side of a slowly moving car, he went between the cars to uncouple them by hand at a point from which he could not signal the engineer to stop, and was injured by his foot catching in an unblocked frog. *Donegan v. Baltimore & N. Y. R. Co.*, 91 C. C. A. 555, 165 Fed. 869.

The act of a switchman in stepping between slowly moving cars to uncouple them by hand on the failure of the auto-

matic coupler to work, was not the sole proximate cause of injuries received by him, since the violation of the Safety Appliance Act contributed to the accident. *Otos v. Great N. R. Co.*, 128 Minn. 283, 150 N. W. 922, affirmed 239 U. S. 349, — L. ed. —, 36 Sup. Ct. Rep. 124.

The fact that a brakeman in violation of a rule of a carrier went between moving cars to uncouple them on the failure of a coupler, by reason of a defect, to open from the side of a car, will not preclude a recovery under the Federal Safety Appliance Act where there was a reasonable necessity for him to assume such position in the practical performance of his duties. *Slaughter v. Illinois C. R. Co.*, 125 Minn. 96, 532, 145 N. W. 790, 147 N. W. 284, writ of error dismissed 239 U. S. 651, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

The fact that a brakeman, on the failure of a pin lift lever to work, went between moving cars in violation of a rule of his employer, in order to uncouple them, will not prevent a recovery under the Federal Employers' Liability Act for his death, where there had been such a long continued disregard of the rule as to show its abrogation by the employer. *Thornboro v. Kansas City, M. & O. R. Co.*, 91 Kan. 684, 139 Pac. 410, Ann. Cas. 1915 D. 314, affirmed on rehearing 92 Kan. 681, 142 Pac. 250.

It cannot be said as a matter of law that a brakeman on his inability after repeated efforts to open a coupler from the side of a car, by taking a position on the sill of one of the cars and clinging with one hand to a handhold and uncoupling the cars with the other, assumed an unnecessarily dangerous position, where in doing as he did he followed general instructions he had received. *Nichols v. Chesapeake & O. R. Co.*, 115 C. C. A. 601, 195 Fed. 913.

Where a brakeman who was unable to uncouple slowly backing cars with the lift lever was injured as he stood on the sill of one of the cars, in accordance with general instructions, to uncouple them by hand, it cannot be said, as a matter of law, that it was his duty either to have climbed over the train and used the lift lever on the opposite side or to refuse to go between the cars until the train stopped. *Nichols v. Chesapeake & O. R. Co.*, 115 C. C. A. 601, 195 Fed. 913.

#### To Adjust Coupler for Impact.

The defective condition of a coupler which prevented it from operating by impact, was the proximate cause of the death of a switchman, who, while adjusting the coupler by hand, was killed when other cars were kicked against those between which he was working. *Voelker v. Chicago, M. & St. P. R. Co.*, 116 Fed.

867, reversed on other grounds 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264.

#### To Close Knuckle to Prevent Recoupling.

Where a switchman was injured while closing with his hand the knuckle of a coupler so as to prevent its recoupling in kicking the car from which it had just been detached, he was not engaged in uncoupling a car against the danger of which the Federal Safety Appliance Act is directed. *Weiss v. Belt R. of C.*, 186 Ill. App. 43.

Where a switchman was injured while between cars attempting to close the knuckle of a coupler with his hand so as to prevent the recoupling of the cars in a kicking movement, the proximate cause of his injury was not the failure of the coupler to comply with the Federal Safety Appliance Act. *Weiss v. Belt R. of C.*, 186 Ill. App. 43.

#### Catching Foot in Frog.

The proximate cause of the death of a brakeman was the failure of a carrier to furnish a coupler which complied with the Federal Safety Appliance Act, where his foot caught in an unblocked frog and he was killed while between moving cars uncoupling them on the failure of the coupler to open from the side of a car. *York v. St. Louis, I. M. & S. R. Co.*, 86 Ark. 244, 110 S. W. 803, S. C. 92 Ark. 554, 123 S. W. 376.

A defective coupler which could not be operated from the side of a car, was the proximate cause of the death of a brakeman who was killed by his foot catching in a defective switch when he stepped between moving cars to uncouple them by hand. *Turritin v. Chicago, St. P. M. & O. R. Co.*, 95 Minn. 408, 104 N. W. 225.

Negligence cannot be predicated on the mere fact that a carrier failed to block a frog in which a brakeman caught his foot and was injured when, by reason of the violation of the Federal Safety Appliance Act by a carrier, he stepped between slowly moving cars to uncouple them by hand. *Donegan v. Baltimore & N. Y. R. Co.*, 91 C. C. A. 555, 165 Fed. 869.

It cannot be said as a matter of law that the unblocked condition of a frog in which a brakeman's foot was caught was the proximate cause of his injury, where, by reason of a violation of the Federal Safety Appliance Act by a carrier, he was compelled to go between slowly moving cars to uncouple them by hand. *Donegan v. Baltimore & N. Y. R. Co.*, 91 C. C. A. 555, 165 Fed. 869.

#### To Repair Coupling Apparatus.

A car with a defective coupling device, billed to a repair shop, is in use, within the meaning of the Federal Safety Ap-

pliance Act, where, while such car was standing on a switch track an employee was injured as he was inserting a new knuckle in the coupler, when other cars ran against him. *Erie R. Co. v. Russell*, 106 C. C. A. 160, 183 Fed. 722, writ of error dismissed 220 U. S. 607, 57 L. ed. 607, 31 Sup. Ct. Rep. 722.

Where a switchman was killed while placing a new knuckle in a coupler when other cars ran against him without apparent cause, the defective coupling apparatus was the proximate cause of the accident. *Erie R. Co. v. Russell*, 106 C. C. A. 160, 183 Fed. 722, writ of error dismissed 220 U. S. 607, 57 L. ed. 607, 31 Sup. Ct. Rep. 722.

A carrier is answerable for the negligence of a conductor in ordering a car with a defective coupler removed to a repair shop when it could have been conveniently and quickly repaired at the place where the defect was discovered, where an employee sustained an injury as the result of such movement while between them attempting to repair such coupler. *Chicago J. R. Co. v. King*, 94 C. C. A. 652, 169 Fed. 372, affirmed 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79.

#### To Repair Air Hose.

Where a brakeman was killed at night by the movement of a freight train after it had stopped at a coal chute, when, without the knowledge of any member of the train crew, he went between cars which had defective coupling apparatus, in order to repair a small leak in the air brake pipe, a carrier cannot, under the Safety Appliance Act, be held answerable for his death. *Lyddy v. Louisville & N. R. Co.*, 117 C. C. A. 20, 197 Fed. 524.

#### To Couple Defective Car With Chain.

Where an employee, while connecting a car which had lost its drawbar to another car with a chain for movement from a transfer track used for interstate and intrastate traffic to a repair track, was injured when other cars employed in such traffic were shoved against the one on which he was working, his employer is answerable under the Federal Safety Appliance Act. *Southern R. Co. v. Snyder*, 109 C. C. A. 344, 187 Fed. 492, S. C. 124 C. C. A. 60, 205 Fed. 868.

### G. Assumed Risk.

#### Violation of Safety Appliance Act.

Since the enactment of the Federal Employers' Liability Act assumed risk is not a defense to an action for injuries to or the death of an employee caused in whole or in part by a carrier's violation of the Safety Appliance Act. *Birch v. American R. Co.*, 5 Porto Rico Fed. Rep. 273, re-



versed on other grounds 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603; *Grand Trunk W. R. Co. v. Lindsay*, 120 C. C. A. 166, 201 Fed. 836, affirmed 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914 C. 168; *Farley v. New York, N. H. & H. R. Co.*, 88 Conn. 409, 91 Atl. 651; *Atlantic C. L. R. Co. v. Whitney*, 65 Fla. 72, 61 So. 179, 3 N. C. C. A. 812, S. C. '62 Fla. 124, 56 So. 937; *Thornboro v. Kansas City, M. & O. R. Co.*, 91 Kan. 684, 139 Pac. 410; *Louisville & N. R. Co. v. Patrick*, 167 Ky. 118, 180 S. W. 55; *La Mere v. Railway Transfer Co.*, 125 Minn. 159, 145 N. W. 1068, Ann. Cas. 1915 C. 667, writ of error dismissed 239 U. S. 651, 60 L. ed. —, 36 Sup. Ct. Rep. 159; *Ahrens v. Chicago, M. & St. P. R. Co.*, 121 Minn. 335, 141 N. W. 297; *Sears v. Atlantic C. L. R. Co.*, 169 N. C. 466, 86 S. E. 176; *Steele v. Atlantic C. L. R. Co.*, — S. C. —, 87 S. E. 639; *San Antonio & A. P. R. Co. v. Wagner*, — Tex. Civ. App. —, 166 S. W. 24.

An employee does not assume the risk of injury from a locomotive drawbar which was not of the height prescribed by the Federal Safety Appliance Act and the rules of the Interstate Commerce Commission. *Southern R. Co. v. Crockett*, 234 U. S. 725, 58 L. ed. 1564, 34 Sup. Ct. Rep. 897.

The doctrine of assumed risk is eliminated in actions under the Federal Employers' Liability Act only where the violation by a carrier of some statute intended for the safety of employees causes or contributes to the injury or death of an employee. *Columbia & P. S. R. Co. v. Sauter*, 139 C. C. A. 150, 223 Fed. 604.

Under the terms of the Federal Safety Appliance Act an employee does not assume the risk of injury from defective safety appliances. *Southern R. Co. v. Snyder*, 124 C. C. A. 60, 205 Fed. 868, S. C. 109 C. C. A. 344, 187 Fed. 492.

The Federal Safety Appliance Act eliminates from a contract of employment the risks arising from the nonperformance by a carrier of the duties imposed by such act. *Norfolk & W. R. Co. v. Hazelrigg*, 95 C. C. A. 637, 170 Fed. 551, S. C. 107 C. C. A. 66, 184 Fed. 828.

The question of assumed risk does not arise in an action founded on the Federal Employers' Liability Act for injuries caused a railway employee by the sudden movement of a train while he was adjusting a defective coupler on a car engaged in interstate commerce. *Johnson v. Great N. R. Co.*, 102 C. C. A. 89, 178 Fed. 643.

A switchman cannot be held, in an action founded on the Federal Employers' Liability Act, to have assumed the risk of injury from a defective coupling apparatus on an interstate car, by reason of the fact that he chose the more dangerous way of operating it. *St. Louis S. W.*

*R. Co. v. Anderson*, 117 Ark. 41, 173 S. W. 834.

A brakeman does not assume the risk of injury from a coupler which will not operate automatically by impact without the necessity of men going between the ends of cars. *Chicago & A. R. Co. v. Walters*, 120 Ill. App. 152, affirmed on other grounds 217 Ill. 87, 75 N. E. 441.

By remaining in a carrier's employ with knowledge that its cars are not equipped with automatic couplers, a brakeman does not assume the risk of injury from coupling such cars. *Greenlee v. Southern R. Co.*, 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580.

Under the Federal Safety Appliance Act a switchman does not assume the risk of injury from the defective condition of an automatic coupler while a car is standing on a track which was actually used for handling trains although cars in need of repairs were sometimes placed thereon. *Chicago, M. & St. P. R. Co. v. Voelker*, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264, reversing 116 Fed. 867.

Where a practical necessity exists for the uncoupling of moving cars by some other means on the failure of the lift lever to work, what an employee does in such an emergency amounts to assumption of risk. *Brown v. Chicago, R. I. & P. R. Co.*, 107 C. C. A. 300, 185 Fed. 80, affirmed 229 U. S. 317, 57 L. ed. 1204, 33 Sup. Ct. Rep. 840, 3 N. C. C. A. 826.

A switchman does not assume the risk of injury from the failure of a carrier to comply with the absolute duty imposed by the Federal Safety Appliance Act to equip a switch engine with workable automatic coupling apparatus, especially where the former was not aware of its defective condition and did not appreciate the risk arising therefrom. *Clark v. Erie R. Co.*, 230 Fed. 478.

### Going Between Cars.

In order that the doctrine of assumed risk may be applied, there can be no distinction, in an action for injuries sustained by a brakeman who on the failure of a coupler to operate from the side of a car went between slowly moving cars to uncouple them, between negligence on his part in going between the cars and what he did after assuming such position. *Norfolk & W. R. Co. v. Hazelrigg*, 95 C. C. A. 637, 170 Fed. 551, S. C. 107 C. C. A. 66, 184 Fed. 828.

An experienced fieldman in a railway yard assumes the risk of injury from the kicking without warning, according to a general custom, of cars onto a track and against others between which he was working adjusting a defective coupler. *Chicago, M. & St. P. R. Co. v. Voelker*,

65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264, reversing 116 Fed. 867.

The Federal Safety Appliance Act relieves a brakeman, while performing his duties, of assumption of the risk of injury from the failure of a carrier to furnish a coupling device which complies with the terms of the act, but not from his negligence in going between moving cars to uncouple them on the failure of a coupler to open from the side of a car, nor does such act permit him to remain between them an unnecessary length of time. *York v. St. Louis, I. M. & S. R. Co.*, 86 Ark. 244, 110 S. W. 803, S. C. 92 Ark. 554, 123 S. W. 376.

#### **Defective Running Boards.**

Where, on the trial of an action based on the Federal Employers' Liability Act for injuries received by a switchman from a defective footboard on the tender of an engine, it was indiscriminately referred to as a "footboard" and as a "running board" without evidence to show the distinction, the common-law defense of assumption of risk was not available to the defendant, since the defect was the result of the violation of the Safety Appliance Act. *Bramlett v. Southern R. Co.*, 98 S. C. 319, 82 S. E. 501, writ of error dismissed 239 U. S. 651, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

#### **Absence of or Defective Grabirons and Handholds.**

##### **— Failure to Provide.**

In an action for injuries received by a brakeman by reason of the absence from a car of the grabirons required by the Federal Safety Appliance Act, when he went between moving cars to uncouple them, the jury may consider his knowledge of their absence on the question of his intention to assume the risk of attempting to uncouple by hand a car having a defective coupler. *Cleveland, C. C. & St. L. R. Co. v. Baker*, 33 C. C. A. 468, 91 Fed. 224.

A switchman does not assume the risk of injury from the failure of a carrier to equip the sides and end of the tender of a switch engine with grabirons or handholds as required by the Federal Safety Appliance Act. *Daly v. Illinois C. R. Co.*, 170 Ill. App. 185.

##### **— Defects.**

By the express provisions of the Federal Safety Appliance Act an employee does not, by remaining in his employment, assume the risks generally incident to the absence of grabirons from a car, but he is not relieved from such assumption where he voluntarily acts with full knowledge of the absence of such devices. *Cleveland, C. C. & St. L. R. Co. v. Baker*, 33 C. C. A. 468, 91 Fed. 224.

Where an employee is injured as the result of a defective handhold, a carrier is, by the terms of the Federal Safety Appliance Act, denied the defense of assumed risk. *Galveston, H. & S. A. R. Co. v. Kurtz*, — Tex. Civ. App. —, 147 S. W. 658.

An employee does not assume the risk of injury from a defective handhold forming the roof rung of a box car ladder, since it was a device covered by the Federal Safety Appliance Act. *Missouri, K. & T. R. Co. v. Barrington*, — Tex. Civ. App. —, 173 S. W. 595.

An employee does not assume the risk of injury from the failure of a carrier to have secure handholds or grabirons on the roof of a freight car, as required by the Federal Safety Appliance Act, although he continues in the employment with knowledge of such omission. *Cook v. Union P. R. Co.*, — Ia. —, 158 N. W. 521.

#### **Knowledge of Defects.**

The fact that an employee continues to work with knowledge of the insecure condition of a handhold or grabiron on the roof of a freight car is not a bar to a recovery for resulting injuries. *Cook v. Union P. R. Co.*, — Ia. —, 158 N. W. 521.

#### **Defective Power Brakes.**

Since the duty imposed on a carrier by the Federal Safety Appliance Act of keeping power brakes in proper order, was intended for the benefit of employees as well as passengers, there may be a recovery for injuries sustained by the motorman of an interstate electric car in consequence of the failure of the air brakes to work as a result of being out of repair, notwithstanding that such employee was also guilty of contributory negligence. *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. ed. —, 36 Sup. Ct. Rep. 683, affirming 133 C. C. A. 370, 217 Fed. 518.

#### **Failure to Connect Power Brakes.**

A brakeman does not assume the risk of injury from the stopping of a train with unusual violence due to the negligent operation of a freight train by the engineer when the air brakes were not connected as required by the Federal Safety Appliance Act. *La Mere v. Railway Trans. Co.*, 125 Minn. 159, 145 N. W. 1068, Ann. Cas. 1915 C. 667, writ of error dismissed 239 U. S. 651, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

It cannot be said as a matter of law that a brakeman assumed the risk of injury from an unusual jerk or bump of a freight train, which jerk or bump would not have occurred when stopped in an emergency, had the air brakes been connected as required by the Federal Safety Appliance Act. *La Mere v. Railway Trans. Co.*, 125 Minn. 159, 145 N. W. 1068, Ann.

Cas. 1915 C. 667, writ of error dismissed 239 U. S. 651, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

#### **Negligence of Fellow Servants.**

Under the Federal Safety Appliance Act an employee did not assume the risk of injury from the negligence of fellow servants in moving a train while he was between cars adjusting a defective coupler. *Southern P. Co. v. Allen*, 48 Tex. Civ. App. 66, 106 S. W. 441.

### **H. Contributory Negligence.**

#### **1. In General.**

##### **Effect of Abolition of Defense of Assumed Risk.**

Notwithstanding that section eight of the Federal Safety Appliance Act has taken away the defense of assumed risk, it does not deprive a carrier of the defense of contributory negligence in an action for the death of an employee. *Schlemmer v. Buffalo, R. & P. R. Co.*, 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561, affirming 222 Pa. 470, 71 Atl. 1053, S. C. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407, reversing 207 Pa. 198, 56 Atl. 417; *Denver & R. G. R. Co. v. Arrighi*, 63 C. C. A. 649, 129 Fed. 347, S. C. 72 C. C. A. 400, 141 Fed. 67.

The provisions of the Federal Safety Appliance Act abolishing the defense of assumed risk do not affect the common-law defense of contributory negligence. *Southern P. Co. v. Allen*, 48 Tex. Civ. App. 66, 106 S. W. 441.

##### **As Defense in General.**

Contributory negligence as a defense was not taken away by the Federal Safety Appliance Act. *Southern P. R. Co. v. Snyder*, 124 C. C. A. 60, 205 Fed. 868, S. C. 109 C. C. A. 344, 187 Fed. 492.

Contributory negligence is a complete defense to an action based on the Federal Safety Appliance Act for the death of an employee. *Toledo, St. L. & W. R. Co. v. Gordon*, 100 C. C. A. 572, 177 Fed. 152.

The common-law defense of contributory negligence is available in an action for injuries sustained by an employee in consequence of a defective coupler. *Southern P. Co. v. Allen*, 48 Tex. Civ. App. 66, 106 S. W. 441.

The Federal Safety Appliance Act permits the defense of contributory negligence in an action for an injury to an employee caused by defective coupling apparatus on a car not moving in interstate commerce. *Popplar v. Minneapolis, St. P. & S. S. M. R. Co.*, 121 Minn. 413, 141 N. W. 798, Ann. Cas. 1914 D. 383, affirmed 237 U. S. 369, 59 L. ed. 1000, 35 Sup. Ct. Rep. 609.

#### **Failure to Provide Safety Appliances.**

The contributory negligence of a brakeman will not prevent a recovery for injuries received in consequence of a carrier's failure to equip a locomotive with automatic couplers. *Fleming v. Southern R. Co.*, 131 N. C. 476, 42 S. E. 905.

The contributory negligence of a brakeman in coupling cars not equipped with automatic couplers, will not relieve a carrier from liability for resulting injuries. *Greenlee v. Southern R. Co.*, 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580.

#### **Proximate Cause.**

The provision of the Federal Employers' Liability Act as to contributory negligence when a carrier's violation of any safety statute contributes to the injury or death of an employee, eliminates the question of proximate cause from a case where the concurrent negligence of a carrier and an employee contributes to an accident as the result of the former's violation of the Federal Safety Appliance Act. *Spokane & I. E. R. R. Co. v. Campbell*, 133 C. C. A. 370, 217 Fed. 518, Affirmed 241 U. S. 497, 60 L. ed. —, 36 Sup. Ct. Rep. 685.

#### **Going Between Cars.**

##### **— To Couple Cars Not Equipped With Automatic Devices.**

Where a brakeman who was killed while attempting to couple a shovel car which was not equipped with automatic couplers, was required to assume a crouching position in order to make the coupling, the fact that he miscalculated the height to which he could safely arise, although warned to keep his head down, will not permit the court to say as a matter of law that he was guilty of contributory negligence. *Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407, reversing 207 Pa. 198, 56 Atl. 417, S. C. 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561, affirming 222 Pa. 470, 71 Atl. 1053.

##### **— To Operate Defective Couplers.**

Where a practical necessity exists for the uncoupling of moving cars by some other means when the lift lever refuses to work, what is done by an employee in such emergency amounts to an assumption of the risk under the terms of the Safety Appliance Act, and if he is guilty at all of contributory negligence it depends upon the degree of care with which he acts. *Brown v. Chicago, R. I. & P. R. Co.*, 107 C. C. A. 300, 185 Fed. 80, affirmed 229 U. S. 317, 57 L. ed. 1204, 33 Sup. Ct. Rep. 840, 3 N. C. C. A. 826.

It is not negligence per se for a brakeman to go between moving cars to un-

couple them on the failure of the automatic device to work in the manner required by the Federal Safety Appliance Act. *Kansas City, M. & B. R. Co. v. Flippo*, 138 Ala. 487, 35 So. 457.

It cannot be said as a matter of law that it was contributory negligence for a brakeman to step between the ends of slowly moving cars to uncouple them by hand when unable to do so from the side of the car by reason of a defective coupler. *Donegan v. Baltimore & N. Y. R. Co.*, 91 C. C. A. 555, 165 Fed. 869.

It is not negligence as a matter of law for a brakeman to go between moving cars to uncouple them on the failure of the automatic coupler to open from the side of a car. *York v. St. Louis, I. M. & S. R. Co.*, 86 Ark. 244, 110 S. W. 803, S. C. 92 Ark. 554, 123 S. W. 376.

It is not negligence per se under all circumstances for a brakeman to step between moving cars to uncouple them by hand on the failure of an automatic coupler to open from the side of a car as required by the Federal Safety Appliance Act. *Turritin v. Chicago, St. P. M. & O. R. Co.*, 95 Minn. 408, 104 N. W. 225.

Where a yard employee was injured by a collision between cars standing on a transfer track, the fact that while switch engines were working on each end of the track, he went between cars to couple one which did not have a drawbar, cannot be declared as a matter of law to amount to contributory negligence, where he first stationed another employee on the top of a nearby freight car to give warning of danger. *Southern R. Co. v. Snyder*, 124 C. C. A. 60, 205 Fed. 868, S. C. 109 C. C. A. 344, 187 Fed. 492.

It is not contributory negligence for a brakeman to go between moving cars in violation of a carrier's rule requiring the use of a stick in coupling cars, to make a coupling with the heavy draw bar of a locomotive that was not equipped with automatic couplers, where it was impracticable to use a stick in making the coupling. *Fleming v. Southern R. Co.*, 131 N. C. 476, 42 S. E. 905.

It cannot be said as a matter of law that it was contributory negligence for a switchman to go between moving cars to uncouple them, in violation of a rule of a carrier requiring the use of a coupling stick, on the failure of the automatic coupler to open from the side of a car. *Austin v. Cent. of Ga. R. Co.*, 3 Ga. App. 775, 61 S. E. 998.

When at night a brakeman, on a freight train twice breaking in two at the same place, went alone to the break and after several movements of the train was unable to make the coupling hold, he gave a signal to back up quickly, which was obeyed, and he was caught between the

cars and killed, he was guilty of contributory negligence which will preclude a recovery under the Safety Appliance Act. *Toledo, St. L. & W. R. Co. v. Gordon*, 100 C. C. A. 572, 177 Fed. 152.

#### —To Repair Coupler.

Where a switchman was killed while placing a new knuckle in a coupler when other cars ran against him without any apparent cause, he cannot be said, as a matter of law, to have been guilty of contributory negligence. *Erie R. Co. v. Russell*, 106 C. C. A. 160, 183 Fed. 722, writ of error dismissed 220 U. S. 607, 57 L. ed. 607, 31 Sup. Ct. Rep. 722.

#### —To Repair Air Hose.

Where a brakeman was killed at night by the movement of a freight train after it had stopped at a coal chute, when, without the knowledge of any member of the train crew, he went between cars which had defective coupling apparatus, in order to repair a small leak in the air pipe, he was held guilty of contributory negligence, notwithstanding that the movement of such cars in the train was in violation of the Safety Appliance Act. *Lyddy v. Louisville & N. R. Co.*, 117 C. C. A. 20, 197 Fed. 524.

#### —Duty to Go to Opposite Side of Car.

It was contributory negligence for a brakeman to step between the last two cars of a slowly moving freight train to uncouple them because of his inability to do so from the side of a car, when he could have easily passed to the opposite side of the train and uncoupled the cars with the lever on the other car. *Morris v. Duluth, S. S. & A. R. Co.*, 47 C. C. A. 661, 108 Fed. 747.

Where a switchman, in order to uncouple a caboose from a freight car on the failure of the coupler to open from the side of the car, went between them while they were moving about six miles an hour and was injured, his employer is not answerable therefor since the employee chose a dangerous method of performing his duty when he could have passed to the opposite side of the caboose by means of the platform and used the lift lever on that side. *Suttle v. Choctaw, O. & G. R. Co.*, 75 C. C. A. 470, 144 Fed. 668.

On the discovery by an experienced switchman that the coupling apparatus of a car which he was about to couple could not be operated from the side of a car, it was his duty to cross to the opposite side of the track and use the lever on that side of the other car where he could do so in safety through the open space between the cars. *Union P. R. Co. v. Brady*, 88 C. C. A. 579, 161 Fed. 719.

It is contributory negligence for a brakeman, on the failure of the lift lever to open a coupler, to go between moving cars to uncouple them by hand instead of passing to the opposite side of the train and using the lever on the other car. *Gilbert v Burlington, C. R. & N. R. Co.*, 63 C. C. A. 27, 128 Fed. 529, affirming 123 Fed. 832.

The negligence of a brakeman in going between moving cars to uncouple them on the failure of the lift lever to open the coupler instead of going to the other side of the train and using the lever on the other car, is not excused by a custom of employees to go between moving cars under such circumstances, since the danger of doing so was so imminent and obvious that no custom could deprive the act of its inherently negligent character. *Gilbert v Burlington, C. R. & N. R. Co.*, 63 C. C. A. 27, 128 Fed. 529, affirming 123 Fed. 832.

The failure of a brakeman, on his inability to open a coupler from the side of a car, to stop the train or go to the opposite side and use the lever on the other car, instead of going between the moving cars to uncouple them by hand, is not contributory negligence as a matter of law. *St. Louis, I. M. & S. R. Co. v. York*, 92 Ark. 554, 123 S. W. 376, S. C. 86 Ark. 244, 110 S. W. 803.

Where a brakeman who was compelled to uncouple a car from a slowly moving train before a certain switch was reached, on the failure of the automatic coupler to operate from the side of the car went between the ends of two cars to uncouple them, it cannot be said as a matter of law that because he failed to pass to the opposite side of the train and use the lever on the other car he adopted a dangerous method of discharging his duty when a comparatively safe way was open to him. *Donagan v. Baltimore & N. Y. R. Co.*, 91 C. C. A. 555, 165 Fed. 869.

The failure of an inexperienced brakeman, on the refusal of the lift lever to open the coupler of a car when he was uncoupling cars as they were being weighed, to go to the opposite side and use the other lever instead of going between the moving cars, does not amount to contributory negligence where he did as he had seen others do, and he had been instructed to remain on his side of the train and make the cuts. *Norfolk & W. R. Co. v. Hazelrigg*, 107 C. C. A. 66, 184 Fed. 828, S. C. 95 C. C. A. 637, 170 Fed. 551.

The knowledge and experience of a brakeman is to be taken into consideration in determining the question of his contributory negligence in going between slowly moving cars to uncouple them by hand on the failure of the automatic apparatus to work, instead of going to the

opposite side of a train and using the other lift lever. *Norfolk & W. R. Co. v. Hazelrigg*, 107 C. C. A. 66, 184 Fed. 828, S. C. 95 C. C. A. 637, 170 Fed. 551.

The fact that a brakeman in order to kick a car went between moving cars to uncouple them on the failure of the lift lever to open a coupler, is not conclusive evidence of contributory negligence, where the only other way he had of performing his duties without going between the cars was to stop the train and go to the opposite side of the car. *Popplar v. Minneapolis, St. P. & S. S. M. R. Co.*, 121 Minn. 413, 141 N. W. 798, Ann. Cas. 1914 D. 383, affirmed 237 U. S. 369, 59 L. ed. 1000, 35 Sup. Ct. Rep. 609.

The election by a brakeman to go between cars to uncouple them after the lifting lever at the side of a car failed to work, rather than to go to the opposite side of the train and use the lever there, amounts to contributory negligence, if anything. *Fletcher v. South Dakota C. R. Co.*, — S. D. —, 155 N. W. 3.

The election of a brakeman to go between cars in order to uncouple them after the lifting lever at the side of a car failed to work, rather than to go to the opposite side of the train and use the lever there, cannot, as a matter of law, be held negligence in an action under the Federal Employers' Liability Act. *Fletcher v. South Dakota C. R. Co.*, — S. D. —, 155 N. W. 3.

#### Reaching Between Car to Operate Coupler.

It is not contributory negligence as a matter of law for a switchman to place his arm between the buffers of cars in order to adjust a defective coupler which he could not operate from the side of a car, where his signal not to move a switch engine was disobeyed. *Southern P. Co. v. Allen*, 48 Tex. Civ. App. 66, 106 S. W. 441.

It is not contributory negligence per se for a switchman, on the failure of a lift lever to open a coupling of a slowly moving car, to put his arm between the cars and walk beside them in order to open the coupling by hand, since as there existed a necessity to do so he was not obliged to wait for the train to stop and then go to the opposite side and use the lever there. *Chicago, R. I. & P. R. Co. v. Brown*, 107 C. C. A. 300, 185 Fed. 80, affirmed 229 U. S. 317, 57 L. ed. 1204, 33 Sup. Ct. Rep. 840, 3 N. C. C. A. 826.

A switchman who, after several unsuccessful efforts to uncouple two slowly moving cars with the lift lever, reached between them to remove the coupling pin with his hand, was not as a matter of law guilty of contributory negligence which would defeat a recovery for resulting injuries, because he did not anticipate that

his foot might slip and catch in an open frog of which he had or could be charged with knowledge. *Chicago, R. I. & P. R. Co. v. Brown*, 229 U. S. 317, 57 L. ed. 1204, 33 Sup. Ct. Rep. 840, 3 N. C. C. A. 826 affirming 107 C. C. A. 300, 185 Fed. 80.

It was held contributory negligence as a matter of law, in an action for injuries sustained by an experienced switchman as the alleged result of the failure of a carrier to comply with the Federal Safety Appliance Act, for him to guide a coupling link of a barely moving car with his hand and after doing so to leave his hand between the drawheads of the cars until it was injured. *Denver & R. G. R. Co. v. Arrighi*, 63 C. C. A. 649, 129 Fed. 347, but see *S. C. 72 C. C. A. 400*, 141 Fed. 67.

#### Kicking Coupler with Foot.

An employee who saw that a coupler was in such defective condition that it would not couple automatically by impact, was guilty of contributory negligence where he attempted to kick the coupler at the moment of impact in order to make it operate. *Nix v. Southern R. Co.*, 4 Ga. App. 331, 61 S. E. 292.

Where after opening the lip of a defective coupler of a moving car a brakeman was injured when he attempted to kick it into line with the coupler with which it was about to engage, his contributory negligence will not prevent a recovery for his injuries. *Elmore v. Seaboard A. L. R. Co.*, 130 N. C. 506, 41 S. E. 786, S. C. 131 N. C. 569, 42 S. E. 989, 132 N. C. 865, 44 S. E. 620.

#### Absence of Grabirons and Handholds.

In an action for injuries sustained by a brakeman by reason of the absence from a car of the grabirons required by the Federal Safety Appliance Act, when he went between moving cars to uncouple them by hand, the jury may, on the question of contributory negligence, consider his knowledge of their absence. *Cleveland, C. C. & St. L. R. Co. v. Baker*, 33 C. C. A. 468, 91 Fed. 224.

In an action for injuries sustained by a switchman in consequence of the absence of handholds or grabirons from the sides and end of the tender of a switch engine, it was held that the evidence did not warrant the court in holding, as a matter of law, that the manner in which the plaintiff attempted to secure a hold on a post on the tender was not that which an ordinarily careful and prudent switchman would have adopted. *Daly v. Illinois C. R. Co.*, 170 Ill. App. 185.

The absence from a car of the grabirons required by the Federal Safety Appliance Act does not excuse a brakeman from his failure to use ordinary prudence in a particular case when he was aware of the ab-

sence of such device. *Hodge v. Kimball*, 44 C. C. A. 193, 104 Fed. 745.

#### Defective Grabirons and Handholds.

When an employee is injured in consequence of an insecure handhold of a car, a carrier is denied, by the Federal Safety Appliance Act, the defense of contributory negligence. *Galveston, H. & S. A. R. Co. v. Kurtz*, — Tex. Civ. App. —, 147 S. W. 658.

It was contributory negligence for a brakeman to grasp a handhold on the end of a flat car and to step onto a swinging brakebeam in order to ride a short distance, where he was killed by the giving away of the handhold as the result of the rotten condition of the wood to which it was fastened, when he might have ridden in safety on the side on an adjoining box car which was equipped with handholds and stirrup; since the purpose of the Federal Safety Appliance Act in requiring handholds on the ends of cars was to afford greater security to employees while coupling or uncoupling them. *Dawson v. Chicago, R. I. & P. R. Co.*, 52 C. C. A. 286, 114 Fed. 870.

## 2. Effect of Federal Employers' Liability Act.

### In General.

Under the provisions of the Federal Employers' Liability Act contributory negligence is not a defense to nor does it tend to diminish the damages in an action for injuries received by an employee as the result in whole or in part of a carrier's violation of the Federal Safety Appliance Act. *Lucas v. Peoria & E. R. Co.*, 171 Ill. App. 1; *Thornboro v. Kansas City, M. & O. R. Co.*, 91 Kan. 684, 139 Pac. 410; *Ahrens v. Chicago, M. & St. P. R. Co.*, 121 Minn. 335, 141 N. W. 297; *La Mere v. Railway Trans. Co.*, 125 Minn. 159, 145 N. W. 1068, Ann. Cas. 1915 C. 667; *Burho v. Minneapolis & St. L. R. Co.*, 121 Minn. 326, 141 N. W. 300; *Montgomery v. Carolina & N. W. R. Co.*, 169 N. C. 249, 85 S. E. 139, S. C. 163 N. C. 597, 80 S. E. 83; *Steele v. Atlantic C. L. R. Co.*, — S. C. —, 87 S. E. 639; *San Antonio & A. P. R. Co. v. Wagner*, — Tex. Civ. App. —, 166 S. W. 24; *Birch v. American R. Co.*, 5 Porto Rico Fed. Rep. 273, reversed on other grounds 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603; *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 60 L. ed. —, 36 Sup. Ct. Rep. 626, affirming — Tex. Civ. App. —, 166 S. W. 24; *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. ed. —, 36 Sup. Ct. Rep. 683, affirming 133 C. C. A. 370, 217 Fed. 518; *Moore v. St. Joseph & G. I. R. Co.*, — Mo. —, 186 S. W. 1035.

Under the provisions of the Federal Employers' Liability Act declaring that an

employee shall not be held guilty of contributory negligence when a violation by a carrier of any safety statute contributes to his injury or death, no act on the part of an employee, however negligent and irrespective of the extent it in fact contributes to his injury, can be urged as contributory negligence, where a carrier's failure to comply with the Safety Appliance Act contributed to such injury. *Fletcher v. South Dakota C. R. Co.*, — S. D. —, 155 N. W. 3.

Under the provisions of the Federal Employers' Liability Act declaring that contributory negligence shall not be a defense where the violation by a carrier of some safety statute causes or contributes to the injury or death of an employee, the negligent acts which are precluded as a defense are those which in fact merely contribute to and which are not the sole cause of the result. *Fletcher v. South Dakota C. R. Co.*, — S. D. —, 155 N. W. 3.

Contributory negligence is not available as a defense to an action based on the Federal Employers' Liability Act for injuries received by a switchman proximately caused by a defective coupler on a car moving in interstate commerce. *Great N. R. Co. v. Otos*, 239 U. S. 349, — L. ed. —, 36 Sup. Ct. Rep. 124, affirming 128 Minn. 283, 150 N. W. 922.

Contributory negligence is not a defense to an action under the Federal Employers' Liability Act for injuries caused by a defective coupler. *Demerco v. Minneapolis, St. P. & S. S. M. R. Co.*, 122 Minn. 171, 142 N. W. 145; *Sears v. Atlantic C. L. R. Co.*, 169 N. C. 446, 86 S. E. 176.

The question of contributory negligence does not arise in an action based on the Federal Employers' Liability Act, for injuries sustained by a railway employee from the sudden movement of a train while he was attempting to adjust a defective coupler on a car engaged in interstate commerce. *Johnson v. Great N. R. Co.*, 102 C. C. A. 89, 178 Fed. 643.

The fact that a brakeman reached between cars to adjust a coupler which did not work automatically by impact as required by the Safety Appliance Act, does not amount to contributory negligence in an action founded on the Federal Employers' Liability Act. *Parker v. Atlantic C. R. Co.*, 87 N. J. L. 148, 93 Atl. 574.

The contributory negligence of a switchman does not tend to diminish his damages in an action based on the Federal Employers' Liability Act, where his injuries were caused by a defective coupling apparatus on an interstate car, which did not comply with the Safety Appliance Act. *St. Louis S. W. R. Co. v. Anderson*, 117 Ark. 41, 173 S. W. 834.

Contributory negligence is not a defense to an action for injuries sustained by an

employee in consequence of a defective coupling apparatus that did not comply with the Federal Safety Appliance Act. *Moore v. St. Joseph & G. I. R. Co.*, — Mo. —, 186 S. W. 1035.

A carrier's violation of the Safety Appliance Act need not be the sole efficient cause of an employee's injury to bring an action within the clause of the Federal Employers' Liability Act declaring that contributory negligence shall not be a defense where such violation causes or contributes to the injury or death of an employee. *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. ed. —, 36 Sup. Ct. Rep. 683, affirming 133 C. C. A. 370, 217 Fed. 518.

The submission of the question of contributory negligence to the jury in an action under the Federal Employers' Liability Act for injuries resulting from a carrier's violation of the Safety Appliance Act was not prejudicial to the defendant. *Clark v. Erie R. Co.*, 230 Fed. 478.

#### Going Between Cars to Adjust or Operate Defective Coupling Apparatus.

The fact that a switchman was guilty of contributory negligence in going between cars to examine a coupler which, after several attempts, refused to operate automatically by impact as required by the Federal Safety Appliance Act, does not tend to diminish his damages in an action under the Federal Employers' Liability Act, since section 3 of the latter act abrogates the defense of contributory negligence where the violation by a carrier of any statute enacted for the safety of employees contributes to the injury or death of an employee. *Grand Trunk W. R. Co. v. Lindsay*, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914 C. 168, affirming 120 C. C. A. 166, 201 Fed. 836.

The fact that a switchman went between two cars to adjust a defective coupler and was injured by a movement of the train, is not sufficient to charge him with contributory negligence in an action founded on the Federal Employers' Liability Act, where he used ordinary care and prudence. *Grand Trunk W. R. Co. v. Lindsay*, 120 C. C. A. 166, 201 Fed. 836, affirmed 233 U. S. 42, 58 L. ed. 839, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914 C. 168.

Where a switchman, before going between cars of a train to adjust a defective coupler, signalled the engineer not to move the train, but by mistake the cars were pushed together and the switchman injured, he cannot be held guilty of contributory negligence, in an action founded on the Federal Employers' Liability Act, since, under the Safety Appliance Act, he did not, by continuing to work with the apparatus with knowledge of its condi-

tion, assume the risk of injury therefrom. *Grand Trunk W. R. Co. v. Lindsay*, 120 C. C. A. 166, 201 Fed. 836, affirmed 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914 C. 168.

The fact that a brakeman had previously learned at another station of the defective condition of a coupler without reporting it to his conductor, will not prevent a recovery under the Federal Employers' Liability Act for injuries suffered by him when, with such knowledge, he went between cars to uncouple them, since his knowledge bore only on the question of contributory negligence and assumption of risk, which were eliminated from the case by the terms of the Safety Appliance Act. *Nashville, C. & St. L. R. Co. v. Henry*, 158 Ky. 88, 164 S. W. 310.

#### Defective Power Brakes.

Where an engineer, while on his way through a railway yard to his engine in the course of his employment, was struck and killed when enveloped in a cloud of steam and smoke, by an engine running backwards at an excessive speed without lookout, warning or signal, so that it was impossible for him to know his danger until he was struck, the fact that the power brakes of the engine were out of order does not prevent the application of the contributory negligence rule to the Federal Employers' Liability Act, since the condition of the brakes did not contribute to the accident. *Huxoll v. Union P. R. Co.*, 99 Neb. 170, 155 N. W. 900.

### VIII. ACTIONS.

#### A. In General.

##### Transitory Nature.

An action for injuries received by an employee in consequence of the violation by a carrier of the Federal Safety Appliance Act, is transitory, and will lie in a state other than that wherein the accident occurred. *Southern P. Co. v. Allen*, 48 Tex. Civ. App. 66, 106 S. W. 441.

##### Submission Under State Law.

A carrier was not prejudiced in an action for injuries sustained by an employee by reason of a defective coupler, by the striking from its answer of an allegation that the Federal Safety Appliance Act controlled, and the submission of the action under a state law identical in terms with the Federal act. *San Antonio & A. P. R. Co. v. Wagner*, — Tex. Civ. App. —, 166 S. W. 24, affirmed on other grounds 241 U. S. 476, 60 L. ed. —, 36 Sup. Ct. Rep. 626.

#### B. Removal.

##### In General.

A cause of action under a law of the United States which is removable from a state to a Federal court, is not shown in an action for injuries sustained by a switchman from cars not properly equipped with automatic couplers, where the petition did not disclose that the defendant was an interstate carrier or that the Federal Safety Appliance Act controlled. *International & G. N. R. Co. v. Elder*, — Tex. Civ. App. —, 99 S. W. 856.

Where the petition in an action in a state court based on the common law, for injuries received by a brakeman was amended after the defendant pleaded assumed risk and contributory negligence, by setting up a violation by the defendant of the Federal Safety Appliance Act, the action becomes one under a law of the United States for the purpose of removal to a Federal court. *Nichols v. Chesapeake & O. R. Co.*, 127 Ky. 310, 105 S. W. 481.

Where the facts alleged in a complaint bring an action within the Federal Safety Appliance Act, and there is no allegation of any dispute between the plaintiff and the defendant as to the construction of such act, or of any controversy as to what law governs the proceedings, the action cannot be removed by the defendant from a state to a Federal court on a petition setting up facts showing a controversy as to the proper construction of the Federal act. *Leggett v. Great N. R. Co.*, 180 Fed. 314.

Where the only question involved in an action in a state court for injuries sustained by an employee is whether a carrier was engaged in interstate commerce within the meaning of the Federal Safety Appliance Act, and it does not appear that there is any controversy as to the proper construction of the law, the cause of action is not one arising under a law of the United States within the meaning of the Judiciary Act pertaining to the removal of causes. *Myrtle v. Nevada, C. & O. R. Co.*, 137 Fed. 193.

#### C. What Law Controls.

##### In General.

An employee who is injured as the result of his employer's violation of the Federal Safety Appliance Act may recover under the Federal Employers' Liability Act. *Atlantic C. L. R. Co. v. Whitney*, 62 Fla. 124, 56 So. 937, S. C. 65 Fla. 72, 61 So. 179, 3 N. C. C. A. 812.

The Federal Safety Appliance Act will be applied, although not pleaded by the plaintiff, where the defendant's answer alleged and the proof show that at the time an employee met his death, he was



engaged in interstate commerce. *Calhoun v. Great N. R. Co.*, — Wis. —, 156 N. W. 198.

#### D. Limitations.

##### What Law Controls.

The time within which an action for personal injuries may be brought under the Federal Safety Appliance Act, is determined by the law of the state in which the action is begun. *Nichols v. Chesapeake & O. R. Co.*, 115 C. C. A. 601, 195 Fed. 913.

#### E. Pleadings.

##### Setting Up Federal Act.

###### —Necessity.

The Federal Safety Appliance Act need not be specially pleaded in an action for injuries sustained by an employee, it being sufficient if the facts alleged show a liability under such act. *Ahrens v. Chicago, M. & St. P. R. Co.*, 121 Minn. 335, 141 N. W. 297.

A complaint in an action for injuries sustained by a brakeman need not specially aver the Federal Safety Appliance Act, since it will be applied if the facts alleged show a failure on the part of a carrier to comply with its terms. *Kansas City, M. & B. R. Co. v. Flippo*, 138 Ala. 487, 35 So. 457.

Neither the Federal Safety Appliance Act nor its provisions need be referred to in a petition for injuries received by an employee in consequence of a defective coupler which would not couple automatically by impact, since it is sufficient to allege the use of a car with coupling devices so defective and worn as not to couple in such manner. *Voelker v. Chicago, M. & St. P. R. Co.*, 116 Fed. 867, reversed on other grounds 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264.

##### Movement of Defective Car in Interstate Commerce.

The plaintiff need not allege that a car, moved in interstate commerce with a defective coupler which caused an injury, was actually loaded with interstate traffic at the time of the accident. *Felt v. Denver & R. G. R. Co.*, 48 Colo. 249, 110 Pac. 215, 1136, 21 Ann. Cas. 379.

That a car with defective coupling devices, which caused an injury to an employee, was used in interstate commerce need not be alleged in the plaintiff's petition, since the defendant must know, when the defective condition of the car is alleged, that the Federal Safety Appliance Act controls if such car was in fact used in such commerce. *Voelker v. Chicago, M. & St. P. R. Co.*, 116 Fed. 867, reversed on other grounds 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264.

A complaint in an action for injuries sustained by a brakeman is sufficient where it avers in substance that the defendant in moving interstate traffic hauled on its lines a car not equipped with couplers which would couple automatically by impact and that the plaintiff, by reason of such defect, was injured while coupling such cars. *Kansas City, M. & B. R. Co. v. Flippo*, 138 Ala. 487, 35 So. 457.

##### Due Care.

Since contributory negligence is not a defense to an action for injuries received by an employee as the result of a carrier's violation of the Federal Safety Appliance Act, it is unnecessary for the plaintiff to aver or prove that the employee exercised due care and caution at the time of his injury. *Lucas v. Peoria & E. R. Co.*, 111 Ill. App. 1.

##### Setting Up Negligence.

When the duty of a carrier to equip its cars with safety appliances is shown in an action for the death of an employee, it is not necessary to allege the *quo modo* by which its negligence caused the injury. *Mobile, J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395.

##### Sufficiency of Complaint or Declaration.

A cause of action under the Federal Employers' Liability Act was stated by a complaint which in substance charged the defendant with negligence in failing to provide ladders and grab-irons on the end of its cars so as to enable brakemen to pass with safety from one car to another, and also in placing a tank car next to a high car in a freight train, which negligence, it was alleged, concurred with that of an engineer in causing the train to jerk and lurch with unnecessary violence, in causing the death of a brakeman. *Kansas City S. R. Co. v. Leslie*, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915 B. 834, reversed on other grounds 238 U. S. 599, — L. ed. —, 35 Sup. Ct. Rep. 844.

A cause of action sufficient to sustain a verdict under the Federal Employers' Liability Act is shown by a declaration alleging in substance that the defendant was a common carrier in interstate commerce; that the plaintiff was employed by it as a switchman to work with a certain engine and cars owned by the defendant and used in its business; that two cars were shoved together (although not showing that it was done by the defendant) while the plaintiff was between them working with a coupler which would not operate automatically by impact as required by the Safety Appliance Act; since the declaration sufficiently showed that the cars were moved by the defendant. *Grand Trunk W. R. Co. v. Lindsay*, 120 C. C. A. 166, 201 Fed. 836, affirmed 233 U. S. 42, 58 L. ed.

838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914 C. 168.

A complaint, in an action for injuries received by an employee, is sufficient as against a demurrer on the ground that contributory negligence and assumed risk were shown, where it alleged in substance that a car with a defective coupler was moved in violation of the Federal Safety Appliance Act, and that the plaintiff was injured while between cars adjusting the coupler when his foot caught in a frog, which to the knowledge of the defendant was unblocked contrary to a custom upon which the plaintiff relied. *Grand Trunk W. R. Co. v. Poole*, 175 Ind. 567, 93 N. E. 26.

A petition under the original Safety Appliance Act did not state a cause of action for an injury to an employee, where it alleged that the defendant was a carrier engaged in interstate commerce by railroad, that its cars were not equipped with couplers such as were prescribed by the act, and that the plaintiff's injuries proximately resulted from the absence of such devices, but without alleging that the cars were at any time used in moving interstate commerce. *Brinkmeier v. Missouri P. R. Co.*, 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412, affirming 81 Kan. 101, 105 Pac. 221, S. C. 77 Kan. 14, 22, 93 Pac. 97.

A complaint alleging in general terms that a brakeman in the employ of an interstate carrier was injured while working on an interstate train, notwithstanding that a state law was pleaded, is sufficient to take the case to the jury under the Federal Employers' Liability Act, where the evidence showed that his injury was caused by the defendant's violation of the Safety Appliance Act. *Ahrens v. Chicago, M. & St. P. R. Co.*, 121 Minn. 335, 141 N. W. 297.

That a carrier was engaged in interstate commerce is sufficiently shown by an allegation that it was engaged in interstate and intrastate commerce and that it used on its railroad in such commerce a certain engine and car which it became the duty of an employee to couple together. *San Antonio & A. P. R. Co. v. Wagner*, — Tex. Civ. App. —, 166 S. W. 24, affirmed 241 U. S. 476, 60 L. ed. —, 36 Sup. Ct. Rep. 626.

A failure to comply with the Federal Safety Appliance Act is charged by an allegation that a carrier was negligent in having and permitting the couplers on an engine and car to be in such condition that they would not couple automatically by impact as required by law. *San Antonio & A. P. R. Co. v. Wagner*, — Tex. Civ. App. —, 166 S. W. 24, affirmed 241 U. S. 476, 60 L. ed. —, 36 Sup. Ct. Rep. 626.

That a coupler did not comply with the Federal Safety Appliance Act is shown by an allegation that the couplers attached to an engine and car would not operate automatically by impact as required by law,

and that for the purpose of making a coupling it became necessary for the plaintiff to stand on the footboard of a switching engine and shove the coupler thereof with his foot. *San Antonio & A. P. R. Co. v. Wagner*, — Tex. Civ. App. —, 166 S. W. 24, affirmed 241 U. S. 476, 60 L. ed. —, 36 Sup. Ct. Rep. 626.

### **Plea and Answer.**

#### **— Assumed Risk.**

Assumption of risk cannot be pleaded as a defense to an action for injuries received by an employee as the result of a carrier's violation of the Federal Safety Appliance Act. *Kansas City, M. & B. R. Co. v. Flipppo*, 138 Ala. 487, 35 So. 457.

A plea of assumed risk is properly stricken in an action based on the Federal Safety Appliance Act. *Mobile, J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395.

### **Amendments.**

A complaint in a common-law action for injuries sustained by an employee in consequence of the failure of a carrier to equip cars with the couplers in ordinary use, cannot be amended, after the running of the statute of limitations, by setting up a violation of the Federal Safety Appliance Act. *Allen v. Tuscarora V. R. Co.*, 229 Pa. 97, 78 Atl. 34, 30 L. R. A. (N. S.) 1096, 140 Am. St. Rep. 714.

### **F. Evidence.**

#### **1. Judicial Notice.**

##### **Safety Appliance Act.**

A state court will take judicial notice of the Federal Safety Appliance Act. *Kansas City, M. & B. R. Co. v. Flipppo*, 138 Ala. 487, 35 So. 457.

#### **2. Presumptions and Inferences.**

##### **Contributory Negligence.**

The mere fact that a switchman was injured while making a link and pin coupling of cars which were not equipped with automatic couplers as required by the Federal Safety Appliance Act, does not create a presumption that as a matter of law he was guilty of contributory negligence. *Denver & R. G. R. Co. v. Arrighi*, 73 C. C. A. 400, 141 Fed. 67, S. C. 63 C. C. A. 649, 129 Fed. 347.

##### **Defective Condition of Coupling Apparatus.**

The fact that an employee was injured while attempting to operate an automatic coupler, does not warrant an inference, in an action under the Federal Employers'

Liability Act, that the coupling apparatus was defective. *Steele v. Atlantic C. L. R. Co.*, — S. C. —, 87 S. E. 639.

#### **Employment of Car in Interstate Commerce.**

It will be presumed in an action for injuries sustained by a brakeman while adjusting a coupler which would not operate automatically by impact, that cars from which interstate shipments had been removed were still employed in interstate commerce within the meaning of the Federal Safety Appliance Act. *Wheeling Term. Co. v. Russell*, 126 C. C. A. 519, 209 Fed. 795.

#### **Noncompliance with Federal Law.**

The fact that a coupler did not work automatically by impact at the time a brakeman was injured, raises a presumption, in an action based on the Federal Employers' Liability Act, that the defendant had not complied with the Safety Appliance Act. *Parker v. Atlantic C. R. Co.*, 87 N. J. L. 148, 93 Atl. 574.

### **3. Burden of Proof.**

#### **Employment of Car in Interstate Commerce.**

The burden of showing that the tender of a locomotive, which was not equipped with an automatic coupler, by reason of which a brakeman was injured, was engaged in interstate commerce at the time of the accident, is on the plaintiff. *Phila. & R. R. Co. v. Winkler*, 4 Penn. (Del.) 387, 56 Atl. 112, affirming 4 Penn. (Del.) 80, 53 Atl. 90.

The plaintiff need not show, in an action for injuries received in consequence of a defective coupling apparatus, that the car to which it was attached was moving in interstate commerce, where an allegation of his petition that it was engaged in such commerce was not denied in the defendant's answer in the manner required by the law of the forum. *Norfolk & W. R. Co. v. Hazelrigg*, 95 C. C. A. 637, 170 Fed. 551, S. C. 107, C. C. S. 66, 184 Fed. 828.

#### **Violation of Federal Law.**

The burden is on the plaintiff, in an action for personal injuries, to show that they were caused by a carrier's violation of the Federal Safety Appliance Act. *Morris v. St. Louis S. W. R. Co.*, — Tex. Civ. App. —, 158 S. W. 1055.

The burden is on the plaintiff in an action for injuries to an employee, to prove an alleged violation of the Federal Safety Appliance Act. *Hench v. Penn. R. Co.*, 246 Pa. 1, 91 Atl. 1056, L. R. A. 1915 D. 557.

The burden of proof is on the plaintiff to show that the safety appliances which caused his injury were defective. *Weiss v. Belt R. of C.*, 186 Ill. App. 43.

#### **Exercise of Care to Remedy Defects.**

Where it is apparent that a car, with a defective coupling device, has been hauled upon the defendant's track, the burden is upon the defendant, in an action for injuries caused an employee by such defect, to prove that it used all reasonable endeavor possible to discover and correct the defect. *Norfolk & W. R. Co. v. Hazelrigg*, 107 C. C. A. 66, 184 Fed. 828, S. C. 95 C. C. A. 637, 170 Fed. 551.

If any degree of care on the part of a carrier will excuse the use of a car with safety appliances that do not comply with the requirements of the Federal Safety Appliance Act, the defendant, in an action for personal injuries, has the burden of showing it. *Grand Trunk W. R. Co. v. Poole*, 175 Ind. 567, 93 N. E. 26.

#### **Exemption from Federal Law.**

##### **— Four-Wheeled Cars.**

The burden rests on a carrier, in an action for the death of an employee in consequence of the failure to equip a car with automatic couplers, to bring itself within the provisions of section six of the Federal Safety Appliance Act, excepting four-wheeled cars from its operation. *Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, 51 L. Ed. 681, 27 Sup. Ct. Rep. 407, reversing 207 Pa. 198, 56 Atl. 417, S. C. 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561, affirming 222 Pa. 470, 71 Atl. 1056.

##### **—Extension of Time for Providing Safety Devices.**

In the extension of time granted March 13, 1911, by the Interstate Commerce Commission for equipping freight cars with safety appliances of the standard designated by the Commission, relates only to cars in actual use at the time the amendments to the Federal Safety Appliance Act of March 14, 1910, and March 4, 1911, took effect, and therefore no duty rested on a carrier to provide secure handholds and grabirons on the roofs of such freight cars, the carrier has the burden of showing, in an action for injuries caused an employee from an insecure handhold, that such car was within the exception. *Cook v. Union P. R. Co.*, — Ia. —, 158 N. W. 521.

### **4. Admissibility.**

#### **Use of Cars in Interstate Commerce.**

In an action for injuries sustained by a brakeman in the employ of a purely intrastate railway company, in consequence of the defective condition of a coupler, he cannot, in order to invoke the Federal

Safety Appliance Act, show that the defendant frequently received from and delivered to connecting lines passengers and freight which came from or was destined to points without the state. *Rio Grande S. R. Co. v. Campbell*, 44 Colo. 1, 96 Pac. 986.

#### **Defective Safety Apparatus.**

In an action under the Federal Employers' Liability Act for injuries received by an employee while coupling cars, where the description of the coupling apparatus showed no defect therein, but the plaintiff testified that he was experienced in coupling cars and thoroughly understood the construction and operation of couplers, and that the lift chain on the one in question was too long, such evidence is admissible to show a defect in the coupler. *Steele v. Atlantic C. L. R. Co.*, — S. C. —, 87 S. E. 639.

Where, in an action under the Federal Employers' Liability Act, the petition alleged that a switchman's injury was due to the failure of the couplers of an interstate car and a switch engine to meet, the plaintiff may show the reasons why they would not do so, including the fact that the coupler of the car was broken, even though a violation of the Safety Appliance Act was not charged by alleging any inherent defect in the apparatus itself. *Trowbridge v. Kansas City & W. B. R. Co.*, — Mo. App. —, 179 S. W. 777.

#### **Method of Uncoupling Cars with Defective Couplers.**

Since the Federal Safety Appliance Act imposes an absolute duty on a carrier to maintain the safety devices on its cars in good repair, evidence of a method of uncoupling cars without going between them on the failure of the automatic devices to work, is not admissible in an action for the death of a switchman who was killed while between cars uncoupling them by hand on the failure of the coupler to open from the side of a car. *Lucas v. Peoria & E. R. Co.*, 171 Ill. App. 1.

#### **Necessity for Going Between Cars to Adjust Couplers.**

Evidence that occasions arise when it is necessary for employees to go between cars to fix with their hands the knuckles of the coupling apparatus is not inadmissible in an action under the Federal Employers' Liability Act as tending to show a violation of a rule of the defendant forbidding employees to go between moving cars. *Moore v. St. Joseph & G. I. R. Co.*, — Mo. —, 186 S. W. 1035.

#### **Necessity for Pushing Coupler with Foot.**

A brakeman who was injured while attempting to push with his foot a drawhead of a moving car into line so as to meet

another coupler, may testify as to the necessity for doing so, since such testimony was a statement of fact rather than the expression of an opinion. *San Antonio & A. P. R. Co. v. Wagner*, — Tex. Civ. App. —, 166 S. W. 24, affirmed 241 U. S. 476, 60 L. ed. —, 36 Sup. Ct. Rep. 626.

#### **Prior and Subsequent Conditions.**

It may be shown, in an action for the death of an employee as the alleged result of a defective coupler, that two days after the accident such appliance was found in a defective condition. *Lucas v. Peoria & E. R. Co.*, 171 Ill. App. 1.

In an action for the death of a brakeman who was killed when he went between cars from the inside of a curve to couple them on the failure of the automatic apparatus to work, the plaintiff may show, in order to rebut the defendant's showing that when the cars came together there was not sufficient space to permit a man to go between their ends in safety, that immediately before and after the accident similar couplings were safely made at the same place. *Mobile, J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395.

#### **Photographs.**

A photograph of the tender of a locomotive of the class of that by which an employee was injured is admissible in an action for injuries sustained in consequence of the failure of a carrier to equip a tender with grabirons or handholds, in order to explain the testimony of a witness that at a certain time such appliances were attached to the end sill of the tender which caused the accident. *Moore v. St. Joseph & G. I. R. Co.*, — Mo. —, 186 S. W. 1035.

### **5. Weight and Sufficiency.**

#### **Violation of Federal Law.**

A finding that a coupler did not comply with the Federal Safety Appliance Act is justified by evidence that it did not work after three or four attempts to operate it, and that after an accident it did not work properly but was in such condition that it could be reported as in bad order. *Poppular v. Minneapolis, St. P. & S. S. M. R. Co.*, 121 Minn. 413, 141 N. W. 798, Ann. Cas. 1914 D. 383, affirmed 237 U. S. 369, 59 L. ed. 1000, 35 Sup. Ct. Rep. 609.

Proof of repeated and unsuccessful efforts to make the lift lever at the side of a car operate a coupler is some evidence that the apparatus was not in the condition required by the Federal Safety Appliance Act. *Nichols v. Chesapeake & O. R. Co.*, 115 C. C. A. 601, 195 Fed. 913.

Evidence that a brakeman made several attempts to operate a coupler in the manner contemplated by the Safety Appliance

Act, and that it failed to work, is, in an action based on the Federal Employers' Liability Act for injuries sustained by him while between the cars uncoupling them, sufficient to show the defendant's failure to comply with the former act. *Fletcher v. South Dakota C. R. Co.*, — S. D. —, 155 N. W. 3.

### **Negligence.**

Evidence that an employee was injured as the proximate result of a carrier's violation of the Federal Safety Appliance Act establishes, if not negligence per se, a prima facie case of negligence. *St. Louis, I. M. & S. R. Co. v. Neal*, 71 Ark. 445, 78 S. W. 220, S. C. 83 Ark. 591, 98 S. W. 958, reversed 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616; *St. Louis, I. M. & S. R. Co. v. York*, 92 Ark. 554, 123 S. W. 376, S. C. 86 Ark. 244, 110 S. W. 803.

A showing in an action for injuries sustained by a switchman, that they were caused by the use in violation of the Federal Safety Appliance Act of a car with defective couplers, constitutes a prima facie case of negligence on the part of a carrier. *Grand Trunk W. R. Co. v. Poole*, 175 Ind. 567, 93 N. E. 26.

When the plaintiff in an action for personal injuries shows them to be the result of a defective coupling device, he makes a prima facie showing of the defendant's negligence. *Norfolk & W. R. Co. v. Hazelrigg*, 107 C. C. A. 66, 184 Fed. 828, S. C. 95 C. C. A. 637, 170 Fed. 551.

Negligence on the part of a carrier is shown in an action for the death of a brakeman, by evidence that it was due to the condition of a coupler which could not be operated from the side of a car, and that the defect was discoverable by proper inspection which the defendant failed to make. *St. Louis, I. M. & S. R. Co. v. York*, 92 Ark. 554, 123 S. W. 376, S. C. 86 Ark. 244, 110 S. W. 803.

### **Cause of Injury.**

Where the plaintiff shows that he received an injury in consequence of the failure of a coupling device to operate from the side of a car the cause of his injury is not rendered conjectural because the proof shows that the failure of the coupler to operate was due to either a broken locking device or too long a lift chain. *Norfolk & W. R. Co. v. Hazelrigg*, 107 C. C. A. 66, 184 Fed. 828, S. C. 95 C. C. A. 637, 170 Fed. 551.

### **Attempt to Make Coupling.**

A finding that a brakeman was engaged in making a coupling is sustained by evidence that he was injured in consequence of a defective coupler, when, in order to adjust it so it would operate by impact, he went in front of a moving car when it was

from 300 to 400 feet from the car to which it was to be coupled. *Burho v. Minneapolis & St. L. R. Co.*, 121 Minn. 326, 141 N. W. 300.

### **To Take Case or Particular Questions to Jury.**

Where, after making repeated and unsuccessful efforts to uncouple slowly backing cars with the lift lever, a brakeman, according to general instructions, assumed a position between the cars on the sill of one of them and uncoupled them by hand, and, after doing so he was thrown to the ground and injured by a sudden jerk of the cars, the evidence was held sufficient to require the submission to the jury of an action based on the Safety Appliance Act, although there was testimony that the lift lever operated the coupler an hour after the accident. *Nichols v. Chesapeake & O. R. Co.*, 115 C. C. A. 601, 195 Fed. 913.

Evidence that an employee was injured as the proximate result of a carrier's violation of the Federal Safety Appliance Act establishes negligence sufficient to take a case to the jury. *St. Louis, I. M. & S. R. Co. v. Neal*, 71 Ark. 445, 78 S. W. 220, S. C. 83 Ark. 591, 98 S. W. 958, reversed 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616.

In an action for injuries received by a brakeman as the alleged result of defective coupling apparatus, the evidence of the defect, although not clear and convincing, was held sufficient to take the question to the jury. *Kansas City, M. & B. R. Co. v. Flippo*, 138 Ala. 487, 35 So. 457.

Evidence that after three attempts the lever would not operate a coupler, and that it also had refused to work a short time before at another station, was sufficient to take to the jury an action under the Federal Employers' Liability Act for injuries sustained by the plaintiff while between cars uncoupling them, notwithstanding that the evidence for the defendant showed that the coupler worked properly immediately after the accident. *Nashville, C. & St. L. R. Co. v. Henry*, 158 Ky. 88, 164 S. W. 310.

Evidence that an employee was killed while adjusting a coupler which had twice refused to couple automatically by impact is sufficient, in an action for his death, to take to the jury the question whether the coupler was defective. *Montgomery v. Carolina & N. W. R. Co.*, 163 N. C. 597, 80 S. E. 83, S. C. 169 N. C. 249, 85 S. E. 139.

### **To Sustain Verdict or Findings.**

A judgment for the plaintiff in an action for injuries sustained by a switchman in consequence of the absence of grabirons or handholds from the end and sides of the tender of a switch engine, held sus-

tained by the evidence in an action based on the Federal Safety Appliance Act. *Daly v. Illinois C. R. Co.*, 170 Ill. App. 185.

Evidence that a brakeman was injured while between cars trying to uncouple them after the lift lever failed to operate the coupler, was held sufficient to sustain a judgment for the plaintiff in an action under the Federal Employers' Liability Act. *Fletcher v. South Dakota C. R. Co.*, — S. D. —, 155 N. W. 3.

Evidence that after three attempts the lever failed to operate a coupler and that it also had refused to work a short time before at another station, was sufficient to sustain a finding in an action under the Federal Employers' Liability Act that the coupler was not in a workable condition, notwithstanding the evidence of the defendant showed that it worked properly immediately after the accident. *Nashville, C. & St. L. R. Co. v. Henry*, 158 Ky. 88, 164 S. W. 310.

A finding that the coupling apparatus of an engine and car, or on both of them, were in bad repair and did not comply with the Federal Safety Appliance Act, is justified where the coupling pin on the car failed to operate at the first impact as it should have done, but it required manipulation in preparation for a second impact, and the drawbar on the engine was so far out of alignment as to require adjustment for the second impact, and it appeared by opinion evidence that such equipment was defective. *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 60 L. ed. —, 36 Sup. Ct. Rep. 626, affirming — *Tex. Civ. App.* —, 166 S. W. 24.

A verdict for the plaintiff in an action for the death of a brakeman as the result of the giving away of a handhold or grab-iron on the roof of a car is sustained by evidence tending to show that the decedent was on the roof of the car just before the accident, and that he fell when he attempted either to descend from or to seat himself on the side of a car of a rapidly moving train. *Cook v. Union P. R. Co.*, — Ia. —, 158 N. W. 521.

In an action under the Federal Employers' Liability Act for injuries sustained by a switchman as the result of the absence of the lower rung from the side ladder of a freight car, the evidence was held sufficient to sustain a judgment for the plaintiff, where, although conflicting, it tended to show that his back and spinal column were severely and permanently injured by a fall from the ladder. *Cramer v. Chicago, M. & St. P. R. Co.*, — Minn. —, 158 N. W. 796.

#### G. Examination of Witnesses.

##### Cross-Examination of Plaintiff.

The plaintiff in an action for injuries sustained by a brakeman while opening by

hand a defective automatic coupler, may be cross-examined as to whether, when he found that the coupler would not open properly, he signalled for a slowly backing engine, which was about to make the coupling, to slow down or stop, since such evidence tended to show that the accident was due to his failure to give such signal. *Chicago & A. R. Co. v. Walters*, 217 Ill. 87, 75 N. E. 441, affirming 120 Ill. App. 152.

#### H. Issues and Variance.

##### In General.

An averment that a brakeman's injuries were due to the absence of an automatic coupler from a car is not supported by evidence of a defect in such device. *Kansas City, M. & B. R. Co. v. Flippo*, 138 Ala. 487, 35 So. 457.

Where a petition in an action for injuries to a switchman charged two acts of negligence, one being the use of a car with a defective coupler that was fully described, and which was the proximate cause of his injury, and at the trial both parties introduced evidence as to the condition of the coupling apparatus, the defendant was duly warned by such pleading that the condition of such apparatus was in issue. *Voelker v. Chicago, M. & St. P. R. Co.*, 116 Fed. 867, reversed on other grounds 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264.

#### I. Questions of Law and Fact.

##### In General.

Where a switchman was injured from a defective footboard on the tender of an engine, and on the trial of an action under the Federal Employers' Liability Act such appliance was indiscriminately called a "footboard" and a "running board" without evidence to show the difference, the question whether it was a running board was properly left to the jury, since if it was, the employee was within the protection of the Safety Appliance Act. *Bramlett v. Southern R. Co.*, 98 S. C. 319, 82 S. E. 501, writ of error dismissed 239 U. S. 651, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

Whether a coupling was attempted at an improper place is a question for the jury in an action for injuries to a switchman who attempted to push into line with his foot couplers that had several inches of lateral play, while coupling cars on a curve, where such couplings had been successfully made daily at the same place for a year prior to the accident. *Willett v. Illinois C. R. Co.*, 122 Minn. 513, 142 N. W. 883.

Evidence that on the failure of a coupler to open from the side of a car, a brakeman stepped between slowly moving cars to uncouple them, and that he was killed when, while walking backwards, his foot

caught in an unblocked frog, presents a question for the jury in an action for his death, since a violation by the defendant of the Federal Safety Appliance Act was shown. *York v. St. Louis, I. M. & S. R. Co.*, 86 Ark. 244, 110 S. W. 803, S. C. 92 Ark. 554, 123 S. W. 376.

An action for injuries sustained by an employee was properly submitted to the jury under the Federal Safety Appliance Act, where the petition, although based on a state law, alleged in general terms that the defendant was a common carrier in interstate commerce and that the plaintiff was employed by it as a brakeman on an interstate freight train, and set forth facts showing a violation by the defendant of the Federal act. *Ahrens v. Chicago, M. & St. P. R. Co.*, 121 Minn. 335, 141 N. W. 297.

#### **Whether Act Performed in Discharge of Duty.**

Where a switchman, in attempting to board a step at the end of the tender of a moving switch engine in order to uncouple a car when directed to do so, was injured by reason of the absence of handholds or grabirons from the end and sides of the tender, the question whether he was performing a duty in connection with and as an indispensable part of the act of uncoupling the car, is a question for the jury. *Daly v. Illinois C. R. Co.*, 170 Ill. App. 185.

#### **Assumed Risk.**

Where the jury found that an employee was injured by a defective coupler on an interstate car, the court, in an action founded on the Federal Employers' Liability Act, properly refused to submit to the jury the questions of assumed risk. *Sears v. Atlantic C. L. R. Co.*, 169 N. C. 446, 86 S. E. 176.

The question of assumed risk is for the jury in an action under the Federal Employers' Liability Act for injuries sustained by a brakeman when he went between cars to adjust a coupler for impact. *St. Louis & S. F. R. Co. v. Brown*, — Okla. —, 144 Pac. 1075, affirmed 241 U. S. 223, 60 L. ed. —, 36 Sup. Ct. Rep. 602.

#### **Cause of Accident.**

When the evidence as to whether a defective drawhead was the sole cause of a brakeman's injury is not wholly free from conflict, it is a question for the jury in an action founded on the Federal Safety Appliance Act. *Kansas City, M. & B. R. Co. v. Flippo*, 138 Ala. 487, 35 So. 457.

In an action under the Federal Employers' Liability Act, for injuries sustained by an employee while coupling cars, where the evidence is conflicting as to whether the accident was due to a defect in the

apparatus or the failure of a coemployee to properly operate the knuckle of the coupler, it is for the jury to say what caused the accident. *Steele v. Atlantic C. L. R. Co.*, — S. C. —, 87 S. E. 639.

Whether the proximate cause of a brakeman's death was a defective coupler is a question for the jury in an action founded on the Federal Employers' Liability Act, where he was killed while between moving cars attempting to uncouple them after the failure of the pin lift lever to operate from the side of the car. *Thornboro v. Kansas City, M. & O. R. Co.*, 91 Kan. 684, 139 Pac. 410, Ann. Cas. 1916 D. 314.

Where a brakeman, on the failure of a coupler, because of a defect, to operate from the side of a slowly moving car, stepped between cars to uncouple them by hand at a point from which he could not signal the engineer to stop, and was injured when his foot caught in a frog which he did not know was unblocked, the question whether the carrier's violation of the Federal Safety Appliance Act was the proximate cause of the accident was for the jury. *Donegan v. Baltimore & N. Y. R. Co.*, 91 C. C. A. 555, 165 Fed. 869.

Where a brakeman, while hurrying under orders from his superior to make a coupling, did not, after observing the defective condition of the coupling apparatus, have time to signal the engineer to stop the train, and the former was injured while attempting to push the coupler into position with his foot, it is for the jury to say, in an action under the Federal Employers' Liability Act, whether the conduct of the brakeman was the sole cause of his injury or whether the defective coupler contributed thereto. *Smith v. Atlantic C. L. R. Co.*, 127 C. C. A. 311, 210 Fed. 761.

In an action predicated on the Federal Safety Appliance Act for injuries sustained by a brakeman by the giving away of a grabiron on the side of the caboose which he attempted to board while in motion, it is for the jury to say whether the grabiron was insecure, and also whether an open drain-box on the road bed contributed to the accident, where the evidence in relation thereto is conflicting. *McNaney v. Chicago, R. I. & P. R. Co.*, — Minn. —, 157 N. W. 650.

#### **Contributory Negligence.**

##### **— In General.**

The question of the plaintiff's contributory negligence, when the evidence is conflicting, is for the jury in an action for personal injuries based on a violation of the Federal Safety Appliance Act. *Kansas City, M. & B. R. Co. v. Flippo*, 138 Ala. 487, 35 So. 457.

Where the jury, in an action under the Federal Employers' Liability Act, found that an employee's injury was due to a defective coupler on an interstate car, there was no error in refusing to submit the question of contributory negligence to the jury. *Sear v. Atlantic C. L. R. Co.*, 169 N. C. 446, 86 S. E. 176.

#### —Going Between Cars to Operate Couplers.

Whether a brakeman was guilty of contributory negligence is a question for the jury, in an action under the Federal Safety Appliance Act for personal injuries sustained, where, being unable, after repeated efforts, to uncouple slowly backing cars with the lift lever, in accordance with general instructions, he assumed a position on the sill of one of the cars and, clinging to a handhold with one hand, uncoupled the cars with the other, and after straightening up, was thrown to the ground by a sudden jerk of the train. *Nichols v. Chesapeake & O. R. Co.*, 115 C. C. A. 601, 195 Fed. 913.

Where, because of a defect in a coupler which prevented its operation from the side of a car, a brakeman stepped between the ends of slowly moving cars to uncouple them by hand and was injured when his foot caught in an unblocked frog, the question of contributory negligence is for the jury. *Donegan v. Baltimore & N. Y. R. Co.*, 91 C. C. A. 555, 165 Fed. 869.

Since the Federal Safety Appliance Act expressly provides that an employee shall not assume the risk of injury from a carrier's violation of such act, the question whether it was contributory negligence for a brakeman to go between moving cars to uncouple them on the failure of the automatic coupling device to work, is for the jury. *York v. St. Louis, I. M. & S. R. Co.*, 86 Ark. 244, 110 S. W. 803, S. C. 92 Ark. 554, 123 S. W. 376.

Whether it was contributory negligence for a switchman to go between moving cars in violation of a rule of a carrier as to the use of a coupling stick, to uncouple cars by hand on the failure of the automatic apparatus to operate from the side of a car, is a question for the jury. *Austin v. Cent. of Ga. R. Co.*, 3 Ga. App. 775, 61 S. E. 998.

Whether it was negligence for a brakeman, in disobedience to a rule of his employer, to go between slowly moving cars to uncouple them on the failure of the automatic apparatus to work, is a question for the jury in an action under the Federal Employers' Liability Act for his death. *Popplar v. Minneapolis, St. P. & S. R. Co.*, 121 Minn. 413, 141 N. W. 798, Ann. Cas. 1914 D. 383, affirmed 237 U. S. 369, 59 L. ed. 1000, 35 Sup. Ct. Rep. 609.

Whether a switchman was negligent in

violating a rule of his employer by going between cars to adjust a defective coupler, which did not comply with the requirements of the Federal Safety Appliance Act, is a question for the jury. *Southern P. Co. v. Allen*, 48 Tex. Civ. App. 66, 106 S. W. 441.

Whether it was contributory negligence for a brakeman of meager experience to step between moving cars to uncouple them by hand on the failure of an automatic coupler to open from the side of a car, is a question for the jury, where a rule of a carrier prohibiting men from going between moving cars was commonly disregarded. *Turritin v. Chicago, St. P. M. & O. R. Co.*, 95 Minn. 408, 104 N. W. 225.

Whether the conduct of a brakeman in going between slowly moving cars, in violation of a rule of his employer, in order to uncouple them on the failure of the lift lever to work, instead of passing to the opposite side of the cars and using the lever on that side, constituted negligence on his part is a question for the jury in an action under the Safety Appliance Act for his death, where such rule did not direct what should be done in such event. *Popplar v. Minneapolis, St. P. & S. M. R. Co.*, 121 Minn. 413, 141 N. W. 798, Ann. Cas. 1914 D. 383, affirmed 237 U. S. 369, 59 L. ed. 1000, 35 Sup. Ct. Rep. 609.

Whether it was contributory negligence for a brakeman, on his inability to open a coupler from the side of a car, not to stop the train or go to the opposite side and use the lever on the other car, instead of going between the moving cars to uncouple them, is a question for the jury, where there was a necessity for immediate and rapid action in making the cut. *St. Louis, I. M. & S. R. Co. v. York*, 92 Ark. 554, 123 S. W. 376, S. C. 86 Ark. 244, 110 S. W. 803.

Whether it was contributory negligence for a switchman, on the refusal of the lift lever on the tender of a switch engine to operate the coupler, to go between the engine and a car to uncouple them instead of passing to the opposite side and using the lever on the car, is a question for the jury. *Southern P. Co. v. Allen*, 48 Tex. Civ. App. 66, 106 S. W. 441.

Where a brakeman, on discovering at night that a coupler would not operate automatically by impact, was confronted with a situation he was not bound to anticipate, his conduct in going between a car and a moving engine to adjust the coupler does not make the question of his negligence one of law on the ground that he might have chosen a safer course by stopping the engine, where he had reasonable grounds to believe that he could make the coupling in safety. *Chicago & A. R. Co. v. Walters*, 217 Ill. 87, 75 N. E. 441, affirming 120 Ill. App. 152.



### — Going Between Cars to Repair Couplers.

Where a switchman was killed while placing a new knuckle in a coupler when other cars ran against him without apparent cause, the question of contributory negligence is for the jury. *Erie R. Co. v. Russell*, 106 C. C. A. 160, 183 Fed. 722, writ of error dismissed 220 U. S. 607, 57 L. ed. 607, 31 Sup. Ct. Rep. 722.

Whether it was contributory negligence for a switchman to go between cars to replace a broken coupler knuckle is a question for the jury in an action based on the Federal Safety Appliance Act for injuries sustained from an unexpected movement of a train, where the evidence tended to show that he was justified in assuming that the train would not be moved while he was so engaged. *Chicago J. R. Co. v. King*, 94 C. C. A. 652, 169 Fed. 372, affirmed 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79.

Whether it was contributory negligence for a car inspector to attempt to replace a broken knuckle in a coupler, a repair which could be made in a minute's time, while a car stood on a delivery track, is a question for the jury in an action founded on the Federal Employers' Liability Act, where he was killed when the car was struck by other cars which ran against it by gravity. *Illinois C. R. Co. v. Stewart*, 138 C. C. A. 444, 223 Fed. 30.

### Defective Condition of Safety Appliances.

Whether the coupler of a car was defective is a question of fact in an action founded on the Federal Employers' Liability Act. *Fletcher v. South Dakota C. R. Co.*, — S. D. —, 155 N. W. 3.

Whether the coupling apparatus of a car was defective was a question for the jury in an action for the death of a brakeman who, after giving a stop signal and repeatedly trying without success to operate the coupler from the side of slowly moving kicked cars, went between them to uncouple them by hand and was run over, where there was evidence that immediately after the accident the coupler could be operated only with difficulty, and that its condition was such that it should have been reported as in bad order. *Minneapolis, St. P. & S. S. M. R. Co. v. Popplar*, 237 U. S. 369, 59 L. ed. 1000, 35 Sup. Ct. Rep. 609, affirming 121 Minn. 413, 141 N. W. 798, Ann. Cas. 1914 D. 383.

Whether couplers were defective within the meaning of the Federal Safety Appliance Act is a question for the jury, where for a year prior to the failure of couplers with several inches of lateral play to couple by impact while cars were standing on a curve, couplings had been made daily with success at the same place, and a brakeman was injured while attempting to push one of such couplers into line with his

foot. *Willett v. Illinois C. R. Co.*, 122 Minn. 513, 142 N. W. 883.

Where a brakeman was crushed between two freight cars, one of which was equipped with an automatic and the other with a link and pin coupler, and there was a difference of several inches in the height of the two couplers, it was a question for the jury whether the defendant failed to comply with the Federal Safety Appliance Act as to the standard height of drawbars. *St. Louis, I. M. & S. R. Co. v. Neal*, 71 Ark. 445, 78 S. W. 220, S. C. 83 Ark. 591, 98 S. W. 958, 210 U. S. 281, 52 L. ed. 1061, 23 Sup. Ct. Rep. 616.

Where the evidence was conflicting as to whether a grabiron on a car was insecurely fastened with a nail in the absence of a nut, the question of the defendant's negligence was for the jury in an action prosecuted under the Federal Employers' Liability Act for injuries received by a brakeman from the giving way of the grabiron. *Carpenter v. Kansas City S. R. Co.*, 189 Mo. App. 164, 175 S. W. 234.

### Due Care.

Whether a brakeman should have selected some other method of adjusting a defective coupler which would not operate automatically by impact, than that of placing his arm between the cars, is a question for the jury in an action based on the Federal Employers' Liability Act. *Parker v. Atlantic C. R. Co.*, 87 N. J. L. 148, 93 Atl. 574.

Where it had been the custom for years for brakemen to go between moving cars to couple and uncouple them, the question whether in doing so on the failure of a coupler to operate from the side of a car in an emergency requiring immediate and rapid action in making the cut, an employee acts as and uses such care as a person of ordinary prudence would exercise under the circumstances, is a question for the jury. *St. Louis, I. M. & S. R. Co. v. York*, 92 Ark. 554, 123 S. W. 376, S. C. 86 Ark. 244, 110 S. W. 803.

Whether an experienced switchman who was injured while making a link and pin coupling of cars which did not comply with the Federal Safety Appliance Act, exercised ordinary care in doing so, is a question for the jury. *Denver & R. G. R. Co. v. Arrighi*, 72 C. C. A. 400, 141 Fed. 67, S. C. 63 C. C. A. 649, 129 Fed. 347.

### Use of Car in Interstate Commerce.

Where the evidence was conflicting as to whether a car with a defective coupler which caused an injury to a brakeman, was engaged in interstate commerce, the question is for the jury. *Kansas City, M. & B. R. Co. v. Flippo*, 138 Ala. 487, 35 So. 457.

Whether a switchman was engaged in interstate commerce within the meaning of the Federal Safety Appliance Act is a question for the jury, where he was killed while switching cars in a railway yard and putting them into strings for immediate transportation on boats across a river to another state. *Hurley v. Illinois C. R. Co.*, — Minn. —, 157 N. W. 1005.

### J. Instructions.

#### In General.

The defendant was not prejudiced, in an action based on the Federal Employers' Liability Act, by the refusal of an instruction to the effect that a switchman could not recover for injuries caused by the movement of a train while he was between two cars adjusting a defective coupler which would not operate by impact, if he gave the engineer a "come ahead" signal, where there was a controversy as to who gave such signal. *Grand Trunk W. R. Co. v. Lindsay*, 120 C. C. A. 166, 201 Fed. 836, affirmed 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914 C. 168.

It was not reversible error to refuse a requested instruction in an action based on the Federal Employers' Liability Act for injuries sustained by a switchman, that his going between cars to examine a coupler which refused to operate by impact, and then giving a signal to the engineer to come ahead, would, as a matter of law, prevent a recovery, since the doctrine of comparative negligence established by such act was ignored. *Grand Trunk W. R. Co. v. Lindsay*, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914 C. 168, affirming 120 C. C. A. 166, 201 Fed. 836.

Where a switchman was injured as the result of a defective footboard on an engine, and on a trial of an action under the Federal Employers' Liability Act it was indiscriminately referred to as a "footboard" and a "running board," without the distinction being shown, the fact that the court, in instructing the jury, made remarks concerning the general law of assumed risks, was not prejudicial error, where they were charged, in unmistakable terms, that the Federal act alone controlled; since assumption of risk was no defense if such defect constituted a violation of the Safety Appliance Act. *Bramlett v. Southern R. Co.*, 98 S. C. 319, 82 S. E. 501, writ of error dismissed 239 U. S. 651, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

In an action for injuries sustained by an employee in consequence of the negligent movement of a locomotive, the tender of which was not equipped with handholds or grabirons, as he was between the end of the tender and a car adjusting a defective coupler, the omission from an instruction of the element of the alleged negligent

movement of the engine was not harmful to the defendant in an action based on the Federal Safety Appliance Act. *Moore v. St. Joseph & G. I. R. Co.*, — Mo. —, 186 S. W. 1035.

An instruction, in an action based on the Federal Safety Appliance Act for injuries sustained by an employee as the result of the absence of a grabiron or handhold from the end of the tender of an engine, to the effect that the defendant would not be liable if the pin-lifting rod were so constructed that it could be grasped by employees so as to furnish them reasonable security, and that any iron rod or iron device securely fastened to the tender and of which an employee could conveniently catch hold was a grabiron or handhold within the meaning of the law, was not harmful to the defendant. *Moore v. St. Joseph & G. I. R. Co.*, — Mo. —, 186 S. W. 1035.

#### Duty to Instruct as to Interstate Commerce.

In an action for injuries received by a brakeman from the failure of a carrier to equip a car with grabirons or handholds as required by the Federal Safety Appliance Act, the court is not bound to instruct on its own motion as to what amounts to interstate commerce. *Malott v. Hood*, 201 Ill. 202, 66 N. E. 247, affirming 99 Ill. 360.

#### Applicability of Safety Appliance Act.

The jury may be instructed as to the Federal Safety Appliance Act, although it was not alleged in the plaintiff's petition, in an action for the death of a switchman in consequence of a defective coupler, when it appears from the evidence that such car was used in interstate commerce. *Voelker v. Chicago, M. & St. P. R. Co.*, 116 Fed. 867, reversed on other grounds 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264.

The fact that counsel in his argument to the jury, in an action for the death of a switchman, did not refer to the Federal Safety Appliance Act does not prevent the court instructing the jury with respect to such act when, if properly construed, it had a bearing on the case. *Voelker v. Chicago, M. & St. P. R. Co.*, 116 Fed. 867, reversed on other grounds 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264.

#### Inspection of Cars by Carrier.

Since the Federal Safety Appliance Act imposes on a carrier an imperative duty not to use cars, without regard to ownership, unless equipped with automatic couplers in normal working condition, a requested instruction as to the duty of a carrier to inspect foreign cars was properly refused in an action for injuries received by a switchman in consequence of a defective coupler. *Grand Trunk W. R. Co. v. Pools*, 175 Ind. 567, 93 N. E. 26.

The word "inspect" should have been omitted from an instruction, in an action under the Federal Employers' Liability Act for injuries caused a brakeman by the giving away of a handhold on a car, to the effect that it was the duty of the employer to use ordinary care to furnish, inspect, and to keep and maintain the handhold reasonably safe. *Cincinnati, N. O. & T. P. R. Co. v. Nolan*, 161 Ky. 205, 170 S. W. 650, S. C. 167 Ky. 11, 179 S. W. 1046, 10 N. C. C. A. 812.

An instruction to the effect that if a brakeman was unable to uncouple cars by using the lifting lever at the side of a car, evidence of the inspection of the car by the defendant could not be considered by the jury, and that the only purpose of evidence tending to show inspection before and after the accident was to determine whether the coupling was defective, was not prejudicial to the defendant in an action based on the Federal Employers' Liability Act, where the jury was told that before the plaintiff could recover it must appear that there was some defect or insufficiency in the cars or appliances of the defendant. *Fletcher v. South Dakota C. R. Co.*, — S. D. —, 155 N. W. 3.

#### Carrier's Knowledge of Defects.

The jury was erroneously instructed in an action for injuries received by an employee, that if the lift chain of a coupler was too long when the apparatus was purchased by the defendant, or if it was placed on the coupler by the defendant, the latter, as a matter of law, had full knowledge of the defect, since the instruction withdrew from the jury the question of negligence. *Southern P. Co. v. Allen*, 48 Tex. Civ. App. 66, 106 S. W. 441.

An instruction that if the defendant knew of a defect in a coupler which caused an injury to the plaintiff, or could have known of it in time to notify him or to make repairs and failed to do so, that it was negligence, does not erroneously make the defendant an insurer of the safety of such apparatus, where other portions of the instruction, in an action based on the Federal Employers' Liability Act, limited the defendant's duty to the exercise of ordinary care. *Vandalia R. Co. v. Holland*, 183 Ind. 438, 108 N. E. 580.

#### Employee's Knowledge of Defects.

Where a brakeman was injured by the giving away of a handhold on a car by reason of the rotten condition of the car sill which was a latent defect of which he was unaware, all reference to his knowledge may be omitted from an instruction in an action based on the Federal Employers' Liability Act. *Cincinnati, N. O. & T. P. R. Co. v. Nolan*, 161 Ky. 205, 170 S. W. 650,

S. C. 167 Ky. 11, 179 S. W. 1046, 10 N. C. C. A. 812.

#### Negligence.

An instruction to the effect that it was negligence for an interstate carrier not to equip a car with a coupler that would operate automatically by impact so as to obviate the necessity for employees going between the ends of cars, that such negligence continued up to the moment of an employee's injury, and that the carrier was answerable if his injury was the proximate result of such failure, was correctly given in an action based on the Federal Safety Appliance Act. *Carson v. Southern R. Co.*, 68 S. C. 55, 46 S. E. 525, affirmed 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609.

#### Defective Coupling Apparatus.

In an action for injuries received by a brakeman in consequence of a defective coupler, an instruction that he could not recover unless the jury was satisfied by a preponderance of the evidence that at the time of his injury the cars he was coupling either had never been equipped with couplers which operated automatically by impact or that their couplers had become so broken, out of repair, defective or insufficient that they would not couple in such manner, and that his injuries were directly caused either by the failure so to equip such cars, or because the couplers had become so broken, out of repair or insufficient that they would not couple automatically by impact, was as favorable as the defendant could demand. *Wheeling Term. Co. v. Russell*, 126 C. C. A. 519, 209 Fed. 795.

An instruction requested by the defendant, in an action for injuries to a brakeman while between cars adjusting a defective coupler that did not operate automatically by impact, to find for the defendant if the jury believed that the plaintiff, while weighting empty freight cars, closed the knuckle of a coupler in order to aid such work, that it was still closed at the time of his injury so as to prevent the apparatus from working automatically by impact, and that it was the direct cause of his injury, was properly refused, where the evidence for the defendant, in an action based on the Federal Safety Appliance Act, showed that if the couplers were in order, they could be opened without the necessity of a man going between the ends of the cars. *Wheeling Term. Co. v. Russell*, 126 C. C. A. 519, 209 Fed. 795.

The defendant is entitled to an instruction in an action under the Federal Employers' Liability Act for injuries sustained by an employee while coupling cars, that the mere fact that a coupler failed to open did not warrant an inference that it was defective. *Steele v. Atlantic C. L. R. Co.*, — S. C. —, 87 S. E. 639.

An instruction, in an action under the Federal Employers' Liability Act for injuries sustained by a brakeman when, on the failure of the automatic apparatus to work, he went between cars to uncouple them, was correctly given to the effect that it was the duty of the defendant to have its cars equipped with automatic couplers and pin lifters or levers so that they could be coupled and uncoupled without the plaintiff going between them, and to have and maintain such appliances in a proper and workable condition, and that the plaintiff could recover if they were not in such condition, and it was therefore necessary for him to go between the cars to uncouple them after a train was stopped on his signal, and he was injured while doing so by the negligence of the engineer in starting the train. *Nashville, C. & St. L. R. Co. v. Henry*, 158 Ky. 88, 164 S. W. 310.

#### **Moving Car for Repairs.**

The jury was correctly instructed in an action for injuries sustained by a switchman from the movement of a train while he was between cars replacing a broken coupler knuckle, that if his conductor discovered that the condition of the coupler was such that in order to couple the cars it was necessary for a man to go between the ends of them to replace the knuckle, it was his duty not to move the cars with the coupler in such condition unless there was a necessity for doing so, and if in the prosecution of the carrier's business it was reasonably practicable to have repaired the defect where the car stood, it was his duty to do so, and the fact that repairs could be more conveniently made at some other place would not justify the removal of the car to such point. *Chicago J. R. Co. v. King*, 94 C. C. A. 652, 169 Fed. 372, affirmed 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79.

#### **Assumed Risk.**

An instruction to the effect that by going between moving cars to uncouple them on the failure of the coupler to open from the side of a car, a brakeman did not assume the risk of injury from a carrier's violation of the Federal Safety Appliance Act if he used the caution of a reasonably prudent person, did not take from the jury the question of his negligence in doing so. *St. Louis, I. M. & S. R. Co. v. York*, 92 Ark. 554, 123 S. W. 376, S. C. 86 Ark. 244, 110 S. W. 803.

An instruction that a fieldman while adjusting a defective coupler assumed the risk of injury from other cars being kicked against the defective car, was properly refused in an action for his death, although it appeared that it was a general and uniform custom in a railway yard to kick cars to a fieldman without notice or warn-

ing and that he should look out for his own safety. *Voelker v. Chicago, M. & St. P. R. Co.*, 116 Fed. 867, reversed 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264.

The court need not instruct as to assumed risk in an action based on the Federal Employers' Liability Act, where a violation by the employer of the Safety Appliance Act is shown. *Atlantic C. L. R. Co. v. Whitney*, 65 Fla. 72, 61 So. 179, 3 N. C. C. A. 812, S. C. 62 Fla. 124, 56 So. 937.

#### **Contributory Negligence.**

##### **— In General.**

A trial court cannot instruct in an action for injuries sustained by an employee as the result of a defective coupler, that as a matter of law he was guilty of contributory negligence, where the evidence is such as to create a fair difference of opinion. *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617, reversing 86 C. C. A. 95, 158 Fed. 931, 14 Ann. Cas. 233.

In an action for injuries sustained by a brakeman in consequence of a coupler not complying with the Federal Safety Appliance Act, the jury was correctly instructed that he was rightfully on a track in front of a moving car if it was necessary for him to be there in order to prepare the defective coupler to operate by impact, that he was engaged in the line of his duty at the time and that the defective coupler was the proximate cause of his injury. *Burho v. Minneapolis & St. L. R. Co.*, 121 Minn. 326, 141 N. W. 300.

An instruction that if the plaintiff's injury was the result of his own act and was not due in any manner to any defect or insufficiency in cars or appliances resulting from the defendant's negligence, the plaintiff could not recover under the Federal Employers' Liability Act, and that before he could recover it must appear that there was some defect or insufficiency in the defendant's cars or appliances due to its negligence, was properly refused in an action for injuries caused a brakeman by a coupler which did not comply with the Safety Appliance Act. *Fletcher v. South Dakota C. R. Co.*, — S. D. —, 155 N. W. 3.

##### **— Going Between Moving Cars.**

An instruction as to contributory negligence was properly refused, in an action founded on the Federal Employers' Liability Act, where the jury found that a switchman exercised due care in going between cars to adjust a defective coupler. *Grand Trunk W. R. Co. v. Lindsay*, 120 C. C. A. 166, 201 Fed. 836, affirmed 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914 C. 168.

In an action for injuries sustained by a

brakeman as the result of a defective coupler, an instruction that if he was the only person who was aware of the defect he should not have attempted to use the apparatus, but should have reported the defect to his superior, was properly refused in an action under the Federal Employers' Liability Act, since the fact that he went between cars to uncouple them would amount to contributory negligence only. *Fletcher v. South Dakota C. R. Co.*, — S. D. —, 155 N. W. 3.

In an action for injuries sustained by a brakeman who on his inability to uncouple slowly moving cars from the side, went between them and was hurt, the jury should have been instructed to the effect that he could not recover if by his own negligence he contributed to his injury which, but for his conduct, would not have occurred. *Norfolk & W. R. Co. v. Hazelrigg*, 95 C. C. A. 637, 170 Fed. 551, S. C. 107 C. C. A. 66, 184 Fed. 828.

In an action for injuries sustained by a brakeman who, on the failure of the lift lever to operate a coupler on slowly moving cars, went between them and was injured, the jury should not have been instructed to the effect that, under the Federal Safety Appliance Act, contributory negligence was not a defense, since under such act he could not be charged with assumption of risk, that his action could not be defeated by calling his conduct contributory negligence, and that if it could be defeated by such a claim it must be on the ground that he failed to exercise ordinary care while between the moving cars. *Norfolk & W. R. Co. v. Hazelrigg*, 95 C. C. A. 637, 170 Fed. 551, S. C. 107 C. C. A. 66, 184 Fed. 828.

Where an inexperienced brakeman, on the failure of a lift lever to open a coupler, went between slowly moving cars to uncouple them by hand and was injured, a requested instruction to the effect that he could not recover if there was a safe and an unsafe way of performing such duty and he voluntarily and without necessity chose the unsafe way, was properly refused, since it did not include the essential element of his knowledge, experience and appreciation of the danger. *Norfolk & W. R. Co. v. Hazelrigg*, 107 C. C. A. 66, 184 Fed. 828, S. C. 95 C. C. A. 637, 170 Fed. 551.

In an action for the death of a brakeman who was killed while between moving cars uncoupling them on the failure of a coupler to open from the side of a car, an instruction was properly refused to the effect that if the jury believed that the decedent knew and appreciated the danger of going between the cars and did so while they were in motion, he could not recover, since such instruction made it negligence per se for him to go between the cars for that purpose. *St. Louis, I. M.*

*& S. R. Co. v. York*, 92 Ark. 554, 123 S. W. 376, S. C. 86 Ark. 244, 110 S. W. 803.

In an action for injuries sustained by a switchman while between cars adjusting a defective coupler which did not conform to the requirements of the Federal Safety Appliance Act, the jury was properly instructed that if the plaintiff's violation of a rule of his employer in going between the cars was negligence on his part causing or contributing to his injury, he could not recover. *Southern P. Co. v. Allen*, 48 Tex. Civ. App. 66, 106 S. W. 441.

#### **Diminution of Damages.**

The jury should not be instructed to diminish the plaintiff's damages for his contributory negligence in an action under the Federal Employers' Liability Act, where he was injured by the defendant's violation of the Safety Appliance Act. *Fletcher v. South Dakota C. R. Co.*, — S. D. —, 155 N. W. 3.

#### **K. Arguments.**

##### **Damages.**

It was error for the plaintiff's counsel, in an action for injuries received by an employee in consequence of a defective coupler, to argue to the jury that they should give the plaintiff every cent that they possibly could, that they could not make a mistake in giving him too much, as the court had the power to reduce the amount if too large, but that if the award was too small there was no power to add to it even a single postage stamp. *San Antonio & A. P. R. Co. v. Wagner*, — Tex. Civ. App. —, 166 S. W. 24, affirmed on other grounds 241 U. S. 476, 60 L. ed. —, 36 Sup. Ct. Rep. 626.

#### **E. Verdict.**

##### **1. Directing.**

#### **When Violation of Safety Appliance Act Shown.**

Before a peremptory instruction can be given for the defendant, in an action founded on the Federal Employers' Liability Act for injuries caused by a defective coupler on an interstate car, the evidence, taken in the light most favorable to the plaintiff, must exclude the conclusion that the violation by the defendant of the Safety Appliance Act contributed to the accident. *Smith v. Atlantic C. L. R. Co.*, 127 C. C. A. 311, 210 Fed. 761.

A verdict cannot be directed for the defendant in an action for an injury to the hand of an experienced switchman as the alleged result of violation by a carrier of the Federal Safety Appliance Act, where it appeared that in guiding with his hand

the link of a link and pin coupler into another drawhead he adopted the only practicable method of making the coupling and that he withdrew his hand as quickly as possible, although not soon enough to avoid injury. *Denver & R. G. R. Co. v. Arrighi*, 72 C. C. A. 400, 141 Fed. 67, S. C. 63 C. C. A. 649, 129 Fed. 347.

A verdict should be directed for the defendant in an action for injuries sustained by an experienced switchman as the alleged result of the failure of a carrier to comply with the Federal Safety Appliance Act, where he guided a link coupling into a drawhead with his hand and did not withdraw it in time to avoid injury. *Denver & R. G. R. Co. v. Arrighi*, 63 C. C. A. 649, 129 Fed. 347, but see S. C. 72 C. C. A. 400, 141 Fed. 67.

A motion to direct a verdict for the defendant was properly denied in an action under the Safety Appliance Act for injuries sustained by a brakeman who went between slowly moving cars to uncouple them on the failure of the lever at the side of a car to open the coupler because of a defect therein. *Norfolk & W. R. Co. v. Hazelrigg*, 95 C. C. A. 637, 170 Fed. 551, S. C. 107 C. C. A. 66, 184 Fed. 828.

An action for injuries sustained by a brakeman cannot be taken from the jury where it appeared that because of a broken lift lever chain a coupler could not be opened from the side of a car, and he stepped between cars moving about two miles an hour to uncouple them, at a point from which he was unable to signal the engineer to stop, and was injured by his foot catching in a frog which he did not know was unblocked. *Donegan v. Baltimore & N. Y. R. Co.*, 91 C. C. A. 555, 165 Fed. 869.

A verdict could not be directed for the defendant in an action based on the Safety Appliance Act for injuries received by a brakeman, where it appeared that after he had unsuccessfully made repeated efforts to uncouple slowly backing cars with the lift lever, he assumed, according to general instructions, a position between the cars on the sill of one of them and uncoupled them by hand and after straightening up that he was thrown and injured by a sudden jerk of the train. *Nichols v. Chesapeake & O. R. Co.*, 115 C. C. A. 601, 395 Fed. 913.

A motion to direct a verdict for the defendant on the ground of assumed risk, in an action under the Federal Employers' Liability Act for injuries sustained by a brakeman when he went between cars to adjust a coupler, was held properly denied. *St. Louis & S. F. R. Co. v. Brown*, — Okla. —, 144 Pac. 1075, affirmed 241 U. S. 223, 60 L. ed. —, 36 Sup. Ct. Rep. 602.

A verdict cannot be directed for the defendant in an action for injuries received

by an employee from the giving way of a handhold on the roof of a box car, which formed the last rung of a ladder, since a violation of the Federal Safety Appliance Act was shown. *Missouri, K. & T. R. Co. v. Barrington*, — Tex. Civ. App. —, 173 S. W. 595.

In an action under the Federal Employers' Liability Act for injuries sustained by a switchman as the alleged result of a defective "footboard" of an engine, the defendant is not entitled to a peremptory instruction on the ground that a footboard was not within the Federal Safety Appliance Act, where its attorney during the trial referred indiscriminately to such appliance as a "footboard" or "running board." *Bramlett v. Southern R. Co.*, 98 S. C. 319, 82 S. E. 501, writ of error dismissed 239 U. S. 651, 60 L. ed. —, 36 Sup. Ct. Rep. 159.

A verdict should be directed for the defendant in an action for the death of a switchman who, while riding on the footboard of a switch engine, was killed when it was derailed, where the negligence relied on was the violation of the Federal Safety Appliance Act, and the decedent would have been in such position irrespective of the fact that the coupling apparatus of the engine was defective. *Devine v. Chicago & C. R. R. Co.*, 259 Ill. 449, 102 N. E. 803, reversing 174 Ill. App. 324.

## 2. Special Questions and Verdicts.

### Special Questions.

In an action on the Federal Employers' Liability Act for injuries received by a switchman by reason of a defective coupler, in addition to their general verdict the jury may be interrogated as to whether the defendant violated the Safety Appliance Act, and if it did, whether that was the proximate cause of the injury, as well as whether the plaintiff used ordinary care for his own protection. *Grand Trunk W. R. Co. v. Lindsay*, 120 C. C. A. 166, 201 Fed. 836, affirmed 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914 C. 168.

### Special Verdict.

#### — What Judgment to Be Entered.

A Federal court in an action founded on the Federal Safety Appliance Act, will not look to the evidence nor beyond the pleadings and the judges' record to determine what judgment should have been entered on a special verdict. *Spokane & I. E. R. Co. v. Campbell*, 133 C. C. A. 370, 217 Fed. 518, affirmed 241 U. S. 497, 60 L. ed. —, 36 Sup. Ct. Rep. 683.

#### — Sufficiency to Sustain General Verdict.

A special finding that the negligence of a motorman of an interstate electric car,

together with the negligence of his employer in violating the Federal Safety Appliance Act with respect to efficient air brakes, contributed to the former's injury, is sufficient to sustain a general verdict in his favor in an action based on the Federal Employers' Liability Act. *Spokane & I. E. R. Co. v. Campbell*, 133 C. C. A. 370, 217 Fed. 518, affirmed 241 U. S. 497, 60 L. ed. —, 36 Sup. Ct. Rep. 683.

In an action under the Federal Employers' Liability Act for injuries sustained by a motorman in a collision between electric cars, where a general verdict was rendered for the plaintiff, a special finding that immediately before the collision the air brakes on the plaintiff's train were insufficient to permit him to control the speed thereof, means not only that the braking equipment was defective, but also that it was the proximate cause of the collision, especially when the jury was instructed that before they could find for the plaintiff on the theory of defective brakes, they must be satisfied that their defective condition was the direct proximate cause of the accident. *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. ed. —, 36 Sup. Ct. Rep. 683, affirming 133 C. C. A. 370, 217 Fed. 518.

#### — Judgment Non Obstante Verdicto.

Where, in answer to a special interrogatory in an action for injuries received by a switchman when his foot caught in an unblocked frog while he was between moving cars attempting to adjust a defective coupler, the jury found that when injured the plaintiff was performing his work in the usual and customary manner, and that the method of adjusting the coupler suggested by the defendant as a safe way was always dangerous, such answer does not entitle the defendant to a judgment notwithstanding a verdict for the plaintiff, on the ground that the latter's contributory negligence was shown. *Grand Trunk W. R. Co. v. Poole*, 175 Ind. 567, 93 N. E. 26.

### 3. Amount.

#### Excessiveness.

A verdict for \$9,000, in an action based on the Federal Safety Appliance Act, is not excessive for the death of a switchman 26 years of age, of good and industrious habits, who earned about \$75 monthly. *Voelker v. Chicago, M. & St. P. R. Co.*, 116 Fed. 867, reversed on other grounds 65 C. C. A. 526, 129 Fed. 522, 70 L. R. A. 264.

A verdict for \$24,750 for injuries sustained by a brakeman 25 years of age, as the result of a coupler not complying with the Federal Safety Appliance Act, was not excessive, where he suffered great pain and was crippled for life. *Burho v. Minneapolis & St. L. R. Co.*, 121 Minn., 326, 141 N. W. 300.

### M. New Trial.

#### In General.

A new trial on the ground that the defendant was taken by surprise by the conduct of the court in calling the attention of the jury to the Federal Safety Appliance Act in an action for the death of a switchman, who was killed in consequence of a defective coupler, was properly denied where, although such act was not set up in the pleadings, evidence was given by both parties as to the condition of the coupler, and the defendant, when given an opportunity at the close of the court's charge to suggest further instructions, did not do so. *Voelker v. Chicago, M. & St. P. R. Co.*, 116 Fed. 867, reversed on other grounds 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264.

### N. Appeal and Error.

#### 1. To Federal Supreme Court.

##### (a) In General.

(No decisions.)

##### (b) From State Courts.

#### When Federal Question Involved.

The contention in a state court that the Federal Safety Appliance Act unconstitutionally delegated legislative power to the Interstate Commerce Commission and the American Railway Association to determine the standard height of drawbars of freight cars, raises a Federal question. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, reversing 83 Ark. 591, 98 S. W. 958, S. C. 71 Ark. 495, 78 S. W. 220.

The denial by a state court of a carrier's objection to an erroneous construction of the Federal Safety Appliance Act, which on the evidence warranted a judgment against it, as well as of its contention for a correct construction which would relieve it from liability for the death of an employee, raises a Federal question which is reviewable on writ of error by the United States Supreme Court. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, reversing 83 Ark. 591, 98 S. W. 958, S. C. 71 Ark. 495, 78 S. W. 220.

The denial by a state court of the contention of a carrier that it could rely on the common-law defense of assumption of risk in an action based on the Safety Appliance Act for injuries received by an employee, is reviewable by the United States Supreme Court on writ of error. *Southern R. Co. v. Crockett*, 234 U. S. 725, 58 L. ed. 1564, 34 Sup. Ct. Rep. 897.

A holding of a state court that an employee assumed the risk of injury from

coupling a shovel car not equipped with automatic coupler to another car so equipped, is reviewable on a writ of error by the United States Supreme Court, where the Federal Safety Appliance Act was relied on to relieve the decedent from assumption of risk. *Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407, reversing 207 Pa. 198, 56 Atl. 417, S. C. 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561, affirming 222 Pa. 470, 71 Atl. 1053.

Where an experienced brakeman was killed while coupling a shovel car, which was not equipped with automatic couplers, to another car, without observing obvious precautions for his own safety after due warning of the danger, a holding by a state court that, as a matter of law, he was guilty of contributory negligence, did not deny the plaintiff any rights secured by the Federal Safety Appliance Act. *Schlemmer v. Buffalo, R. & P. R. Co.*, 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561, affirming 222 Pa. 470, 71 Atl. 1053, S. C. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407, reversing 207 Pa. 198, 56 Atl. 417.

The question whether the conduct of a brakeman in going between slowing moving cars in violation of a rule of his employer, in order to uncouple them by hand on the failure of the lift lever to operate the automatic coupler, was such as to bar an action for his death is not a Federal question which may be reviewed by the Supreme Court of the United States on writ of error to a state court. *Minneapolis, St. P. & S. S. M. R. Co. v. Popplar*, 237 U. S. 369, 59 L. ed. 1000, 35 Sup. Ct. Rep. 609, affirming 121 Minn. 413, 141 N. W. 798, Ann. Cas. 1914 D. 383.

The holding by a state court that the Federal Safety Appliance Act required a carrier to keep the automatic coupler on cars used in interstate commerce in proper repair for use was held not to deny any claim or right specifically set up by the defendant under any act of Congress which was reviewable by the Federal Supreme Court on writ of error. *Southern R. Co. v. Carson*, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609, affirming 68 S. C. 55, 46 S. E. 525.

An instruction in an action for injuries received by a brakeman, that the Federal Safety Appliance Act exacted a usual, that is, an ordinary, degree of care with respect to the appliances to which it relates, was not so erroneous as to permit of review by the Supreme Court of the United States on a writ of error to a state court. *Erie R. Co. v. Solomon*, 237 U. S. 427, 59 L. ed. 1033, 35 Sup. Ct. Rep. 648.

Where the petition in an action for injuries sustained by a railroad employee, does not disclose a cause of action under the original Federal Safety Appliance Act,

but at most shows only a right to recover at common law, the ruling of a state court as to the sufficiency of the evidence to sustain a recovery does not present a Federal question which is reviewable by the United States Supreme Court on writ of error. *Brinkmeier v. Missouri P. Ry. Co.*, 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412, affirming 81 Kan. 101, 105 Pac. 221, S. C. 77 Kan. 14, 22, 92 Pac. 97.

The denial, after there had been two trials and the statute of limitations had run, of leave to amend a petition in an action in a state court based on the original Safety Appliance Act for injuries received by an employee from a defective coupler, so as to allege that the cars in question were used in moving interstate commerce, involved only a question of pleading and practice under the state laws, which was not reviewable on writ of error by the Federal Supreme Court. *Brinkmeier v. Missouri P. R. Co.*, 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412, affirming 81 Kan. 101, 105 Pac. 221, S. C. 77 Kan. 14, 22, 93 Pac. 97.

#### **What Reviewed Without Exception or Assignment.**

When not assigned as error, the failure of the record to show that the plaintiff's pleadings and evidence disclosed his employment in interstate commerce at the time he sustained an injury in consequence of a defective coupler, is not such plain error as the Supreme Court of the United States will, under Rule 4, ¶ 21, consider without assignment of error in an action based on the Federal Employers' Liability Act and the Safety Appliance Act; since such omission may have been an oversight that could have been corrected in a state court had the defendant raised the question, and the Safety Appliance Act applied anyway; and the only effect of the Employers' Liability Act was on the question of contributory negligence, which was not material if there was a violation of the other act. *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 60 L. ed. —, 36 Sup. Ct. Rep. 626, affirming — Tex. Civ. App. —, 166 S. W. 24.

#### **(c) From Federal Courts.**

##### **In General.**

The Supreme of the United States may review a judgment of the Circuit Court of Appeals in an action under the Federal Safety Appliance Act for injuries sustained by an employee. *Chicago J. R. Co. v. King*, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79, S. C. 94 C. C. A. 652, 169 Fed. 372.

Where the only question presented to the Federal Supreme Court by writ of error to the Circuit Court of Appeals, is



whether the evidence is sufficient to sustain a recovery by an employee for injuries caused by a defective coupler, and no interpretation of the Federal Safety Appliance Act is involved, under the Judicature Act of 1891, 26 St. at L. 826, ch. 517, U. S. Comp. St. Supp. 1901, p. 488, the judgment of the lower court is final. *Chicago J. R. Co. v. King*, 222 U. S. 222, 56 L. Ed. 173, 32 Sup. Ct. Rep. 79, affirming 94 C. C. A. 652, 169 Fed. 372.

#### Extent of Review.

The Supreme Court of the United States will not scrutinize the whole record in order to determine whether an employee was guilty of contributory negligence, where he was injured in consequence of a carrier's violation of the Safety Appliance Act, but will give the record only such examination and consideration as may be necessary to determine whether there is plain error. *Chicago J. R. Co. v. King*, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79, affirming 94 C. C. A. 652, 169 Fed. 372.

On writ of error to the Circuit Court of Appeals the Federal Supreme Court will merely examine the record in order to ascertain whether plain error has been committed, where the interpretation of the Safety Appliance Act is not involved and the only question presented is the sufficiency of the evidence to sustain a verdict for the plaintiff for injuries caused by a defective coupler; since under the Judicature Act of 1891, 26 St. L. 826, ch. 517, U. S. Comp. St. Supp. 1901, p. 488, the judgment of the lower court is final. *Chicago J. R. Co. v. King*, 222 U. S. 222, 56 L. ed.

173, 32 Sup. Ct. Rep. 79, affirming 94 C. C. A. 652, 169 Fed. 372.

## 2. To Federal Circuit Court of Appeals.

### In General.

A finding by the jury in an action for injuries to a brakeman while adjusting a defective coupler, as to the nature and extent of his injuries, will not be reviewed by the Circuit Court of Appeals. *Wheeling Term. Co. v. Russell*, 126 C. C. A. 519, 209 Fed. 795.

## 3. Remanding for New Trial.

### In General.

Where a judgment for the plaintiff, in an action under the Federal Employers' Liability Act for injuries received by a switchman when a cut of cars moving in the ordinary and customary manner, was shunted against that on which he was adjusting a coupler, was reversed by an appellate court on the ground of assumed risk, the case will be remanded, under a state statute permitting the court to render such judgment as the trial court should have entered except where it is necessary that some matter of fact be ascertained, so as to enable the plaintiff to amend his pleadings by setting up a violation of the Safety Appliance Act, although not relied on at the first trial. *Ft. Worth & D. C. R. Co. v. Copeland*, — Tex. Civ. App. —, 164 S. W. 857.

## IX. CRIMINAL LIABILITY.

(Will be covered in subsequent issues.)

## APPENDIX

### BOILER INSPECTION ACT.\*

#### Federal.

An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this Act shall apply to any common carrier or carriers, their officers, agents and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia, or in any territory of the United States, or from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this Act shall include all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement or lease; and the term "employees" as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train.

Sec. 2. That from and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any common carrier, its officers or agents, subject to this Act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, so that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this Act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

Sec. 3. (Relates exclusively to the appointment, qualifications and compensation of Federal inspectors.)

Sec. 4. (Relates to the creating of inspection districts, and appointment, quali-

fication and compensation of assistant inspectors.)

Sec. 5. That each carrier subject to this Act shall file its rules and instructions for the inspection of locomotive boilers with the chief inspector within three months after the approval of this Act, and after hearing and approval by the Interstate Commerce Commission, such rules and instructions, with such modifications as the Commission requires, shall become obligatory upon such carrier: Provided, however, that if any carrier subject to this Act shall fail to file its rules and instructions, the chief inspector shall prepare rules and instructions not inconsistent herewith for the inspection of locomotive boilers, to be observed by such carrier; which rules and instructions, being approved by the Interstate Commerce Commission, and a copy thereof served on the president, general manager, or general superintendent of such carrier, shall be obligatory, and a violation thereof punished as hereinafter provided: Provided, also, that such common carrier may, from time to time, change the rules and regulations herein provided for, but such changes shall not take effect, and the new rules and regulations be in force, until the same shall have been filed with and approved by the Interstate Commerce Commission. The chief inspector shall also make all needful rules, regulations, and instructions not inconsistent herewith for the conduct of his office, and for the government of the district inspectors: Provided, however, that all such rules and instructions shall be approved by the Interstate Commerce Commission before they take effect.

Sec. 6. That it shall be the duty of each inspector to become familiar, so far as practicable, with the condition of each locomotive boiler ordinarily housed or repaired in his district, and if any locomotive is ordinarily housed or repaired in two or more districts, then the chief inspector shall make such division between inspectors as will avoid the necessity for duplication of work. Each inspector shall make such personal inspection of the locomotive boilers under his care, from time to time, as may be necessary to fully carry out the provisions of this Act, and as may be consistent with his other duties, but he shall not be required to make such inspections at stated times or at regular intervals. His first duty shall be to see that the carrier make inspections in accordance with the rules and regulations established or approved by the Interstate Commerce Commission, and that carriers

\*Act Feb. 17, 1911, ch. 108, § 8 Stat. at Large 913, U. S. Comp. Stat., 1913, §§ 8630-8639, Fed. Stats. Anno. Supp., 1912, p. 339.

repair the defects which such inspections disclose before the boiler or boilers or appurtenances pertaining thereto are again put in service. To this end each carrier subject to this act shall file with the inspector in charge, under oath of the proper officer or employee, a duplicate of the report of each inspection required by such rules and regulations, and shall also file with such inspector, under oath of the proper officer or employee, a report showing the repair of the defects disclosed by the inspection. The rules and regulations hereinbefore provided for shall prescribe the time at which such reports shall be made. Whenever any district inspector shall, in the performance of his duty, find any locomotive boiler or apparatus pertaining thereto not conforming to the requirements of the law or rules and regulations established and approved as hereinbefore stated, he shall notify the carrier in writing that the locomotive is not in serviceable condition, and thereafter such boiler shall not be used until in serviceable condition: Provided, that a carrier, when notified by an inspector in writing that a locomotive boiler is not in serviceable condition, because of defects set out and described in such notice, appeal to the chief inspector by telegraph or letter to have said boiler re-examined, and upon receipt of the appeal from the inspector's decision, the chief inspector shall assign one of the assistant chief inspectors, or any district inspector other than the one from whose decision the appeal is taken, to re-examine and inspect said boiler within fifteen days from date of notice. If on such re-examination the boiler is found in serviceable condition, the chief inspector shall immediately notify the carrier in writing, whereupon such boiler may be put into service without further delay; but if the re-examination of said boiler sustains the decision of the district inspector, the chief inspector shall at once notify the carrier owning or operating such locomotive that the appeal from the decision of the inspector is dismissed, and upon receipt of such notice the carrier may within thirty days appeal to the Interstate Commerce Commission, and, on such appeal, and after hearing, said Commission shall have the power to revise, modify, or set aside such action of the chief inspector and declare that said locomotive is in serviceable condition, and authorize the same to be operated: Provided, further, that pending either appeal the requirements of the inspector shall be effective.

Sec. 7. That the chief inspector shall make an annual report to the Interstate Commerce Commission of the work done during the year, and shall make such recommendations for the betterment of the service as he may desire.

Sec. 8. That in the case of accident resulting from failure from any cause of a locomotive boiler, or its appurtenances, resulting in serious injury or death to one or more persons, a statement forthwith must be made in writing of the fact of such accident, by the carrier owning or operating said locomotive, to the chief inspector. Whereupon the facts concerning such accident shall be investigated by the chief inspector or one of his assistants, or such inspector as the chief inspector may designate for that purpose. And where the locomotive is disabled to the extent that it cannot be run by its own steam, the parts affected by the said accident shall be preserved by said carrier intact, so far as possible, without hindrance or interference to traffic until after said inspection. The chief inspector or an assistant, or the designated inspector making the investigation, shall examine or cause to be examined thoroughly the boiler or part affected, making full and detailed report of the cause of the accident to the chief inspector. The Interstate Commerce Commission may, at any time, call on the chief inspector for a report on any accident embraced in this section, and, on the receipt of said report, if it deems it to the public interest, make reports of such investigations, stating the cause of the accident, together with such recommendations as it deems proper. Such reports shall be made public in such manner as the Commission deems proper. Neither said report nor any report of said investigation, nor any part thereof, shall be admitted in evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation.

Sec. 9. That any common carrier violating this Act, or any rule or regulation made under its provisions, or any lawful order or any inspector, shall be liable to a penalty of one hundred (\$100) dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such attorneys, subject to the direction of the Attorney-General, to bring such suits upon duly verified information being lodged with them, respectively, of such violations having occurred; and it shall be the duty of the chief inspector of locomotive boilers to give information to the proper United States attorney of all violations of this Act coming to his knowledge.

Sec. 10. That the total amounts directly appropriated to carry out the provisions of this Act shall not exceed for any one fiscal year the sum of three hundred thousand (\$300,000) dollars.

**CARMACK AMENDMENT.\***

That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recovery from the common carrier, railroad or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owner of such property, as may be evidenced by any receipt, judgment or transcript thereof.

**CUMMINS AMENDMENT. †**

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of section 7 of an Act entitled "An Act to amend an Act entitled 'An Act to regulate commerce,'" approved February 4, 1887, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29, 1906, as reads as follows, to-wit:

That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or a bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under ex-

isting law, be, and the same is hereby, amended so as to read as follows, to-wit:

That any common carrier, railroad or transportation company subject to the provisions of this Act receiving property for transportation from a point in one state or territory or the District of Columbia to a point in another state, territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation or other limitation of any character whatsoever, shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; and any such common carrier, railroad or transportation company so receiving property for transportation from a point in one state, territory or the District of Columbia to a point in another state or territory, or from a point in a state or territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage or injury to such property caused by it or by any such common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void: Provided, however, That if the goods are hidden from view by wrapping, boxing or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and

\*Act June 29, 1906, ch. 3591, § 7, 34 Stat. at Large, 593, U. S. Comp. Stat., 1913, § 8592 (11), Fed. Stat. Anno. Supp., 1909, p. 273.

†Act March 4, 1913, ch. 176, 38 Stat. at Large, 1197, Fed. Stat. Anno. Supp., 1916, p. 124.

maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: Provided further, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: Provided further, That it shall be unlawful for any such common carrier to provide by rule, contract, regulation or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, That if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.

Sec. 2. That this Act shall take effect and be in force from ninety days after its passage.

That so much of an Act to amend an Act entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved March fourth, nineteen hundred and fifteen, as reads as follows, to-wit:

"Provided, however, That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules," be, and the same is hereby, amended to read as follows, to-wit:

Provided, however, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly

authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transaction. The term "ordinary live stock" shall include all cattle, swine, sheep, goats, horses and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses.\*

## EMPLOYERS LIABILITY ACT.†

### Federal.

An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in

\*Act Aug. 9, 1916.

† Act April 22, 1908, ch. 149, 35 Stat. at Large, 65 U. S. Comp. St. Supp., 1911, p. 1322, Fed. Stat. Anno., 1909, Supp., p. 584, amended April 5, 1910, ch. 143, 36 Stat. at Large 291. U. S. Comp. Stat. Supp., 1911, pp. 1324, 1325, U. S. Comp. Stat., 1913, §§ 8657-8666, Fed. Stat. Anno. Supp., 1912, p. 335.

part from the negligence of any of the officers, agents or employees of such [common] carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 2. That every common carrier by railroad in the territories, the District of Columbia, the Panama Canal zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act, to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 5. That any contract rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has

contributed or paid to any insurance, relief, benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued. Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

Sec. 7. That the term "common carrier" as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Sec. 8. That nothing in this act shall be held to limit the duty or liability of common carriers, or to impair the rights of their employees, under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under an Act of Congress entitled "An act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the states and foreign nations to their employees," approved June eleventh, nineteen hundred and six.

Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee; but in such cases there shall be only one recovery for the same injury.

## HOURS OF LABOR ACT.\*

### Federal.

An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon.

Be it enacted by the Senate and House of Representatives of the United States

\*Act March 4, 1907, ch. 2939, 34 Stat. at Large 1415, U. S. Comp. Stat. Supp., 1911, p. 1231, U. S. Comp. Stat., 1913, §§ 8677-8680, Fed. Stat. Anno., 1909, Supp., p. 581.

of America in Congress assembled, That the provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any territory of the United States, or from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train.

Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: Provided, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: Provided, further, The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

Sec. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this Act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: Provided, That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen: Provided further, That the provisions of this Act shall not apply to the crews of wrecking or relief trains.

Sec. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provision of this Act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this Act.

Sec. 5. That this Act shall take effect and be in force one year after its passage.

## SAFETY APPLIANCE ACT.\*

### Federal.

An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of January,

\*Act of March 2, 1893, 27 Stat. at Large 531, ch. 196, Comp. Stat., 1913, §§ 8605-8622, 6 Fed. Stat. Anno., p. 752, amended April 1, 1896, 29 Stat. at Large 85, March 2, 1903, 32 Stat. at Large 943, ch. 976, 10 Fed. Stat. Anno., p. 375, April 14, 1910, 36 Stat. at Large 298, ch. 160, U. S. Comp. Stat., 1913, §§ 8605-8650.

eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Sec. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this Act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this Act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this Act.

Sec. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

Sec. 5. That within ninety days from the passage of this Act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States

by such means as the Commission may deem proper. But should said Association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

Sec. 6 (As amended April 1, 1896). That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: Provided, That nothing in this Act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

Sec. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this Act.

Sec. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this Act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

AN ACT\* to amend an Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars

\*Act of March 2, 1903 [32 Stat. at L., 943].



with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions and requirements of the Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are used upon street railways.

Sec. 2. That whenever, as provided in said Act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

Sec. 3. That the provisions of this Act shall not take effect until September

first, nineteen hundred and three. Nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States district attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements, and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this Act, apply to this Act.

AN ACT to supplement "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes and for other purposes," and other safety appliance Acts, and for other purposes.\*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this Act shall apply to every common carrier and every vehicle subject to the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, commonly known as the "Safety Appliance Acts."

Sec. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

Sec. 3. That within six months from the passage of this Act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of

\*Act of April 14, 1910 [38 Stat. at L., 298].

this Act and section four of the Act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this Act by such means as the Commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this Act: Provided, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this Act. Said Commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the Commission.

Sec. 4. That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line any car subject to the requirements of this Act not equipped as provided in this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six: Provided, That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equip-

ment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this Act or section six of the Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs can not be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or "perishable" freight.

Sec. 5. That except that, within the limits specified in the preceding section of this Act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three; and, except as aforesaid, all of the provisions, powers, duties, requirements, and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, shall apply to this Act.

Sec. 6. That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this Act, and all powers heretofore granted to said Commission are hereby extended to it for the purpose of the enforcement of this Act.



In addition to all the latest cases pertaining to the liability, under the various Acts of Congress, of Interstate Railway Companies for injuries to or the death of employees and their liability under the Carmack and Cummins Amendments, the January number of The Federal Railway Digest will contain a complete digest of the civil liability of Interstate Carriers under all other Acts of Congress, while their criminal liability under the Federal laws will be covered in the quarterly for April, 1917.

**VOL. I**

**JANUARY, 1917**

**NO. 3**

# **THE FEDERAL RAILWAY DIGEST**

## **THE CIVIL LIABILITY OF INTERSTATE CARRIERS BY RAIL**

**UNDER THE ACT REGU-  
LATING COMMERCE, AS  
AMENDED, THE FEDERAL  
EMPLOYERS' LIABILITY ACT  
SAFETY APPLIANCE ACT  
BOILER INSPECTION ACT  
HOURS OF LABOR ACT  
AND THE LIVE STOCK ACT**

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**Use in Connection with No. 2, Volume I**

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**PRICE, \$6.50 PER ANNUM**

**Published Quarterly by  
THE FEDERAL LAW BOOK COMPANY, 180 N. Dearborn St., CHICAGO**

**STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION,  
ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912**

Of The Federal Railway Digest, published Quarterly, at Chicago, Illinois, for October 1, 1916.

State of Illinois, County of Cook—ss.

Before me, a Notary Public in and for the State and county aforesaid, personally appeared Wm. J. Ingersoll, who, having been duly sworn according to law, deposes and says that he is the Business Manager of The Federal Railway Digest, and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management (and if a daily paper, the circulation), etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 443, Postal Laws and Regulations, printed on the reverse of this form, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

Publisher, The Federal Law Book Company, 180 N. Dearborn St., Chicago, Ill.

Editor, William J. Ingersoll, 180 N. Dearborn St., Chicago, Ill.

Managing Editor (none).

Business Manager, William J. Ingersoll, 180 N. Dearborn St., Chicago, Ill.

2. That the owners are: (Give names and addresses of individual owners, or, if a corporation, give its name and the names and addresses of stockholders owning or holding 1 per cent or more of the total amount of stock.)

Owner, The Federal Law Book Company, a corporation. Address, 180 N. Dearborn St., Chicago.

Stockholders, William J. Ingersoll, 180 N. Dearborn St., Chicago, Ill.; L. W. Ingersoll, 1230 N. Dearborn St., Chicago, Ill.

3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: (If there are none, so state.) (None.)

W. J. INGERSOLL.

Sworn to and subscribed before me this 20th day of September, 1916.

(SEAL)

SARA J. SANFORD.

(My commission expires May 6, 1920.)

THE  
**Federal Railway Digest**

A Cumulative Quarterly

**Digesting All Decisions**

Both State and Federal

Pertaining to the Civil and  
Criminal Liability of

**Interstate Carriers by Rail**

Under All Acts of Congress

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**WILLIAM J. INGERSOLL, *Editor***

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PUBLISHED QUARTERLY BY  
**THE FEDERAL LAW BOOK COMPANY**  
180 N. DEARBORN STREET  
CHICAGO

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# *Announcement*

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**T**HIS number of the Federal Railway Digest should be used in connection with No. 2, Volume I. The next number of this publication will complete its first year by digesting all cases reported to April 1, 1917, and decided by the several State and Federal Courts under all Acts of Congress which impose either civil or criminal liability on carriers by rail. Thereafter the cumulative quarterlies will keep the whole subject constantly down to date.

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THE FEDERAL LAW BOOK CO.

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# THE FEDERAL RAILWAY DIGEST

## *A Cumulative Quarterly*

Entered as second-class matter July 10, 1916, at the postoffice at Chicago, Ill., under the act of March 3, 1879.

Vol. 1

JANUARY, 1917

No. 3

### ANIMALS

See Carriers of Interstate Freight and Express, VII.

### BOILER INSPECTION ACT

#### FEDERAL

(No new decisions. See October, 1916, Quarterly.)

### CARRIAGE OF PERSONS

- I. IN GENERAL.
- II. FARES AND TICKETS.
- III. PASSES.
  - A. In General.
  - B. Contracts to Issue.
  - C. To Whom Issued.
    - 1. In General.
    - 2. Caretakers of Live Stock.
    - 3. Employees and Their Families.
  - D. Limitation of Liability.
  - E. Improper Use of Passes.
- IV. OBTAINING TRANSPORTATION IN VIOLATION OF LAW.
  - A. In General.
  - B. Expulsions.
    - 1. In General.
    - 2. Use of Improper Ticket.
    - 3. Traveling Wrong Route.
  - C. Injury or Death.
- I. IN GENERAL.  
(No decisions.)

#### II. FARES AND TICKETS.

##### Recovery of Undercharges.

A carrier which sells a round trip interstate ticket over a circuitous route for less than the published tariff rate, may recover the difference, notwithstanding that the purchaser was not aware of the undercharge, and that he might have made the same journey by different routes for the price he paid for the ticket. *Louisville & N. R. Co. v. Maxwell*, 237 U. S. 94, 59 L. ed. 853, 35 Sup. Ct. Rep. 494.

##### Refusal to Accept Ticket.

An interstate passenger may recover for the refusal of a conductor in a rude and insolent manner to accept a round trip excursion ticket the issuance of which was authorized by the tariffs of the carrier, because, by mistake of the selling agent, too short a return limit was indicated. *Illinois C. R. Co. v. Fleming*, 148 Ky. 473,

146 S. W. 1110; *Illinois C. R. Co. v. Roberts*, 148 Ky. 478, 146 S. W. 1113.

### III. PASSES.

#### A. In General.

(No decisions.)

#### B. Contracts to Issue.

##### Validity.

##### —In Consideration of Release of Damage Claims.

A contract of an interstate carrier to issue an annual free pass for life in consideration of a release of a valid claim for personal injuries, is invalidated by section 6 of the Interstate Commerce Act, as amended June 29, 1906,\* although the contract was executed many years prior to the passage of such act. *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 31 Sup. Ct. Rep. 265, 34 L. R. A. (N. S.) 671, reversing 133 Ky. 652, 118 S. W. 982. See also 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42, reversing 150 Fed. 406.

The fact that section 6 of the Act Regulating Commerce, as amended June 29, 1906,\* invalidates an existing contract of a carrier to issue an annual free pass to a person for life in consideration of the release of a valid claim for personal injuries, does not unconstitutionally infringe the liberty of contract guaranteed to citizens. *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 31 Sup. Ct. Rep. 265, 34 L. R. A. (N. S.) 671, reversing 133 Ky. 652, 118 S. W. 982. See also 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42, reversing 150 Fed. 406.

##### —In Consideration of Conveyance of Land.

A contract of an interstate carrier to give a person a free pass annually during his life in consideration of a conveyance of land for railway purposes, was avoided by the subsequent enactment of the Hepburn Act.\* *Louisville & N. R. Co. v. Crowe*, 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (N. S.) 848; *Cowley v. Northern P. R. Co.*, 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559; *Dorr v. Chesapeake & O. R. Co.*, — W. Va., —, 88 S. E. 666, L. R. A. 1916 E. 622. *Contra*, *Curry v. Kansas & C. P. R. Co.*, 58 Kan. 6, 48 Pac. 579.

##### Enforcement.

Specific performance will not be decreed of an interstate carrier's contract to issue a free pass annually in consideration of a grant of land for railway purposes, since the contract was avoided by the subsequent passage of the Hepburn Act. *Louisville & N. R. Co. v. Crowe*, 156 Ky. 27,

160 S. W. 759, 49 L. R. A. (N. S.) 848; *Cowley v. Northern P. R. Co.*, 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559; *Dorr v. Chesapeake & O. R. Co.*, — W. Va., —, 88 S. E. 666, L. R. A. 1916 E. 622.

Damages cannot be recovered for the refusal of a carrier, after the passage of the Hepburn Act, to furnish an annual free pass under an agreement antedating such act to do so during the life of a grantor in consideration of a conveyance of land for railway purposes. *Cowley v. Northern P. R. Co.*, 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559.

Although a carrier's contract to issue an annual free pass in consideration of a conveyance of land for railway purposes was avoided by the enactment of the Hepburn Act,\* and specific performance cannot be decreed, yet the carrier must pay the grantor the reasonable value of the land minus the value of transportation actually furnished under the contract. *Louisville & N. R. Co. v. Crowe*, 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (N. S.) 848.

Since a carrier's contract to issue or procure the issuance of an annual pass during the life of a grantor in consideration of a conveyance of land for railway purposes is not void under the Interstate Commerce Act, nor as an entire contract, an action will lie at any time for the failure of the carrier to provide a pass in any year. *Curry v. Kansas & C. P. R. Co.*, 58 Kan. 6, 48 Pac. 579.

The refusal of a carrier to comply with a contract to issue an annual free pass during a person's lifetime in consideration of the release of a claim for personal injuries, on the ground that the agreement was avoided by the passage of the Hepburn Act,\* does not prevent the specific performance of the contract with respect to intrastate transportation. *Mottley v. Louisville & N. R. Co.*, 150 Fed. 406, reversed 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42. See also 219 U. S. 467, 55 L. ed. 297, 31 Sup. Ct. Rep. 265, 34 L. R. A. (N. S.) 671, reversing 133 Ky. 652, 118 S. W. 982.

##### Rescission.

A conveyance of land to a carrier for railway purposes in consideration of the issuance of an annual free pass for the life of the grantor, will not be rescinded in equity after a substantial performance by the carrier and material increase of the property in value, because further performance was rendered impossible by the passage of the Hepburn Act.\* *Cowley v. Northern P. R. Co.*, 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559.

Where the passage of the Hepburn Act invalidated an existing agreement to issue an annual free pass in consideration of a

\*See Appendix for text of Act.

previous conveyance of land for railway purposes, the grantor cannot obtain a rescission of the conveyance. *Dorr v. Chesapeake & O. R. Co.*, — W. Va. —, 88 S. E. 666, L. R. A. 1916 E. 622.

## C. To Whom Issued.

### 1. In General.

(No decisions.)

### 2. Caretakers of Live Stock.

Validity of stipulation in pass relieving carrier from liability for personal injuries, see *infra* III, D.

### 3. Employees and Their Families.

#### Who Is an Employee.

A traveling agent of a freight traffic association, composed of a number of railway companies who paid his compensation, is an employee of such carriers within the meaning of the provisions of the Hepburn Act relating to free transportation. *Gill v. Erie R. Co.*, 151 App. Div. 131, 135 N. Y. Supp. 353, rehearing and appeal denied 151 App. Div. 131, 136 N. Y. Supp. 1135.

#### Pass for Employee's Wife.

A free pass issued under section 1 of the Hepburn Act for the interstate transportation of the wife of an employee, is gratuitous and not in consideration of the husband's services. *Charleston & W. C. R. Co. v. Thompson*, 234 U. S. 576, 58 L. ed. 1476, 34 Sup. Ct. Rep. 964, reversing 13 Ga. App. 528, 541, 79 S. E. 242, 80 S. W. 1097.

### D. Limitation of Liability.

#### Validity of Limitations.

##### — In General.

A carrier is not answerable to a person traveling on a free pass for injuries not due to the willful or wanton negligence of the carrier, where the pass released the carrier from liability for negligent injuries, such limitation being valid under the Hepburn Act. *Wright v. Central of Ga. R. Co.*, — Ga. App. —, 89 S. E. 457.

##### — In Employee's Pass.

An employee who was injured while riding on a pass, issued under the provision of section 1 of the Act Regulating Commerce, is not bound by a condition that, by accepting and using the pass, he assumed all risk of injury to his person or property, whether due to the negligence of the carrier or otherwise. *Gill v. Erie R. Co.*, 151 App. Div. 131, 135 N. Y. Supp.

353, rehearing and appeal denied 151 App. Div. 131, 136 N. Y. Supp. 1135.

##### — In Pass for Member of Employee's Family.

A condition in a free pass issued by a carrier under section 1 of the Hepburn Act for the interstate transportation of a member of the family of an employee, relieving the carrier from liability for negligent injuries sustained by the holder, is valid. *Charleston & W. C. R. Co. v. Thompson*, 234 U. S. 576, 58 L. ed. 1476, 34 Sup. Ct. Rep. 964, reversing 13 Ga. App. 528, 541, 79 S. E. 242, 80 S. E. 1097.

A pass issued by a railway company for the use of a member of the family of an express messenger, as a part of the consideration for services rendered by him to the railway company, is a "free pass" within the meaning of the Hepburn Act, and a condition thereof, by which the holder assumed all risk of accident, is valid. *Morris v. West Jersey & S. R. Co.*, — N. J. L. —, 94 Atl. 593.

##### — In Pass for Relative of Employee.

Since a father who does not reside with a son, an adult railway employee, is not a member of the latter's family to whom free transportation may be issued under the Hepburn Act, a pass for interstate transportation of the parent is void, and a condition relieving the carrier from liability for negligence is unenforceable. *Wentz v. Chicago, B. & Q. R. Co.*, 259 Mo. 450, 168 S. W. 1166.

##### — In Pass of Caretaker of Live Stock.

Since under section 1 of the Act Regulating Commerce free transportation may be furnished one who accompanies an interstate shipment of live stock, he becomes a passenger for hire, and a stipulation releasing a carrier from liability for negligence is void. *Norfolk S. R. Co. v. Chatman*, 138 C. C. A. 350, 222 Fed. 802; *Wiley v. Grand Trunk R. Co.*, 222 Fed. 127; *Willcox v. Erie R. Co.*, 162 App. Div. 94, 147 N. Y. Supp. 360.

#### Willful or Wanton Injuries.

A stipulation in an employee's pass issued under the Hepburn Act, relieving a carrier from liability for injuries resulting from the negligence of the carrier, does not include injuries due to the willful act of another employee. *Turman v. Seaboard A. L. R. Co.*, — S. C. —, 89 S. E. 655.

Punitive damages cannot be awarded an employee for injuries sustained while riding on a free pass issued under the terms of the Hepburn Act, merely on evidence that his injuries were caused by the willful act of another employee, unless knowledge thereof on the part of the master is shown

either before the event or by subsequent ratification. *Turman v. Seaboard A. L. R. Co.*, — S. C. —, 89 S. E. 655.

#### **E. Improper Use of Pass.**

##### **Mail Clerk Using Pass for Private Business.**

Where an assistant chief railway mail clerk was killed by the negligence of a carrier, while in good faith, and with the consent of the carrier, he was using his official pass to make an interstate journey for private purposes, the decedent was entitled to the benefit of a state law making carriers answerable for failure to exercise care for the safety of gratuitous passengers, since the prohibition of the Hepburn Act against free transportation does not deprive the one accepting the same of the benefit and protection of local laws. *Southern P. Co. v. Schuyler*, 227 U. S. 601, 57 L. ed. 662; 33 Sup. Ct. Rep. 277, 43 L. R. A. (N. S.) 901, affirming 37 Utah, 581, 595, 612, 109 Pac. 458, 464, 1025.

#### **IV. OBTAINING TRANSPORTATION IN VIOLATION OF LAW.**

##### **A. In General.**

(No decisions.)

##### **B. Expulsion.**

##### **1. In General.**

##### **Person Tendering Correct Fare, but Less Than Tariff Rate.**

There can be no recovery for the ejection from a train of a person who tendered fare for the exact mileage he desired to travel, and who refused to pay an erroneous interstate tariff rate, since the court was without jurisdiction to rectify an error in a schedule approved by the Interstate Commerce Commission. *Lipman v. Atlantic C. L. R. Co.*, 90 S. C. 517, 73 S. E. 1026.

##### **False Arrest for Obtaining Free Transportation.**

A carrier is not relieved from liability to an employee for false imprisonment for a refusal to pay an interstate fare, by reason of the fact that the latter attempted to obtain free transportation in violation of the Hepburn Act. *Comisky v. Norfolk & W. R. Co.*, — W. Va. —, 90 S. E. 385.

##### **2. Use of Improper Ticket.**

##### **Ticket Violating Act Regulating Commerce.**

A carrier is not answerable for the ejection from a train of a person who insists on being carried on a ticket which shows

on its face that it was issued in violation of the carrier's interstate tariffs and the orders of the Interstate Commerce Commission. *Melody v. Great N. R. Co.*, 25 S. D. 606, 127 N. W. 543, 30 L. R. A. (N. S.) 568, Ann. Cas. 1912 C. 727.

##### **Transportation Valid Only Within State.**

Where a newspaper publisher, for a portion of an interstate journey, used mileage received in payment for advertising, and which was good only for intrastate use, and then tendered a ticket for the remainder of an interstate trip, he cannot recover for his expulsion from a train for refusing to pay the full interstate fare for the whole distance, since his attempted use of the mileage was in violation of the Act Regulating Commerce. *Illinois C. R. Co. v. Holman*, 106 Miss. 449, 64 So. 7.

##### **3. Traveling Wrong Route.**

##### **Where No Joint Through Rate.**

A person who insists on riding on a through ticket over a route for which no through joint rate has been established may recover from the initial carrier for failing to furnish him a proper ticket, but not for his ejection from a train of a connecting carrier. *Seaboard A. L. R. Co. v. Patrick*, 10 Ala. App. 341, 65 So. 437.

Since an interstate ticket over a route for which a joint through fare had been established, but the sale of tickets had been suspended, is not, although there was a schedule of local rates in effect, within rule 36 of the Interstate Commerce Commission permitting the application of local tariff rates in the absence of joint through rates, and one who insists on riding on such a ticket without the payment of the local fare cannot recover for his ejection from a train by a connecting carrier, although it appears that a circular had been issued by the joint carriers authorizing the sale of the tickets in question without filing the circular with the Interstate Commerce Commission, which was essential to its validity. *Seaboard A. L. R. Co. v. Patrick*, 10 Ala. App. 341, 65 So. 437.

##### **Traveling Circuitous Route on Ticket for Direct Route.**

A person who insists on being carried over the longer of two routes between interstate points on a ticket good only by way of the shorter line, cannot recover for his expulsion from the train on his refusal to pay the higher established fare for the longer route, since to have carried him on such ticket would have violated the Act Regulating Commerce, *Ligon v. St. Louis & S. F. R. Co.*, 184 Mo. App. 187, 188 S. W. 647; *Sanders v. Atlantic C. L. R. Co.*, 101 S. C. 11, 85 S. E. 167.



**C. Injury or Death.****Person Transported in Violation of Hepburn Act.**

The prohibition of the Hepburn Act against the furnishing of free interstate transportation by carriers, relieves a carrier from liability for injuries received by a person while riding on the engine of an interstate train with the consent of the engineer and without the payment of fare. *Yazoo & M. V. R. Co. Co. v. Messina*, 240 U. S. 395, 60 L. ed. 709, 36 Sup. Ct. Rep. 368, reversing 109 Miss. 143, 67 So. 963. But see S. C. — *Miss.* —, 72 So. 779, certiorari denied 242 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. — (Feb. 5, 1917).

A carrier is answerable for injuries sustained by a person while obtaining free interstate transportation on an engine with the consent of the engineer, in consequence of the latter's negligence, notwithstanding that the injured person was subject to punishment under the Hepburn Act, since his unlawful presence on the engine was a condition and not the cause of his injury. *Illinois C. R. Co. v. Messina*, — *Miss.* —, 72 So. 779, certiorari denied 242 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. —, S. C. 109 Miss. 143, 67 So. 963, reversed

240 U. S. 395, 60 L. ed. 709, 36 Sup. Ct. Rep. 368.

There may be recovery for the death of an assistant chief railway mail clerk through the negligence of a carrier while the former was obtaining free interstate transportation on his official pass for private purposes, since no violation of the Hepburn act was shown which would prevent a recovery. *Southern P. Co. v. Schuyler*, 37 Utah, 581, 595, 612, 109 Pac. 458, 464, 1025, affirmed 227 U. S. 601, 57 L. ed. 662, 33 Sup. Ct. Rep. 277, 43 L. R. A. (N. S.) 901.

One obtaining free interstate transportation in violation of the Hepburn Act may recover for injuries sustained from a carrier's negligence, since the latter was bound to exercise a proper degree of care to protect such traveler. *St. Louis & S. F. R. Co. v. Coy*, 113 Ark. 265, 168 S. W. 1106.

Where a person boarded the engine of an interstate train without objection from the engineer, in order to obtain free transportation in violation of the Federal law, and was killed by the negligence of the carrier, the latter is not answerable, since the decedent was a trespasser. *Spencer v. Chicago, M. & St. P. R. Co.*, 161 Wis. 474, 154 N. W. 979.

# CARRIERS OF INTERSTATE FREIGHT AND EXPRESS\*

(See also No. 2, Vol. I.)

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\*For text of Federal 28-Hour Law see Appendix.

\*For text of Carmack Amendment see Appendix Vol. I, No. 2, p. 394.

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  - H. Instructions.
    1. In General.
    5. Delay in Transit.
    6. Notice of Damage Claims.
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    8. Injuries to Live Stock.
  - I. Directing Verdict.
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  - M. Appeal and Error.
    1. In General.
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\*For text of Cummins Amendment see Appendix Vol. I, No. 2, p. 394.

3. Admission and Rejection of Evidence.
4. Instructions.
5. Questions Not Raised Below.
6. Harmless Error.

#### XIV. CRIMINAL LIABILITY.

##### I. IN GENERAL.

(No decisions for this number.)

##### II. WHAT LAW GOVERNS.

###### A. In General.

(No decisions for this number.)

###### B. Federal Laws.

Controlling effect of Carmack Amendment, see *infra* XI, D. 1.

###### In General.

A contract of interstate shipment is governed by and must be construed with reference to the Federal decisions without regard to state laws. *Potter v. Kansas City S. R. Co.*, 187 Mo. App. 56, 172 S. W. 1153; *Riddler v. Missouri P. R. Co.*, 184 Mo. App. 709, 171 S. W. 632; *Betka v. Houston & T. C. R. Co.*, — Tex. Civ. App. —, 189 S. W. 532.

Interstate shipments are governed exclusively by Federal Laws and the common-law principles accepted and enforced by the Federal courts, to the exclusion of all state laws, rules and policies. *Northwestern Cons. Milling Co. v. Chicago, B. & Q. R. Co.*, — Minn. —, 160 N. W. 1028.

The rights and liabilities of the parties to an interstate shipment depend on Federal legislation, the contract or bill of lading and the common-law rules as accepted and applied by the Federal courts. *Chicago, R. I. & P. R. Co. v. Paden*, — Okla. —, 162 Pac. 727.

###### Effect of Federal Decisions on State Courts.

The decisions of the Federal courts construing and applying the Interstate Commerce Act are binding on state courts. *Adams Express Co. v. Cook*, 162 Ky. 592, 172 S. W. 1096; *Armstrong v. Illinois C. R. Co.*, 162 Ky. 539, 172 S. W. 947; *Wabash R. Co. v. Priddy*, 179 Ind. 483, 101 N. E. 724; *Aradalou v. N. Y. N. H. & H. R. Co.*, — Mass. —, 114 N. E. 297; *Jones v. Southern Express Co.*, 104 Miss. 449, 61 So. 165; *Donoho v. Missouri P. R. Co.*, — Mo. App. —, 187 S. W. 141; *Thompson v. Atchison, T. & S. F. R. Co.*, — Mo. App. —, 185 S. W. 1145; *Howard v. Chicago, R. I. & P. R. Co.*, — Mo. App. —, 184 S. W. 906; *Riddler v. Missouri P. R. Co.*, 184 Mo. App.

709, 171 S. W. 632; *Bailey v. Missouri P. R. Co.*, 184 Mo. App. 457, 171 S. W. 44; *McFall v. Chicago, B. & Q. R. Co.*, 181 Mo. App. 142, 168 S. W. 341; *Johnson Grain Co. v. Chicago, B. & Q. R. Co.*, 177 Mo. App. 194, 164 S. W. 182; *Hamilton v. Chicago & A. R. Co.*, 177 Mo. App. 145, 164 S. W. 248; *Rich v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379, 148 S. W. 1011; *Davenport v. Chesapeake & O. R. Co.*, 87 Misc. 303, 149 N. Y. Supp. 865; *Washington Horse Exchange v. Louisville & N. R. Co.*, — N. C. —, 87 S. E. 941; *Stevens v. St. Louis S. W. R. Co.*, — Tex. Civ. App. —, 178 S. W. 810; *Chicago, R. I. & P. R. Co. v. Dalton*, — Tex. Civ. App. —, 177 S. W. 556; *St. Louis, I. M. & S. R. Co. v. West*, — Tex. Civ. App. —, 159 S. W. 142.

###### C. State Laws.

Effect of Carmack Amendment on state laws, see *infra* XI, D. 2.

###### In General.

Interstate shipment are not controlled by state laws. *Northwestern Cons. Milling Co. v. Chicago, B. & Q. R. Co.*, — Minn. —, 160 N. W. 1028; *Potter v. Kansas City S. R. Co.*, 187 Mo. App. 56, 172 S. W. 1153; *Betka v. Houston & T. C. R. Co.*, — Tex. Civ. App. —, 189 S. W. 532.

The Federal law supersedes all state laws respecting the liability of carriers for interstate shipments. *Chesapeake & O. R. Co. v. Jordan*, — Ind. App. —, 114 N. E. 461.

Since Congress has undertaken the regulation of interstate shipments the several states are powerless to exercise any control over them. *Smith v. Atchison, T. & S. F. R. Co.*, 210 Fed. 988.

#### III. INTERSTATE COMMERCE COMMISSION.\*

Action by Interstate Commerce Commission as condition precedent to action for overcharges, see *infra* IV, J, 3, (d) and J, 8.

##### A. In General.

(No decisions for this number.)

##### B. Powers and Duties.

(Will be covered in later issues.)

##### C. Orders and Findings.

Orders and findings of Interstate Commerce Commission as evidence, see *infra* III, C, 5, and XIII, G, 8.

\*See Appendix for text of Interstate Commerce Act.

**1. In General.****Res Judicata.**

A finding by the Interstate Commerce Commission of the correct freight rate applicable to an interstate shipment is res adjudicata in a subsequent action between the same parties pertaining to such rate. *Pecos & N. T. R. Co. v. Porter*, — Tex. Civ. App. —, 156 S. W. 267, S. C. 56 Tex. Civ. App. 479, 121 S. W. 897, 183 S. W. 98.

**2. Jurisdiction to Make.**

(Will be covered in later issues.)

**3. Enforcement.**

(Will be covered in later issues.)

**4. Restraining Enforcement.**

(Will be covered in later issues.)

**5. Reparation Orders.**

Instructions pertaining to reparation orders, see *infra* XIII, H, 1.

**(a) In General.****Award of Reparation as Judgment.**

An award of damages by the Interstate Commerce Commission is not a judgment in the sense that it concludes the subsequent enforcement in a court of law of the claim on which it arose, but the award is *prima facie* evidence of the facts therein recited. *Clark Bros. Coal M. Co. v. Pennsylvania R. Co.*, 241 Pa. 515, 88 Atl. 754, reversed on other grounds 238 U. S. 456, 59 L. ed. 1406, 35 Sup. Ct. Rep. 896.

**(b) Validity.****Formal Defects.**

Where an action was brought against a carrier on a reparation order made by the Interstate Commerce Commission, the fact that another order afterwards made to correct a formal defect in the original one, stated an impossible date for the payment of the amount of the award by the carrier, did not affect the action. *Missouri P. R. Co. v. Ferguson Saw Mill Co.*, — C. C. A. —, 235 Fed. 474.

**Sufficiency of Evidence Before Commission.**

An order of the Interstate Commerce Commission for reparation for excessive freight charges cannot be held void in an action under § 16 of the Act to Regulate Commerce, because the order failed to fix a reasonable rate for future shipments. *Baer Bros. M. Co. v. Denver & R. G. R. Co.*, 233 U. S. 479, 58 L. ed. 1055, 34 Sup. Ct. Rep. 641, affirming 109 C. C. A. 337, 187 Fed. 486.

When a proceeding before the Interstate Commerce Commission was heard

on the theory that the petitioner himself paid excessive interstate freight charges, a subsequent action on a reparation order will not be dismissed because the only evidence of payment produced before the commission was express receipts which did not show that the plaintiff really paid the charges, where, at the trial, he proved that he did so and that he was damaged thereby. *Missouri P. R. Co. v. Ferguson Saw Mill Co.*, — C. C. A. —, 235 Fed. 474.

**(c). Allowance of Damages.****For Discrimination, Preferences and Rebates.****— In General.**

The damages awarded a shipper by the Interstate Commerce Commission for unjust discrimination between him and a competitor, is measured by the injury sustained from the allowance of the rebates. *Meeker v. Lehigh V. R. Co.*, 236 U. S. 412, 59 L. ed. 644, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916 B. 691, modifying 128 C. C. A. 311, 211 Fed. 785.

**— In Distribution of Cars.**

Under the Interstate Commerce Act as amended, the Interstate Commerce Commission has jurisdiction to award damages in favor of a shipper for unjust discrimination by a carrier in the distribution of cars for the interstate transportation of coal, notwithstanding that it is sold *f. o. b.* at the mines. *Pennsylvania R. Co. v. Clark Bros. C. M. Co.*, 238 U. S. 456, 59 L. ed. 1406, 35 Sup. Ct. Rep. 896, reversing 241 Pa. 515, 88 Atl. 754.

The Interstate Commerce Commission has jurisdiction to award reparation to a shipper for unjust and discriminatory practices of a carrier in the distribution of coal cars in violation of the provisions of the Act Regulating Commerce. *Jacoby v. Pennsylvania R. Co.*, 209 Fed. 989. See 239 U. S. 631, 60 L. ed. 476, 36 Sup. Ct. Rep. 166.

An action lies against a carrier on a reparation order of the Interstate Commerce Commission awarding damages to an interstate shipper for unjust discrimination in the distribution of coal cars in violation of the Act Regulating Commerce. *Jacoby v. Pennsylvania R. Co.*, 200 Fed. 989. See 239 U. S. 631, 60 L. ed. 476, 36 Sup. Ct. Rep. 166.

**Excessive Rates.**

The Interstate Commerce Commission may determine the reasonableness of an interstate freight rate and order reparation for excessive charges, although no through rate had been established, where shipments were billed to a local point in another state, and, in accordance with a long course of dealings between the con-

necting carriers, were rebilled as local shipments to an intrastate point, and the charges divided between the carriers according to the local rates. *Baer Bros. M. Co. v. Denver & R. G. R. Co.*, 233 U. S. 479, 58 L. ed. 1055, 34 Sup. Ct. Rep. 641, affirming 109 C. C. A. 337, 187 Fed. 486.

The Interstate Commerce Commission has power under the Act to Regulate Commerce, to award reparation to a shipper for the exaction by a carrier of interstate freight charges in excess of its established tariffs. *Chicago, B. & Q. R. Co. v. Feintuch*, 112 C. C. A. 126, 191 Fed. 482.

The Interstate Commerce Commission may award reparation to a shipper for the collection of excessive interstate freight rates on shipments made prior to the filing of his petition with the commission. *Missouri P. R. Co. v. Ferguson Saw Mill Co.*, — C. C. A. —, 235 Fed. 474.

An order of the Interstate Commerce Commission requiring a carrier to make reparation for charges exacted in excess of the actual cost of handling cars to and from a shipper's warehouse, for the privilege of unloading and reconsigning hay in interstate commerce, will not be enforced by the courts, since the carrier is entitled to a reasonable profit for such service. *Southern R. Co. v. St. Louis Hay & G. Co.*, 215 U. S. 297, 53 L. ed. 1004, 29 Sup. Ct. Rep. 678, reversing 82 C. C. A. 614, 153 Fed. 728, and 149 Fed. 609.

### Overcharges.

The damages awarded a shipper by the Interstate Commerce Commission for freight overcharges are measured by the financial injury thereby sustained. *Meeker v. Lehigh V. R. Co.*, 236 U. S. 412, 59 L. ed. 644, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916 B. 691, modifying 128 C. C. A. 311, 211 Fed. 785.

### Interest.

The Interstate Commerce Commission may in a reparation proceeding award interest on excessive freight rates paid by a shipper under protest. *Missouri P. R. Co. v. Ferguson Saw Mill Co.*, — C. C. A. —, 235 Fed. 474; *Denver & R. G. R. Co. v. Baer Bros M. Co.*, 126 C. C. A. 399, 209 Fed. 577.

### (d) Reparation Orders As Evidence

#### As Prima Facie Evidence

##### — Validity

The provision of the Act Regulating Commerce making the findings of the Interstate Commerce Commission prima facie evidence in an action at law, is constitutional. *Western N. Y. & P. R. Co. v. Penn. Refining Co.*, 70 C. C. A. 23, 137 Fed. 343, affirmed on other grounds 208 U. S. 208, 52 L. ed. 456, 28 Sup. Ct. Rep. 268; *Lehigh V. R. Co. v. Clark*, 125 C. C.

A. 235, 207 Fed. 717, modified and affirmed 238 U. S. 473, 59 L. ed. 1414, 35 Sup. Ct. Rep. 717.

Section 16 of the Interstate Commerce Act, as amended, making the findings and orders of the Interstate Commerce Commission prima facie evidence of the facts therein contained, does not unconstitutionally deprive a carrier, in an action based on such reports and orders, of the right of trial by jury, or deny him due process of law, since such section creates a rebuttable presumption only. *Meeker v. Lehigh V. R. Co.*, 236 U. S. 412, 59 L. ed. 644, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916 B. 691, modifying 128 C. C. A. 311, 211 Fed. 785.

##### — Conclusiveness.

A violation of the Act Regulating Commerce is established by an order of the Interstate Commerce Commission declaring an interstate freight rate unreasonable, although such finding is not decisive, either prima facie or otherwise, of the question of a carrier's liability to a shipper for damages. *Lehigh V. R. Co. v. Meeker*, 128 C. C. A. 311, 211 Fed. 785, affirmed on other grounds 236 U. S. 412, 59 L. ed. 644, 35 Sup. Ct. Rep. 328.

The pertinency and evidential weight and value of the facts as to which a finding and order of the Interstate Commerce Commission is prima facie evidence in an action on a reparation order, are for the determination of the court and jury as in other civil cases, and may or may not make out a prima facie case for the plaintiff. *Lehigh V. R. Co. v. Meeker*, 128 C. C. A. 311, 211 Fed. 785, affirmed on other grounds 236 U. S. 412, 59 L. ed. 644, 35 Sup. Ct. Rep. 328.

##### Admissibility as Affected by Form and Contents.

A finding and reparation order of the Interstate Commerce Commission are not prima facie evidence of a carrier's liability in an action by a shipper under section 16 of the Act to Regulate Commerce, where the facts are not stated in either the finding or order. *Lehigh V. R. Co. v. Clark*, 125 C. C. A. 235, 207 Fed. 717, modified and affirmed 238 U. S. 473, 59 L. ed. 1414, 35 Sup. Ct. Rep. 717.

A finding and order of the Interstate Commerce Commission of the unreasonableness of a freight rate, together with an award of reparation to a shipper, is not the prima facie evidence contemplated by section 16 of the Act to Regulate Commerce, since only the facts stated in the order, and not the order itself, are prima facie evidence of the liability of a carrier in an action against it. *Lehigh V. R. Co. v. Clark*, 125 C. C. A. 235, 207 Fed. 717, modified and affirmed 238 U. S. 473, 59 L. ed. 1414, 35 Sup. Ct. Rep. 717.



In order that the findings and orders of the Interstate Commerce Commission may, under section 16 of the Act Regulating Commerce, be prima facie evidence of the facts therein stated, they must somewhere contain, in some form, sufficiently clear and definite findings of the necessary facts so that the carrier has notice of the case against it, and is able to controvert the prima facie effect of such findings and orders. *Lehigh V. R. Co. v. Clark*, 125 C. C. A. 235, 207 Fed. 717, modified and affirmed 238 U. S. 473, 59 L. ed. 1414, 35 Sup. Ct. Rep. 717.

The ultimate and not the evidential facts are all that need be stated in an order of the Interstate Commerce Commission awarding reparation to a shipper for unlawful overcharges in freight rates, in order to make it admissible as prima facie evidence of the carrier's liability in an action based on section 16 of the Interstate Commerce Act. *Mills v. Lehigh V. R. Co.*, 238 U. S. 473, 59 L. ed. 1414, 35 Sup. Ct. Rep. 888, modifying and affirming 125 C. C. A. 235, 207 Fed. 717; *Meeker v. Lehigh V. R. Co.*, 236 U. S. 412, 59 L. ed. 644, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916 B. 691, modifying 128 C. C. A. 311, 211 Fed. 785.

A report or reparation order of the Interstate Commerce Commission is admissible in an action at law for its enforcement, although it contains immaterial matters in addition to findings of fact. *Southern R. Co. v. St. Louis Hay & G. Co.*, 82 C. C. A. 614, 153 Fed. 728, reversed on other grounds 214 U. S. 279, 53 L. ed. 1004, 29 Sup. Ct. Rep. 768, S. C. 149 Fed. 609; *Meeker v. Lehigh V. R. Co.*, 236 U. S. 412, 59 L. ed. 644, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916 B. 691, modifying and affirming 128 C. C. A. 311, 211 Fed. 785; *Chicago, B. & Q. R. Co. v. Feintuch*, 112 C. C. A. 126, 191 Fed. 482.

A finding of the Interstate Commerce Commission is not admissible as prima facie evidence in an action for reparation, where it consists of finding of facts, opinions, arguments and conclusions blended together, unless the court clearly separates the competent from the incompetent matter and calls the jury's attention thereto. *Western N. Y. & P. R. Co. v. Penn. Refining Co.*, 70 C. C. A. 23, 137 Fed. 343, affirmed on other grounds 208 U. S. 208, 52 L. ed. 456, 28 Sup. Ct. Rep. 268.

Where the Interstate Commerce Commission held interstate freight rates excessive and unreasonable, and denied a shipper reparation, but awarded it on a rehearing, the order for reparation stating that additional evidence was presented without the findings of facts showing the nature thereof, such findings and orders are not prima facie evidence sufficient to sustain an action against the carrier. *Lehigh V. R. Co. v. Clark*, 125 C. C. A. 235,

207 Fed. 717, modified and affirmed 238 U. S. 473, 59 L. ed. 1414, 35 Sup. Ct. Rep. 717.

#### As Evidence of Reasonableness of Rates and Charges.

An order of the Interstate Commerce Commission finding that a rate charged a shipper was excessive and unreasonable is admissible in an action against the carrier under section 16 of the Interstate Commerce Act, as amended, for reparation for overcharges, although such order was made in another proceeding on the complaint of a partnership of which the complainant in the second proceeding was the surviving member, where the latter was allowed to intervene in the previous proceeding without objection from or prejudice to the carrier. *Meeker v. Lehigh V. R. Co.*, 326 U. S. 434, 59 L. ed. 659, 35 Sup. Ct. Rep. 337, Ann. Cas. 1916 B. 691, modifying and affirming 128 C. C. A. 311, 211 Fed. 785.

A finding of the Interstate Commerce Commission as to the reasonableness or unreasonableness of an interstate freight rate is conclusive when lawfully made. *Lehigh V. R. Co. v. Meeker*, 128 C. C. A. 311, 211 Fed. 785, affirmed on other grounds 236 U. S. 412, 59 L. ed. 644, 35 Sup. Ct. Rep. 328.

A finding by the Interstate Commerce Commission that a rate charged a shipper was unreasonable, and fixing the excess over a reasonable rate, is prima facie if not conclusive evidence in an action against a carrier under section 16 of the Act to Regulate Commerce, where no evidence to the contrary is introduced at the trial. *St. Louis S. W. R. Co. v. Samuels*, 128 C. C. A. 188, 211 Fed. 588.

A reparation order of the Interstate Commerce Commission fixing a re-shipment charge is prima facie evidence of its reasonableness in the absence of anything to the contrary. *Southern R. Co. v. St. Louis Hay & G. Co.*, 82 C. C. A. 614, 153 Fed. 728, reversed on other grounds 214 U. S. 279, 53 L. ed. 1004, 29 Sup. Ct. Rep. 768, S. C. 149 Fed. 609.

#### As Evidence of Damages.

Under section 16 of the Act Regulating Commerce the reports and orders of the Interstate Commerce Commission, showing that a shipper was damaged in a stated sum from the collection of an excessive and unreasonable freight rate, are, in an action against the carrier for reparation, prima facie evidence of the shipper's pecuniary loss. *Darnell-Taenzer L. Co. v. Southern P. R. Co.*, 137 C. C. A. 460, 221 Fed. 890, reversing 190 Fed. 659, S. C. 143 C. C. A. 663, 229 Fed. 1022, certiorari denied 238 U. S. 629, 59 L. ed. 1497, 35 Sup. Ct. Rep. 792.

A report of the Interstate Commerce Commission showing the relation of the parties, the general character of the traffic involved, the amount of the shipments with respect to which reparation is claimed, a determination that a specified rate was unjust and unreasonable, and that designated carriers should pay the claimant a stated amount as reparation therefor, is admissible in an action under section 16 of the Interstate Commerce Act against such carriers, to establish their prima facie liability. *Mills v. Lehigh V. R. Co.*, 238 U. S. 473, 59 L. ed. 1414, 35 Sup. Ct. Rep. 888, modifying and affirming 125 C. C. A. 235, 207 Fed. 717.

In an action against a carrier under section 16 of the Act to Regulate Commerce, on a reparation order of the Interstate Commerce Commission, the plaintiff may avail himself in the first instance without further proof, of the conclusive administrative findings or orders of the Commission showing the defendant's violation of the act in the particulars complained of, although the plaintiff must prove the actual damages sustained by him. *Lehigh V. R. Co. v. Clark*, 125 C. C. A. 235, 207 Fed. 717, modified and affirmed 238 U. S. 473, 59 L. ed. 1414, 35 Sup. Ct. Rep. 717.

The fact that an order of the Interstate Commerce Commission states that an excessive interstate freight rate was added to the price paid by the consignee for goods, does not overcome the prima facie effect of a finding by the Commission that the shipper was damaged to the extent of the excess above a reasonable rate. *Darnell v. Southern P. Co.*, 137 C. C. A. 460, 221 Fed. 890, reversing 190 Fed. 659, S. C. 143 C. C. A. 663, 229 Fed. 1022.

#### (e) Who May Enforce.

##### Person Not Injured by Conduct of Carrier.

A reparation order of the Interstate Commerce Commission for the repayment to shippers of the difference between the tariff rate for interstate transportation of oil in barrels and the lower rate for that in tank cars, where shipment in such cars was not open to all persons alike, will not permit a recovery by a shipper who never demanded the use of tank cars, and who did not ship his oil in such cars. *Penn. Refining Co. v. Western N. Y. & P. R. Co.*, 208 U. S. 208, 52 L. ed. 456, 28 Sup. Ct. Rep. 268, affirming 70 C. C. A. 23, 137 Fed. 343.

#### (f) Who Liable Under.

##### Receivers.

Receivers are not liable on a reparation order of the Interstate Commerce Commission when not sued thereon until 4 years after their discharge. *Western N.*

*Y. & P. R. Co. v. Penn. Refining Co.*, 70 C. C. A. 23, 137 Fed. 343, affirmed on other grounds 208 U. S. 208, 52 L. ed. 456, 28 Sup. Ct. Rep. 268.

##### Purchaser at Receiver's Sale.

The fact that a proceeding before the Interstate Commerce Commission for damages sustained in consequence of unlawful discriminations by a carrier was defended by a receiver, does not bring a reparation order therefor within an order of sale making the purchaser of the railway property answerable for liabilities incurred by the receiver. *Western N. Y. & P. R. Co. v. Pennsylvania Refining Co.*, 70 C. C. A. 23, 137 Fed. 343, affirmed on other grounds 208 U. S. 208, 52 L. ed. 456, 28 Sup. Ct. Rep. 268.

#### (g) Actions.

Allowance of attorney fees in actions on reparation orders, see *infra* XIII, K.

Limitation of actions in general, see *infra*, XIII, A, 3.

Reparation orders of Interstate Commerce Commission as evidence, see *supra* III, 5, (d).

##### In General.

Section 16 of the Act Regulating Commerce relating to actions against carriers based on reparation orders of the Interstate Commerce Commission, was not repealed by section 297 of the Federal Judiciary Act of 1911. *St. Louis S. W. R. Co. v. Samuels*, 128 C. C. A. 188, 211 Fed. 588.

A state statute requiring affidavits of defense in actions founded on contracts does not apply to a suit against a carrier on a reparation order of the Interstate Commerce Commission, since the action is one sounding in tort. *Naylor v. Lehigh V. R. Co.*, 188 Fed. 860.

The cause of action against a carrier under section 16 of the Act to Regulate Commerce, when based on a reparation order of the Interstate Commerce Commission, must be the same as that presented to the Commission. *Chicago, B. & Q. R. Co. v. Feintuch*, 112 C. C. A. 126, 191 Fed. 482.

A cause of action against a carrier under section 16 of the Act to Regulate Commerce, on a reparation order of the Interstate Commerce Commission for charges exacted in excess of the established interstate tariff rate, held to be the same as that presented to the Commission. *Chicago, B. & Q. R. Co. v. Feintuch*, 112 C. C. A. 126, 191 Fed. 482.

##### Nature of Action.

An action against a carrier under section 16 of the Act to Regulate Commerce, when based on a reparation order of the Inter-

state Commerce Commission, is one for damages sounding in tort. *Naylor v. Lehigh V. R. Co.*, 188 Fed. 860.

An action under section 16 of the Act to Regulate Commerce, on a reparation order made by the Interstate Commerce Commission, is not a suit on the award for the recovery of the amount thereof, but is a plenary action for the damages actually sustained by the plaintiff from the defendant's violation of such Act as conclusively found by the Commission. *Lehigh V. R. Co. v. Clark*, 125 C. C. A. 235, 207 Fed. 717, modified and affirmed 238 U. S. 473, 59 L. ed. 1414, 35 Sup. Ct. Rep. 717.

When a shipper submits to the Interstate Commerce Commission both an administrative question and that of his damages caused by discriminatory practices against him by a carrier, and the latter neglects to pay the damages awarded by the Commission, an action at law to recover on such award is for damages, the proceedings being de novo and in the nature of an appeal in which the findings of the Commission are, under the terms of the Act Regulating Commerce, prima facie evidence. *Minds v. Pennsylvania R. Co.*, 237 Fed. 267.

An action at law against a railway company for its refusal to comply with an order of the Interstate Commerce Commission for the payment of damages sustained by an interstate shipper, is a proceeding de novo, in which the damages are to be found by the jury under all of the evidence, including the findings of the Commission which are made prima facie evidence by the Act of Congress. *Minds v. Pennsylvania R. Co.*, 237 Fed. 267; *Hillsdale C. & C. Co. v. Pennsylvania R. Co.*, 237 Fed. 272.

#### Limitations.

An action against a carrier under section 16 of the Interstate Commerce Act, as amended, for the recovery of damages awarded by the Interstate Commerce Commission under sections 9 and 13 of the act, for unjust discriminations in violation of sections 1 and 2 thereof, is not controlled by a state statute of limitation except in the absence of an applicable Federal law. *Meeker v. Lehigh V. R. Co.*, 236 U. S. 412, 59 L. ed. 644, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916 B. 691, modifying 128 C. C. A. 311, 211 Fed. 785.

An action based on section 16 of the Interstate Commerce Act, as amended, for the recovery of damages awarded a shipper by the Interstate Commerce Commission for unjust discriminations, is not governed by section 1047 of U. S. Revised Stats., Comp. St. U. S. 1913, section 1712, requiring suits or prosecutions "for a penalty or forfeiture, pecuniary or otherwise,

accruing under the laws of the United States," to be commenced within 5 years. *Meeker v. Lehigh V. R. Co.*, 236 U. S. 412, 59 L. ed. 644, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916 B. 691, modifying 128 C. C. A. 311, 211 Fed. 785.

Section 16 of the Interstate Commerce Act, as amended June 29, 1906, relating to the time for filing complaints with the Interstate Commerce Commission for the recovery of damages for the violation of that act by carriers, and for the filing in the Federal courts of petitions for the enforcement of the orders of the Commission for payment of money, takes all such claims out of the operation of state statutes of limitation. *Meeker v. Lehigh V. R. Co.*, 236 U. S. 412, 59 L. ed. 644, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916 B. 691, modifying 128 C. C. A. 311, 211 Fed. 785.

Claims against a carrier for unjust discriminations which accrued more than two years prior to the amendment of June 29, 1906, to section 16 of the Interstate Commerce Act, are enforceable, since within the proviso permitting the presentation to the Interstate Commerce Commission within one year, of claims that accrued prior to the passage of the act, as such proviso, although not intended to revive claims that were barred by applicable local laws, was in the nature of a saving clause. *Meeker v. Lehigh V. R. Co.*, 236 U. S. 412, 59 L. ed. 644, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916 B. 691, modifying 128 C. C. A. 311, 211 Fed. 785.

A cause of action against a carrier for reparation for excessive interstate charges which accrued December 26, 1905, and which was filed with the Interstate Commerce Commission September 15, 1907, was not barred by the period of limitation prescribed by section 16 of the Act to Regulate Commerce. *Louisville & N. R. Co. v. Dickerson*, 112 C. C. A. 294, 191 Fed. 705, affirmed 187 Fed. 874.

An action will not lie against a carrier on a reparation order when begun more than 1 year after the order was made by the Interstate Commerce Commission and more than 4 years after the cause of action arose, since section 9 of the Act Regulating Commerce requires such claims to be filed with the Commission within 2 years, and actions on such orders to be commenced within 1 year. *Phillips v. Grand Trunk W. R. Co.*, 326 U. S. 662, 59 L. ed. 774, 35 Sup. Ct. Rep. 444, affirming 115 C. C. A. 94, 195 Fed. 12.

#### Res Judicata.

The voluntary dismissal by the plaintiff of an action to recover excessive interstate freight charges from a carrier is not a bar to a subsequent action under section 16 of the Act to Regulate Commerce on a reparation order of the Interstate Com-

merce Commission, although relating to the same shipments that were in issue in the prior action. *Baer Bros. M. Co. v. Denver & R. G. R. Co.*, 233 U. S. 479, 58 L. ed. 1055, 34 Sup. Ct. Rep. 641, affirming 109 C. C. A. 337, 187 Fed. 486.

#### **Procedure.**

An action against a carrier under a reparation order of the Interstate Commerce Commission must proceed like other civil actions for damages. *Lehigh V. R. Co. v. Clark*, 125 C. C. A. 235, 207 Fed. 717, modified and affirmed 238 U. S. 473, 59 L. ed. 1414, 35 Sup. Ct. Rep. 717.

#### **Election.**

The plaintiff will not be required to elect, in an action against a carrier under section 16 of the Act Regulating Commerce on a reparation order of the Interstate Commerce Commission, between two orders the second of which merely corrected a formal defect in the original order. *Missouri P. R. Co. v. Ferguson Saw Mill Co.*, — C. C. A. —, 235 Fed. 474.

#### **Trial by Jury.**

The defendant is entitled to a trial by jury in an action based on a reparation order of the Interstate Commerce Commission. *Lehigh V. R. Co. v. Clark*, 125 C. C. A. 235, 207 Fed. 717, modified and affirmed on other grounds 238 U. S. 473, 59 L. ed. 1414, 35 Sup. Ct. Rep. 717.

#### **Evidence.**

##### **— Presumptions.**

It will be presumed, in an action against a carrier under section 16 of the Interstate Commerce Act, for unjust discriminations and overcharges, that the findings of the Interstate Commerce Commission in favor of the injured shipper were justified by the evidence, and that the amount awarded represented his actual financial loss, where the findings recited that they were based on the evidence adduced. *Meeker v. Lehigh V. R. Co.*, 236 U. S. 412, 59 L. ed. 644, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916 B. 691, modifying 128 C. C. A. 311, 211 Fed. 785.

##### **— Of Damages.**

The plaintiff is entitled to judgment against a carrier in an action on a reparation order for excessive interstate freight charges, where the finding of the Interstate Commerce Commission is that the plaintiff was damaged to the extent of the difference between the amount paid and a reasonable rate, since, under such act, the finding was prima facie evidence, and, in the absence of evidence to the contrary, showed that he was damaged by the unlawful act of the carrier. *Southern P. Co.*

*v. Goldfield Consolidated M. & T. Co.*, 135 C. C. A. 590, 220 Fed. 14.

That the plaintiff was damaged by the exaction of an excessive interstate freight rate was sufficiently shown in an action against a carrier for reparation, under section 16 of the Act Regulating Commerce, although damages were not alleged in terms, where the complaint set out findings of the Interstate Commerce Commission showing the facts, and declaring that the plaintiff was entitled to reparation in a designated sum. *Southern P. Co. v. Goldfield Consolidated M. & T. Co.*, 135 C. C. A. 590, 220 Fed. 14.

Evidence that the plaintiff was actually damaged by the exaction of an excessive interstate freight rate is admissible in an action against a carrier on a reparation order of the Interstate Commerce Commission, in addition to the prima facie presumption created by the finding and order of the Commission, since under section 19 of the Act to Regulate Commerce such action is required to be conducted in all respects like other civil suits. *Missouri P. R. Co. v. Ferguson Saw Mill Co.*, — C. C. A. —, 235 Fed. 474.

A finding and reparation order of the Interstate Commerce Commission that an interstate freight rate was unreasonable, and fixing a new rate, does not show that a shipper suffered pecuniary damages from the exaction of the higher rate, or that the difference between the two rates is the measure of his damages. *Lehigh V. R. Co. v. Clark*, 125 C. C. A. 235, 207 Fed. 717, modified and affirmed 238 U. S. 473, 59 L. ed. 1414, 35 Sup. Ct. Rep. 717.

Where a carrier made a discrimination of \$2 per car between neighboring towns for the privilege of reconsigning interstate carload shipments of hay, a shipper who paid such charge cannot, under section 16 of the Act Regulating Commerce, recover it from the carrier, although reparation was ordered by the Interstate Commerce Commission, without showing that he sustained some pecuniary loss from such discrimination. *Lehigh V. R. Co. v. American Hay Co.*, 135 C. C. A. 307, 219 Fed. 539.

##### **— Scope of Issue.**

Whether the Interstate Commerce Commission has jurisdiction to reduce a rate and to order reparation to a shipper, because not in issue before such body, will not be determined in an action against a carrier, under section 16 of the Act Regulating Commerce, where the pleadings before the Commission were not made a part of the complaint in the subsequent action. *Denver & R. G. R. Co. v. Baer Bros. M. Co.*, 126 C. C. A. 399, 209 Fed. 577, affirming 200 Fed. 614.

**Sufficiency of Findings or Order to Permit Recovery.**

**— In General.**

Findings of fact are sufficiently made by the Interstate Commerce Commission to permit a recovery by a shipper against a carrier under section 16 of the Act Regulating Commerce, where the findings are embodied in the colloquial statements of the opinion of the Commission. *Lehigh V. R. Co. v. American Hay Co.*, 135 C. C. A. 307, 219 Fed. 539.

Under section 16 of the Act Regulating Commerce, an action will lie against an interstate carrier on an order of the Interstate Commerce Commission for reparation for unfair and unjust charges in a stated amount, where the order recites all the facts essential to a recovery, but does not contain the findings of fact referred to in section 14 of the act. *New York C. & H. R. Co. v. Murphy*, 140 C. C. A. 111, 224 Fed. 407.

A reparation order of the Interstate Commerce Commission for the repayment of excessive interstate freight charges is sufficient to sustain an action by the shipper under section 16 of the Act Regulating Commerce, where the order recites the facts, finds the rate charged to have been unreasonable, assesses the shipper's damages and orders the carrier to pay them. *St. Louis S. W. R. Co. v. Samuels*, 128 C. C. A. 188, 211 Fed. 588.

**— Allowance of Insufficient Time for Answer.**

In an action against a carrier on a reparation order, an objection that, as the summons issued by the Commission required the carrier to satisfy the complaint within 20 days, the Commission did not have jurisdiction to make an award of damages because section 6 forbids a change of rates except on 30 days' notice, is without merit, where the carrier was allowed 45 days to answer, without an extension of time being requested or an objection made until the trial. *Missouri P. R. Co. v. Ferguson Saw Mill Co.*, — C. C. A. —, 235 Fed. 474.

**Damages for Delayed Settlement.**

In assessing damages under a reparation order of the Interstate Commerce Commission the jury may consider the lapse of time between the incurrence of the damages and the rendering of the verdict and make an allowance therefor not exceeding lawful interest. *Minds v. Pennsylvania R. Co.*, 237 Fed. 267.

**Directing Verdict.**

A verdict should not be directed for the defendant in an action against a carrier under section 16 of the Act Regulating Commerce on a reparation order for ex-

cessive freight rates, where, in addition to the prima facie case made by the order itself, there was evidence of actual damages sustained from the collection of the unreasonable rate. *Darnell-Taenzer L. Co. v. Southern P. Co.*, 137 C. C. A. 663, 221 Fed. 890, reversing 190 Fed. 659, S. C. 143 C. C. A. 663, 229 Fed. 1022, certiorari denied 238 U. S. 629, 59 L. ed. 1497, 35 Sup. Ct. Rep. 792.

**IV. RATES AND CHARGES.**

Effect on liability of carrier for loss or injury to shipment of illegality of rate charged, see *infra* VII, D.

Evidences of charges, rates, classifications, schedules and tariffs, see *infra* XIII, G, 8.

**A. In General.**

(No decisions for this number.)

**B. Establishment.**

Burden to show establishment of rates and charges, see *infra* XIII, G, 5.

**1. In General.**

(No decisions for this number.)

**2. Filing, Publishing and Posting.**

Effect of failure to file, publish or post rates on liability for misquoting rates, see *infra* IV, K, 4.

Effect of failure to file, publish or post tariffs and schedules on right of carrier to recover undercharges, see *infra* IV, I, 5.

**Filing With Interstate Commerce Commission.**

Car demurrage rates were sufficiently filed within the meaning of the Act Regulating Commerce so as to permit a recovery of such rates by a carrier, when the book of demurrage rules of a car service association, of which such carrier was a member, was filed with the Interstate Commerce Commission, accompanied by a letter stating the amount of the demurrage charges, without objection from the Commission as to the form in which the filing was made. *Berwind-White Coal M. Co. v. Chicago & E. R. Co.*, 235 U. S. 371, 59 L. ed. 275, 35 Sup. Ct. Rep. 131, affirming 171 Ill. App. 302.

The fact that a carrier did not file a tariff of demurrage charges with the Interstate Commerce Commission will not preclude their collection on interstate shipments, since the common law gives the right to recover the same. *Berwind-White Coal M. Co. v. Chicago & E. R. Co.*, 171 Ill. App. 320, affirmed 235 U. S. 371, 59 L. ed. 275, 35 Sup. Ct. Rep. 131.

**Method of Publication.**

Under the Interstate Commerce Act a carrier must not only file its tariffs and schedules of freight rates with the Commission, but in order to make them effective they must promulgate and distribute them in the manner prescribed by law. *Oregon R. & N. Co. v. Thisler*, 90 Kan. 5, 133 Pac. 539.

It will be presumed that the Interstate Commerce Commission, in approving a joint interstate freight tariff, directed that some kind of publication thereof should be made by the carriers. *Atlanta, K. & N. R. Co. v. Horne*, 106 Tenn. 73, 59 S. W. 134.

**Failure of Connecting Carrier to Publish.**

A joint through interstate freight rate established and filed by an initial carrier with the Interstate Commerce Commission is valid, although the connecting carriers failed to publish the rate as required by law, and a contract with the initial carrier for through transportation based on such rate is valid. *Virginia Coal & C. Co. v. Louisville & N. R. Co.*, 98 Va. 776, 37 S. E. 310.

**Filing at Stations.**

In order that a carrier may enforce an interstate freight rate the tariff must be on file with the agent at the station of shipment, and it is not sufficient that it be filed with the Interstate Commerce Commission. *Pecos R. R. Co. v. Reynolds Cattle Co.*, — Tex. Civ. App. —, 135 S. W. 162.

**Failure to Post in Stations.**

A carrier may enforce interstate freight rates which have been approved by the Interstate Commerce Commission, although the former failed to post two copies of the schedules and tariffs in its stations as required by section 6 of the Act Regulating Commerce, where copies were duly filed with its several station agents. *Texas & P. R. Co. v. Cisco Oil Mill*, 204 U. S. 449, 51 L. ed. 562, 27 Sup. Ct. Rep. 358; *Kansas City S. R. Co. v. Albers Comm. Co.*, 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316, reversing 79 Kan. 59, 99 Pac. 819; *Louisville & N. R. Co. v. McMullan*, 5 Ala. App. 662, 59 So. 683; *Northern Ala. R. Co. v. Wilson Mercantile Co.*, 9 Ala. App. 269, 63 So. 34; *Baltimore & O. S. W. R. Co. v. New Albany Box & B. F. Co.*, 48 Ind. App. 647, 94 N. E. 906, 5 S. C. 48 Ind. App. 647, 96 N. E. 28; *Herminghausen v. Adams Express Co.*, 167 Ia. 230, 149 N. W. 234; *Missouri, K. & T. R. Co. v. New Era Milling Co.*, 80 Kan. 141, 101 Pac. 1011; *Louisville & N. R. Co. v. Allen*, 152 Ky. 145, 153 S. W. 198, rehearing denied 152 Ky. 837, 154 S. W. 371; *Hunter v. St. Louis & S. F. R. Co.*, 167

Mo. App. 624, 150 S. W. 733; *Mires v. St. Louis & S. F. R. Co.*, 134 Mo. App. 379, 114 S. W. 1052; *Central R. of N. J. v. Mauser*, 241 Pa. 603, 88 Atl. 791, 49 L. R. A. (N. S.) 92; *Wardlow v. Andrews*, — Tex. Civ. App. —, 180 S. W. 1161.

The failure of a carrier to post in a station two copies of its freight tariffs containing demurrage charges on interstate carload shipments, does not prevent the collection of such charges. *Berwind-White Coal M. Co. v. Chicago & E. R. Co.*, 171 Ill. App. 302, affirmed 235 U. S. 371, 59 L. ed. 275, 35 Sup. Ct. Rep. 131.

A carrier that fails to post copies of its interstate freight schedules at its stations cannot recover the rates therein contained although copies of such schedules were filed with all station agents and notice to that effect displayed in the stations. *Wabash R. Co. v. Sloop*, 200 Mo. 198, 98 S. W. 607.

**Posting Notices Stating Where Rates May Be Found.**

Interstate freight rates which have been approved by the Interstate Commerce Commission, may be enforced by a carrier where schedules and tariffs thereof were distributed among its station agents, and, instead of posting two copies in its stations, as required by section 6 of the Act Regulating Commerce, notices were displayed to the effect that the tariffs and schedules were on file with the agents. *Housman v. Fargo*, 124 N. Y. Supp. 1086.

An interstate freight rate was sufficiently posted where a notice was displayed in a station to the effect that applicable freight schedules and tariffs were on file at a division freight office in another town. *Southern R. Co. v. Wilmont Oil Mills*, — S. C. —, 89 S. W. 476.

An increase of an interstate freight rate does not become effective unless the carrier distributes copies of the schedule among and posts the same in its stations as required by section 6 of the Act Regulating Commerce. *Virginia-Carolina Peanut Co. v. Atlantic C. L. R. Co.*, 166 N. C. 62, 82 S. E. 1, rehearing denied — N. C. —, 84 S. E. 705.

A carrier that merely files its interstate freight tariffs with its station agents without posting the same as required by section 6 of the Act Regulating Commerce, cannot enforce the tariff rates, although a printed notice was posted in its stations stating where copies of such tariff could be found. *Wabash R. Co. v. Sloop*, 200 Mo. 198, 98 S. W. 607.

**Destruction of Posted Schedules.**

Where an interstate freight tariff had been posted in a station but was torn down and not replaced, the rates thereby

established are not enforceable, since there was not a sufficient compliance with the requirements of the Act Regulating Commerce relative to posting. *Griffin v. Wabash R. Co.*, 115 Mo. App. 549, 91 S. W. 1015.

**Damages for Failure to File, Publish or Post Rates.**

A shipper cannot recover damages from a carrier for its failure to publish and file a joint through interstate freight tariff with the Interstate Commerce Commission as required by the Act Regulating Commerce, without showing that he would have shipped under such tariff had he been aware of its existence, and that he sustained injury as a result of the carrier's conduct. *Parsons v. Chicago & N. W. R. Co.*, 167 U. S. 447, 42 L. ed. 231, 17 Sup. Ct. Rep. 887, affirming 11 C. C. A. 489, 63 Fed. 903.

An interstate shipper cannot recover for damages resulting from the failure of a carrier to post interstate freight rates as required by the Act Regulating Commerce. *Central of Ga. R. Co. v. Birmingham Sand & B. Co.*, 9 Ala. App. 419, 64 So. 202.

**What Schedules and Tariffs Must Be Posted.**

**— Foreign Rates.**

The requirement of the Act Regulating Commerce as to the posting of interstate freight rates applies to a shipment partly by water and partly by rail from a foreign country to the United States. *Fisher v. Great N. R. Co.*, 49 Wash. 205, 95 Pac. 77.

**C. Reasonableness.**

(Will be covered in later numbers.)

Reasonableness of rates and charges as question for jury, see *infra* XIII, J.

**D. Binding Effect of Established Rates**

Knowledge of existence of rates as question of jury, see *infra* XIII, J.

**In General.**

Shippers and travelers are charged with notice of a carrier's rates for interstate transportation as filed with the Interstate Commerce Commission, and they must abide thereby unless the charges are found unreasonable by the Interstate Commerce Commission. *Louisville & N. R. Co. v. Maxwell*, 237 U. S. 94, 59 L. ed. 853, 35 Sup. Ct. Rep. 494.

When a carrier adopts classification sheets fixing interstate transportation charges and files the same with the Interstate Commerce Commission, both the carrier and a shipper are bound by such rates and classifications, whether just or unjust, so long as they remain in force.

*Smith v. Great N. R. Co.*, 15 N. D. 195, 107 N. W. 56.

A shipper is, under the Act Regulating Commerce, charged with knowledge of the tariff rate which governs an interstate shipment from the request for cars until delivery by the carrier at destination. *Atchison, T. & S. F. R. Co. v. Smyth*, — Tex. Civ. App. —, 189 S. W. 70.

The schedules of rates charges and regulations filed with the Interstate Commerce Commission by a carrier pursuant to the Hepburn Act are controlling between a carrier and shipper. *Ford v. Chicago, R. I. & P. R. Co.*, 123 Minn. 87, 143 N. W. 249.

A shipper must be held, regardless of the terms of the contract of affreightment, to contract for an interstate shipment with reference to and in accordance with the rates fixed by the carrier's established schedules and tariffs. *Wyrick v. Missouri, K. & T. R. Co.*, 74 Mo. App. 406; *Gerber v. Wabash R. Co.*, 63 Mo. App. 145.

The rule of public policy charging shippers with notice of interstate tariff freight rates does not apply to a consignee who receives and deals with property in reliance upon the charges stated in a bill of lading without knowledge that it was lower than the tariff rate. *Fink v. Pittsburgh, C. C. & St. L. R. Co.*, 2 Ohio App. 235.

**E. Construction of Schedules and Tariffs.**

(Will be covered in later numbers.)

Evidence of charges, rates, classifications, schedules and tariffs, see *infra* XIII, G, 8.

**F. Particular Charges and Rates.**

Evidence of charges, rates, classifications, schedules and tariffs, see *infra* XIII, G, 8.

**1. In General.**

(No decisions.)

**2. Demurrage or Car Services Charges.**

Recovery back of demurrage charges paid, see *infra* III, J.

**(a) In General.**

**Power to Determine Validity and Meaning of Demurrage Rules.**

A Federal court has jurisdiction, in an action between a shipper and a carrier, to determine in the first instance the meaning of the carrier's car demurrage rules filed with the Interstate Commerce Commission, as applied to interstate shipments. *Hite v. Central R. of N. J.*, 96 C. C. A. 326, 171 Fed. 370, S. C. 166 Fed. 976.

**When Collectable.**

A railway company may collect demurrage charges in accordance with its established tariffs on cars used in interstate transportation which the consignee fails to unload within the free time after notice of their arrival and the tender of the shipments to him. *Nebraska Transfer Co. v. Chicago, B. & Q. R. Co.*, 90 Neb. 488, 134 N. W. 163.

**Who May Collect.**

A delivering carrier may collect demurrage charges at the tariff rate on foreign cars in its possession containing interstate shipments. *Gault Lumber Co. v. Atchison, T. & S. F. R. Co.*, 37 Okla. 24, 130 Pac. 291.

**Lighterage Services.**

A railway company that furnishes free lighterage for the movement of foreign freight to vessels, cannot, under the Interstate Commerce Act, recover demurrage charges from a water carrier for delay in unloading lighters, although provided for in the rail carrier's tariffs, where the water carrier did not employ or control the lighters, or agree to furnish a berth for them. *Central of N. J. R. Co. v. Anchor Line*, 135 C. C. A. 388, 219 Fed. 716.

**(b) Reasonableness of Rules and Rates.****Presumptions.**

Demurrage or car service charges based on tariffs filed with the Interstate Commerce Commission are conclusively presumed, in an action in a state court by a carrier against a shipper for their collection on interstate shipments, to be reasonable in the absence of a contrary holding by the Interstate Commerce Commission. *Erie R. Co. v. Wanaque Lumber Co.*, 75 N. J. L. 878, 69 Atl. 168.

**Power of Courts to Determine.**

The reasonableness of a demurrage or car service rule which is filed with an approved by the Interstate Commerce Commission, cannot be determined by the courts, since it is a question primarily for the Commission. *Starks v. Grand Rapids & I. R. Co.*, 165 Mich. 642, 131 N. W. 143.

The reasonableness of a demurrage or car service rule which was filed with and approved by the Interstate Commerce Commission, as applied to cars of vegetables held in a railway yard because of a carrier's refusal to permit the cars to be heated during transit in cold weather, cannot be determined in an action at law against the carrier for the recovery of demurrage charges paid by a shipper, since the question was primarily for the determination of the Commission. *Starks v. Grand Rapids & I. R. Co.*, 165 Mich. 642, 131 N. W. 143.

**(c) Demurrage on Private Cars.****In General.**

A carrier may establish and enforce demurrage charges on private cars while standing on the private tracks of the owners thereof loaded with interstate shipments. *Swift v. Hocking V. R. Co.*, 93 Ohio, 143, 112 N. E. 212, affirmed 242 U. S., — 61 L. ed. —, 37 Sup. Ct. Rep. —; *Northern P. R. Co. v. Carstens Packing Co.*, 92 Wash. 243, 158 Pac. 721.

Private cars owned by a shipper are subject to demurrage in accordance with a carrier's interstate tariffs, while they remain loaded with interstate traffic on a private siding built by the carrier at the expense of such shipper and used by him exclusively. *Norfolk & W. R. Co. v. Swift & Co.*, 56 Pa. Super. Ct. 471.

**Validity of Demurrage Rules.**

The validity and reasonableness of a rule imposing demurrage charges on private cars while standing on the private tracks of their owners, cannot be determined in an action at law, since a question within the exclusive jurisdiction of the Interstate Commerce Commission. *Swift v. Hocking Valley R. Co.*, 93 Ohio 143, 112 N. E. 212, affirmed 242 U. S., — 61 L. ed. —, 37 Sup. Ct. Rep. —; *Northern P. R. Co. v. Carstens Packing Co.*, 92 Wash. 243, 158 Pac. 721.

Whether a duly established rule relating to demurrage charges on privately owned cars while standing on the owner's private tracks, loaded with interstate freight, takes his property without due process of law, cannot be determined by the courts, since the rule depends on the Act Regulating Commerce for its existence, and its validity is a question for the Commission. *Northern P. R. Co. v. Carstens Packing Co.*, 92 Wash. 243, 158 Pac. 721.

**(d) What Constitutes Arrival at Destination.****In General.**

Loaded cars coming from other states and held on storage tracks outside the city of Chicago for reconsignment, in accordance with a custom of 20 years' standing, are at their destination so as to permit the imposition of demurrage charges, where the storage tracks are convenient to a belt line by which the cars are started for their new destinations. *Berwind-White Coal M. Co. v. Chicago & E. R. Co.*, 235 U. S. 371, 59 L. ed. 275, 35 Sup. Ct. Rep. 131, affirming 171 Ill. App. 302.

A carrier cannot collect demurrage charges on an interstate car load shipment of coal until the expiration of the free time after the car has been placed in a suitable position for unloading. *Fen-*



nell Infirmary v. Southern R. Co., 101 S. C. 134, 85 S. E. 237.

**(e) Delay in Unloading Attributable to Carrier.**

**Effect on Liability of Shipper.**

A carrier cannot collect demurrage charges on an interstate carload shipment of coal where, after the car was placed in a convenient position for unloading, it was removed before the consignee had a sufficient opportunity to unload it and was not returned for several days, after which he unloaded it, within the free time. *Fennell Infirmary v. Southern R. Co.*, 101 S. C. 134, 85 S. E. 237.

**Delivering Excessive Number of Cars.**

A railway company that, at the request of a paper manufacturing company, placed an embargo on interstate shipments of bolts which under the Hepburn Act the carrier was bound to accept in interstate transportation and the paper manufacturer was under contract to receive, may remove the embargo without notice to the paper company, although it resulted in a congestion of cars on its track greater than it could handle, and charge the latter with demurrage on cars it was unable to unload within the free period. *Menasha Paper Co. v. Chicago & N. W. R. Co.*, 241 U. S. 55, 60 L. ed. 885, 36 Sup. Ct. Rep. 501, affirming 159 Wis. 508, 149 N. W. 751.

A carrier may collect demurrage on interstate carload shipments, although it delivered more cars than the consignee was able to unload within the free time. *Nebraska Transfer Co. v. Chicago, B. & Q. R. Co.*, 90 Neb. 488, 134 N. W. 163.

**(f) Shipments Unloaded and Held by Carrier.**

**In General.**

The right of a carrier to collect demurrage does not terminate with the unloading of an interstate shipment in order to release a car for service, where the rules of the carrier, as filed with the Interstate Commerce Commission, prohibited it from storing any part of carload shipments in its warehouses or on its grounds without adding such service charge the same is if the freight had been left on the car. *Horton v. Tonopah & G. R. Co.*, 225 Fed. 406.

**3. Elevator Charges.**

**In General.**

Since section 4 of the Act of June 29, 1906, declares that if the owner renders any service or furnishes any instru-

mentality used in the interstate transportation of the property, he may receive just and reasonable allowances therefor, the fact that grain in transit, when unloaded into an elevator, is weighed, stored, inspected, cleaned, mixed, or otherwise treated, does not prevent the owner of the elevator from recovering an elevator charge from the carrier. *Union P. R. Co. v. Updike Grain Co.*, 222 U. S. 215, 56 L. ed. 171, 32 Sup. Ct. Rep. 39, affirming 101 C. C. A. 583, 178 Fed. 223.

A carrier's rule that elevator charges on grain in interstate transit would not be paid unless empty cars were returned to the tracks of the carrier within 48 hours, will not deprive an elevator company of the right to such charges for handling grain in foreign cars, where the elevator was not on the lines of such carrier, and it was prevented from returning such cars to the carrier by reason of a rule of a switching association, of which the carrier and not the elevator company, was a member, precluding the return of empty foreign cars to the track of such carrier. *Union P. R. Co. v. Updike Grain Co.*, 222 U. S. 215, 56 L. ed. 171, 32 Sup. Ct. Rep. 39, affirming 101 C. C. A. 583, 178 Fed. 223.

An elevator company cannot recover from a carrier elevator charges for handling grain moving in interstate commerce, where it failed to comply with a rule of the carrier denying such allowance when cars were not returned to its tracks within 48 hours. *Union P. R. Co. v. Updike Grain Co.*, 222 U. S. 215, 56 L. ed. 171, 32 Sup. Ct. Rep. 39, affirming 101 C. C. A. 583, 178 Fed. 223.

**4. Foreign Rates.**

Validity of contracts pertaining to rates for foreign shipments, see *infra* VI, D, 5.

**5. Icing Charges.**

**In General.**

Since an interstate carrier, by voluntarily holding itself out as ready to ice carload shipments, brings itself within the provisions of the Act Regulating Commerce with respect to the reasonableness, certainty and publicity of rates, it cannot recover as on an express or implied contract for icing services, without making, publishing and filing fixed and definite rates for such service. *Cudahy Packing Co. v. Grank Trunk R. Co.*, 131 C. C. A. 401, 215 Fed. 93.

Notwithstanding the invalidity for uncertainty of an interstate carrier's tariff charge of the actual costs of the ice for icing cars, which in no event was to be

less than \$2.50 per ton, it may recover from a shipper the minimum charge for such service. *Cudahy Packing Co. v. Grand Trunk R. Co.*, 131 C. C. A. 401, 215 Fed. 93.

#### 6. Reconsignment Charges.

##### Reasonableness.

Reconsignment charges exacted by a carrier on interstate shipments in excess of the actual cost of handling are unlawful. *Southern R. Co. v. St. Louis Hay & G. Co.*, 149 Fed. 609, affirmed 82 C. C. A. 614, 153 Fed. 728, reversed 214 U. S. 279, 53 L. ed. 1004, 29 Supt. Ct. Rep. 678, S. C. 149 Fed. 609.

#### 7. Storage Charges.

##### In General.

A carrier must collect its established charges for storing an interstate shipment under an agreement with the consignee. *In re Arlington Hotel Co.*, — Del. —, 98 Atl. 186.

#### G. Duty to Collect Established Rates.

##### In General.

It is the duty of a carrier to collect the lawful existing tariff freight rate for an interstate shipment. *Central of Ga. R. Co. v. Southern Ferro Concrete Co.*, 193 Ala. 108, 68 So. 981, Ann. Cas. 1916 E. 376; *Crane R. Co. v. Philadelphia & R. Co.*, — Pa. —, 97 Atl. 1055; *Texas & P. R. Co. v. Dickson*, — Tex. Civ. App. — 167 S. W. 33.

Since a carrier's compensation for services in connection with interstate shipments cannot be a matter of bargaining with a shipper, no payment can be lawfully demanded or received by the carrier except in accordance with its duly published fixed and definite schedule of charges. *Cudahy Packing Co. v. Grand Trunk R. Co.*, 131 C. C. A. 401, 215 Fed. 93.

It is the duty of an interstate carrier to collect the correct tariff rates for an interstate freight shipment irrespective of any agreement between it and a shipper as to the rate or classification stipulated in the bill of lading. *Hardaway v. Southern R. Co.*, 90 S. C. 475, 73 S. E. 1020, Ann. Cas. 1913 D. 266.

#### H. Contracts Respecting Rates and Charges.

See general *infra* VI.

Validity of contract for rate less than established tariff rate, see *infra* VI, C. 4.

#### I. Recovery of Undercharges

##### 1. In General.

(No decisions.)

##### 2. When Contract for Less Than Tariff Rate.

##### In General.

If a carrier contracts to transport an interstate shipment for less than the established tariff rate it may collect, by action if necessary, the correct rate. *Illinois C. R. Co. v. Segari*, 205 Fed. 998; *Atchison, T. & S. F. R. Co. v. Kinkade*, 203 Fed. 165; *Central of Ga. R. Co. v. Birmingham Sand & B. Co.*, 9 Ala. App. 419, 64 So. 202; *Missouri, K. & T. R. Co. v. Bowles*, 1 Ind. Ter. 250, 40 S. W. 899; *Louisiana R. & N. Co. v. Holly*, 127 La. 615, 53 So. 882; *Sutton v. St. Louis & S. F. R. Co.*, 159 Mo. App. 685, 140 S. W. 76; *Gerber v. Wabash R. Co.*, 63 Mo. App. 145; *Pecos V. & N. E. R. Co. v. Harris*, 14 N. Mex. 410, 94 Pac. 951; *St. Louis & S. F. R. Co. v. Pickens*, — Okla. —, 151 Pac. 1055; *San Antonio & A. P. R. Co. v. Clements*, 20 Tex. Civ. App. 498, 49 S. W. 913; *Houston & T. C. R. Co. v. Dumas*, — Tex. Civ. App. —, 43 S. W. 609.

The fact that a carrier mistakenly contracts for a lower interstate freight rate than is shown by its established tariffs does not, irrespective of the shipper's knowledge of the error, preclude the collection of the correct rate as a condition of the delivery of the goods. *Southern R. Co. v. Harrison*, 119 Ala. 539, 24 So. 552, 43 L. R. A. 385, 72 Am. St. Rep. 936.

A carrier that contracts to transport an interstate shipment for less than the established schedule rate may, after the payment of the agreed charge by and the delivery of the property to the consignee, recover the undercharge. *Atchison, T. & S. F. R. Co. v. Ehret*, — Okla. —, 152 Pac. 1107.

Where, by mistake of an initial carrier, a contract was made for a lower interstate freight rate than that shown by its tariffs, a connecting carrier may collect the true rate. *Chicago, R. I. & P. R. Co. v. Hubbell*, 54 Kan. 232, 38 Pac. 266.

When an interstate shipment is made over connecting lines which have duly established a joint through rate which is higher than that stipulated in the bill of lading, and the delivering carrier, in ignorance of the contract rate, advances to the connecting carrier its full portion of the tariff rate, the former may collect the tariff rate at destination. *Missouri, K. & T. R. Co. v. Stoner*, 5 Tex. Civ. App. 50, 23 S. W. 1020.

When, by mistake, a carrier contracts for the interstate carriage of cordwood

at actual weight rather than at the marked capacity of the car as prescribed by the established tariff, it may collect the correct rate. *St. Louis, I. M. & S. R. Co. v. Wolf*, 100 Ark. 22, 139 S. W. 536, Ann. Cas. 1913 C. 1384.

The fact that a railway company's portion of a through contract rate for a shipment from a foreign country to an inland point, is less than its established interstate rate, does not show the invalidity of the contract under the Act Regulating Commerce, and the carrier cannot collect a higher tariff rate. *Southern P. R. Co. v. Redding*, 17 Tex. Civ. App. 440, 43 S. W. 1061.

### Contract for Less Than Local Rates.

#### — When No Through Rate.

Under section 6 of the Interstate Commerce Act an agreement of a carrier to move an interstate shipment over the lines of connecting carriers at less than the established local rates is void, although there was no joint through rate, and the local rates may be collected. *Kansas City S. R. Co. v. Albers Comm. Co.*, 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316, reversing 79 Kan. 59, 99 Pac. 819.

Where connecting interstate carriers have not established a through joint rate, and one of them agrees to transport an interstate shipment to a point on the line of the other carrier for a definite sum, which agreement was confirmed by the latter carrier, it cannot at destination, in the absence of a showing that the contract rate is unreasonable or different from that granted other shippers, collect a higher rate consisting of the sum of the respective local tariff rates of the two carriers, which had been approved by the Interstate Commerce Commission. *Missouri P. R. Co. v. Relf*, 78 Kan. 463, 97 Pac. 477.

When connecting carriers establish local but not a through joint interstate rate, and one of them contracts to transport a through shipment for less than the combined local rates, the contract is void, and the amount of the local rates may be collected. *Atchison, T. & S. F. R. Co. v. Bell*, 31 Okla. 238, 120 Pac. 887, 38 L. R. A. (N. S.) 351.

### 3. When Less Than Tariff Rate Collected.

#### (a) In General.

#### Recovery of Undercharge.

The fact that a carrier accepts less than its established tariff rate for an interstate shipment does not modify the rights of the parties to insist on the legal rate. *Dayton Iron Co. v. Cincinnati, N. O. & T. P. R. Co.*, 239 U. S. 446, 60 L. ed. 375,

36 Sup. Ct. Rep. 137, affirming 134 Tenn. 221, 183 S. W. 739.

A shipper who obtains a lower interstate freight rate than that fixed by the published tariff of a carrier is answerable for the correct rate. *Foster v. Kansas City S. R. Co.*, 121 La. 1053, 46 So. 1014.

A carrier may recover the difference between the rate paid for an interstate shipment and the correct tariff rate. *Crane R. Co. v. Philadelphia & R. R. Co.*, — Pa. —, 97 Atl. 1055.

A carrier may collect its established charges for storing an interstate shipment notwithstanding that it accepted a less sum and gave a receipt in full to the consignee. *In re Arlington Hotel Co.*, — Del. —, 98 Atl. 186.

When a shipper is ignorant of the fact that the rate charged for an interstate shipment is less than that fixed by the established tariff, he is not answerable for the difference. *Southern Kansas R. Co. v. Burgess*, — Tex. Civ. App. —, 90 S. W. 189.

#### (b) Mistakes in or Misquotation of Rates.

Recovery of damages for misquotation of rates, see *infra* IV, K, 3.

#### Mistakes.

Although a carrier by mistake or otherwise delivers an interstate shipment on the payment of a lower freight rate than that stated in the established schedules, it may recover the difference in an action at law. *Seaboard A. L. R. Co. v. Luke*, — Ga. App. —, 90 S. E. 1041; *New York, N. H. & H. R. Co. v. York*, 215 Mass. 36, 102 N. E. 336, writ of error dismissed 239 U. S. 631, 60 L. ed. 477, 36 Sup. Ct. Rep. 166; *Pennsylvania R. Co. v. Crutchfield*, 55 Pa. Sup. Ct. 346.

Where, without fraud or willful deception, a carrier mistakenly inserted a lower freight rate in a bill of lading than that provided by its interstate tariffs, it may collect the correct rate on delivery of the shipment at destination. *Savannah, F. & W. R. Co. v. Bundick*, 94 Ga. 775, 21 S. E. 995.

The payment by a consignee of a part only on a correct tariff interstate freight rate, although without notice of the mistake, does not relieve him from liability to the carrier for the difference. *Pennsylvania R. Co. v. Titus*, 216 N. Y. 17, 109 N. E. 857, reversing 156 App. Div. 830, 142 N. Y. Supp. 43.

#### Misquotation of Rates.

Ignorance or misquotation of interstate rates is not an excuse for paying or charging either more or less than the established and filed rates for interstate trans-

portation. *Louisville & N. R. Co. v. Maxwell*, 237 U. S. 94, 59 L. ed. 853, 35 Sup. Ct. Rep. 494.

A carrier may recover the established tariff rate for an interstate shipment notwithstanding that a lower rate was quoted the shipper, upon which he relied in good faith. *Baldwin Sheep & L. Co. v. Columbia S. R. Co.*, 58 Oreg. 285, 114 Pac. 469; *Philadelphia & R. R. Co. v. Baer*, 56 Pa. Super. Ct. 307, reversing 20 Pa. Dist. Ct. 556, 38 Pa. Co. Ct. Rep. 549; *Wardlow v. Andrews*, — Tex. Civ. App. —, 180 S. W. 1161; *Coeur d'Alene & S. R. Co. v. Union P. R. Co.*, 49 Wash. 244, 95 Pac. 71.

A shipper is answerable to a carrier for the through joint tariff rate for an interstate shipment according to the published and filed schedules, although the former relies in good faith on a lower rate that the carrier mistakenly quoted him. *Alabama G. S. R. Co. v. McFadden*, 232 Fed. 1000.

A carrier may recover an undercharge on an interstate shipment due to a mistake in quoting a rate, although it delivered the shipment to the consignee and accepted payment of the quoted rate. *Louisville & N. R. Co. v. McMullan*, 5 Ala. App. 662, 59 So. 683; *Georgia R. R. v. Creety*, 5 Ga. App. 424, 63 S. E. 528.

The fact that the correct amount of an interstate freight rate was peculiarly within the knowledge of a carrier and its agents will not preclude a recovery of the correct rate from a shipper, although the latter relied in good faith on the rate as quoted him, since he was charged with knowledge of the true tariff rate. *Baltimore & O. S. W. R. Co. v. New Albany Box & B. F. Co.*, 48 Ind. App. 647, 94 N. E. 906, S. C. 48 Ind. App. 647, 96 N. E. 28.

A carrier that quotes a shipper a lower interstate freight rate than that established by its tariff, may recover the correct rate from the shipper, even though unreasonable, since the Interstate Commerce Commission alone can give relief from unreasonable rates. *Atchison, T. & S. F. R. Co. v. Superior Refining Co.*, 83 Kan. 732, 112 Pac. 604.

#### (c) Mistakes in Classification or Weights.

##### Improper Classification.

Where oats which were not intended for feeding live stock in transit or for seed were shipped in interstate commerce as emigrant's movables, at destination the higher tariff rate on the oats may be collected, since the contract of shipment violated the Act Regulating Commerce. *St. Louis & S. F. R. Co. v. Ostrander*, 66 Ark. 567, 52 S. W. 435.

Where the rate agreed on for an interstate shipment of narrow-gauge cars was

obtained by the representation that they were intended for use by a steam railway, the carrier may collect the applicable higher tariff rate from the consignee, where it appears that such cars were intended for use on a logging railroad. *Missouri, K. & T. R. Co. v. Trinity County L. Co.*, 1 Tex. Civ. App. 553, 21 S. W. 290.

##### Mistakes in Weight.

Where, as the result of a mistake as to the weight of an interstate shipment, a lower rate was collected than that established by the tariffs, the carrier may collect the difference. *Pennsylvania R. Co. v. Mogi*, 71 Misc. 412, 128 N. Y. Supp. 643.

#### 4. When No Established Rate.

##### Rates Not Legally Established.

Where an interstate shipment was made at an agreed rate which the contract stated was the correct tariff charge, the shipper is not liable for the higher rate actually shown by the tariff which did not appear to have been established as required by the Act Regulating Commerce. *Gulf C. & S. F. R. Co. v. Leatherwood*, 29 Tex. Civ. App. 507, 69 S. W. 119.

#### 5. Effect of Failure to File, Publish or Post Rates.

##### Failure to Publish.

One who makes an interstate shipment over the lines of several connecting carriers at a stipulated rate cannot be required to pay a higher tariff rate when it does not appear that the tariff was ever published by the carriers. *Atlanta, K. & N. R. Co. v. Horne*, 106 Tenn. 73, 59 S. W. 134.

##### Failure to Post.

A carrier may recover undercharges on interstate shipments, although two copies of its schedules of rates were not posted in its stations as required by law. *Louisville & N. R. Co. v. McMullan*, 5 Ala. App. 662, 59 So. 683; *No. Ala. R. Co. v. Wilson Mercantile Co.*, 9 Ala. App. 269, 63 So. 34; *Atlanta, K. & N. R. Co. v. Horne*, 106 Tenn. 73, 59 S. W. 134.

Where a carrier that had not posted its schedule or tariff of interstate freight rates, quoted a shipper a rate less than that established by its tariffs, the carrier may recover the difference from the shipper, although the latter acted on the quoted rate in good faith for two years. *Central R. of N. J. v. Mauser*, 241 Pa. 603, 88 Atl. 791, 49 L. R. A. (N. S.) 92.

A delivering carrier cannot recover a greater rate than that agreed on for an interstate shipment over the lines of several

carriers, although such rate was alleged to be less than that prescribed by the established tariff, where it does not appear that a through rate had been established and posted according to law. *Freeman v. Kemendo*, — Tex. Civ. App. —, 148 S. W. 605.

A rate agreed upon for an interstate shipment is binding, although lower than the established tariff rate, where the agent at the point of origin had not been notified of the true rate, nor had the tariff been posted as required by law. *Chicago, R. I. & P. R. Co. v. Gardner*, — Tex. Civ. App. —, 86 S. W. 793.

#### **When Notice Displayed Stating Where Rates Filed.**

There was a sufficient posting to satisfy the Interstate Commerce Act and to permit a carrier to collect from a shipper the difference between the rate paid by him and the higher rate shown by the tariffs, where, at the station from which an interstate shipment was made, a sign was displayed stating that the applicable freight schedules were on file at a division freight office in another town. *Southern R. Co. v. Wilmont Oil Mills*, — S. C. —, 89 S. E. 476.

The failure of a carrier to post its interstate freight schedules at its stations does not preclude it from collecting the rate thereby prescribed, although higher than that agreed upon, where a notice was posted in its stations to the effect that the schedules were filed with the agent. *Houseman v. Fargo*, 124 N. Y. Supp. 1086.

When a carrier contracts to transport an interstate shipment for less than the rate shown by the tariffs filed with the Interstate Commerce Commission, it cannot recover the difference where it did not post copies of the tariff in its stations as required by law, but merely filed them with the station agents and posted notices to that effect. *Sloop v. Wabash R. Co.*, 200 Mo. 198, 98 S. W. 607.

#### **6. Furnishing Larger Cars Than Ordered.**

##### **In General.**

Where, for its own convenience, a carrier furnished an interstate shipper a larger car than he ordered, without that fact being noted on the bill of lading as the carrier's tariff required in order to entitle the shipper to a rate based on the size of the car ordered, and the carrier's claim for charges for the larger car was compromised in good faith, the carrier cannot afterwards recover the amount of the undercharge. *St. Louis S. W. R. Co. v. Spring River Stone Co.*, 236 U. S. 718, 59 L. ed. 805, 35 Sup. Ct. Rep. 456, affirming 169 Mo. App. 109, 154 S. W. 465.

#### **7. When Greater Charge for Short Than for Long Haul.**

##### **In General.**

A carrier cannot recover an alleged undercharge for an interstate shipment where a greater charge was demanded for a short than for a longer haul, when no peculiar conditions are shown justifying such discrimination. *Great N. R. Co. v. Loonan L. Co.*, 25 S. D. 155, 125 N. W. 644.

In a carrier's action against a shipper for the recovery of interstate freight rates according to established tariff, the carrier cannot apply a through rate to a Pacific coast point and the local return rate to an intermediate point, when the through rate to the intermediate point is not shown so that the court may determine which is the lower rate. *Oregon R. & N. Co. v. Coolidge*, 59 Oreg. 5, 116 Pac. 93.

#### **8. Estoppel.**

##### **In General.**

Equitable principles play no part in an action by a carrier against a shipper to recover undercharges on interstate shipments of freight in violation of the Act to Regulate Commerce. *Central R. of N. J. v. Mauser*, 241 Pa. 603, 88 Atl. 791, 49 L. R. A. (N. S.) 92.

An action by a carrier against a shipper for the recovery of undercharges on an interstate freight shipment is an action at law, rather than an equitable proceeding, in which no question of laches arises. *Baltimore & O. S. W. R. Co. v. New Albany Box & B. F. Co.*, 48 Ind. App. 647, 94 N. E. 906, S. C. 48 Ind. App. 647, 96 N. E. 28.

The question of the good faith of the parties, or whether a shipper will suffer loss in consequence of the mistake of a carrier in quoting less than the tariff rate for an interstate shipment, is not open to consideration in an action by the carrier for the recovery of an undercharge. *Baltimore & O. S. W. R. Co. v. New Albany Box & B. F. Co.*, 48 Ind. App. 647, 94 N. E. 906, S. C. 48 Ind. App. 647, 96 N. E. 28.

A carrier cannot estop itself by any act whatsoever from collecting the lawful tariff rates for interstate shipments. *Central of Ga. R. Co. v. Birmingham Sand & B. Co.*, 9 Ala. App. 419, 64 So. 202; *Louisiana R. & N. Co. v. Holly*, 127 La. 615, 53 So. 882.

The fact that a carrier by mistake collects from a consignee less than the full tariff rate for an interstate shipment, does not estop it from recovering the difference between the rate collected and the true rate. *New York, N. H. & H. R. Co. v. York*, 215 Mass. 36, 102 N. E. 336, writ

### **Demurrage Charges When More Cars Delivered Than Consignee Could Unload.**

A consignee cannot recover from a carrier for car service or demurrage charges collected on interstate car load shipments which were not unloaded within the free time because the carrier delivered more cars daily than the consignee could unload. *Nebraska Transfer Co. v. Chicago, B. & Q. R. Co.*, 90 Neb. 488, 134 N. W. 163.

## **2. Voluntary Payments.**

### **In General.**

One who voluntarily pays the charges demanded by a carrier and receives an interstate shipment, cannot recover an overcharge above the tariff rate on the ground that the payment was coerced by the carrier's refusal to make delivery until the illegal charges were paid. *Hardaway v. Southern R. Co.*, 90 S. C. 475, 73 S. E. 1020, Ann. Cas. 1913 D. 266.

A person who voluntarily and without protest pays an interstate freight rate on fruit, including an icing charge, cannot recover the amount of the latter charge from the carrier on the ground that it was unlawful, and that, as the plaintiff was compelled to pay it in order to obtain the fruit, it constituted duress of property. *Knudsen-Ferguson F. Co. v. Chicago, St. P. M. & O. R. Co.*, 79 C. C. A. 483, 149 Fed. 973, certiorari denied 204 U. S. 670, 51 L. ed. 672, 27 Sup. Ct. Rep. 786.

A shipper who for several years paid the tariff rate on interstate shipments without protest or demur cannot recover damages from the carrier under section 8 of the Act to Regulate Commerce, on the theory that the rates paid were unreasonable and unjust. *Van Patten v. Chicago, M. & St. P. R. Co.*, 81 Fed. 545.

### **What Payments Voluntary.**

Payments of overcharges on numerous interstate shipments are not voluntary so as to preclude a recovery of the excess above the contract rate, when payments were made by agents and the mistake was not discovered by the principal until some time afterwards, when part of the overcharges were refunded by the carrier, and the shipper delayed action on the assurance of the carrier that the whole matter would be adjusted. *Kansas City S. R. Co. v. Albers Comm. Co.*, 79 Kan. 59, 99 Pac. 819, reversed on other grounds 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316.

## **3. Excessive and Unreasonable Charges.**

### **(a) In General.**

#### **When Established Rate Collected.**

A shipper cannot recover alleged overcharges on interstate shipments when it

appears that the rates charged and collected by a carrier were those prescribed by its duly established tariffs and schedules. *Geraty v. Atlantic C. L. R. Co.*, 211 Fed. 227; *Van Patten v. Chicago, M. & St. P. R. Co.*, 81 Fed. 545; *Baltimore & O. R. Co. v. LaDue*, 128 App. Div. 594, 112 N. Y. Supp. 964, reversing 57 Misc. 614, 108 N. Y. Supp. 659.

A shipper of live stock cannot recover from a carrier for switching charges collected for moving cars at destination from a point on its own line to a stock yard in another part of a city, when the charge made was in accordance with the carrier's published tariff. *Walker v. Keenan*, 19 C. C. A. 668, 73 Fed. 755, reversing 64 Fed. 992, certiorari denied 164 U. S. 706, 41 L. ed. 1180, 17 Sup. Ct. Rep. 1002.

A shipper of interstate freight cannot recover from a carrier the excess of rates collected above those permitted by state laws or by contract between the carrier and the state, where the rates collected were in accordance with the duly established interstate tariffs. *Clough v. Boston & M. R. Co.*, 77 N. H. 222, 90 Atl. 863.

### **Icing Charges.**

A shipper cannot recover from a carrier for icing charges exacted for an interstate shipment on the ground of unreasonableness because the charge exceeds the actual cost of the ice. *Geraty v. Atlantic C. L. R. Co.*, 211 Fed. 227.

### **Necessity of Showing Illegality of Rate Collected.**

A shipper cannot recover damages under section 1 of the Act Regulating Commerce on the ground that an interstate freight rate collected by a carrier was unjust and unreasonable, where the former does not aver either that the carrier failed to publish a schedule of rates or that if it did those collected were in excess of the established rates. *Kinnavey v. Terminal R. Assn.*, 81 Fed. 802.

An interstate shipper cannot, in the absence of an averment that there was no existing rate published as required by the Act Regulating Commerce, recover the excess above a reasonable rate collected by a carrier. *Swift v. Philadelphia & R. R. Co.*, 64 Fed. 59, S. C. 58 Fed. 858.

Since by requiring the fixing and publication of interstate freight rates by carriers, the Interstate Commerce Act supplies prima facie evidence of the correct rates a carrier may charge, they can be overcome only by averments in avoidance thereof; and a shipper cannot recover the excess over a reasonable rate collected by a carrier, in the absence of an averment that its rates were not established and published in accordance with such law

Swift v. Philadelphia & R. R. Co., 64 Fed. 59.

**(b) Charges Not Prescribed by Tariffs.**

**In General.**

A shipper who is compelled to pay interstate freight charges not provided for in a carrier's established tariffs may recover the excess in an action at law, since it is not a suit for the recovery of overcharges made in violation of the Interstate Commerce Act. *Banner v. Wabash R. Co.*, 131 Ia. 405, 108 N. W. 759.

**Icing Charge in Separate Schedule.**

A shipper cannot, without showing pecuniary damages, recover reasonable icing charges paid by him because such charges were not in a carrier's tariff, where they were contained in a separate schedule. *Knudsen-Ferguson F. Co. v. Michigan C. R. Co.*, 79 C. C. A. 46, 148 Fed. 968, certiorari denied 204 U. S. 671, 51 L. ed. 672, 27 Sup. Ct. Rep. 786.

**(c) Charges in Excess of Tariff or Contract Rate.**

Burden of proof to show overcharges, see *infra* XIII, G, 5.

**Rates in Excess of Established Tariffs.**

**— In General.**

An interstate shipper may recover overcharges made by a carrier in excess of its lawful tariff rates without showing any other damage. *Virginia-Carolina Peanut Co. v. Atlantic C. L. R. Co.*, 166 N. C. 62, 82 S. E. 1, rehearing denied — N. C. —, 84 S. E. 705.

**— Effect of Liability of Initial Carrier.**

The fact that the Carmack Amendment imposes primary liability on an initial carrier for the negligence of subsequent carriers does not preclude an action against a delivering carrier for collecting a charge in excess of the interstate tariff rates. *Western & A. R. Co. v. White Provision Co.*, 142 Ga. 246, 82 S. E. 644.

**Charges in Excess of Contract Rate.**

A shipper who is compelled to pay the tariff rate for an interstate shipment can not recover from the carrier the difference between such rate and a lower contract rate. *Kizer v. Texarkana & Ft. S. R. Co.*, 66 Ark. 348, 50 S. W. 871, writ of error dismissed 179 U. S. 199, 45 L. ed. 152, 21 Sup. Ct. Rep. 100; *Missouri, K. & T. R. Co. v. Bowles*, 1 Ind. Ter. 250, 40 S. W. 899; *St. Louis & S. F. R. Co. v. Pickens*, — Okla. —, 151 Pac. 1055; *Atchison, T. & S. F. R. Co. v. Holmes*, 18 Okla. 92, 90 Pac. 22; *San Antonio & A. P. R. Co. v. Clements*, 20 Tex. Civ. App. 498, 49 S. W.

913; *Houston & T. C. R. Co. v. Dumas*, — Tex. Civ. App. —, 43 S. W. 609.

A shipper cannot recover the excess above a contract rate he was compelled to pay for an interstate shipment, where such agreement gave him an unreasonable preference over other shippers, in violation of the Act Regulating Commerce. *Kizer v. Texarkana & Ft. S. R. Co.*, 66 Ark. 348, 50 S. W. 873, writ of error dismissed 179 U. S. 199, 45 L. ed. 152, 21 Sup. Ct. Rep. 100.

When connecting carriers contract with a shipper for an interstate freight rate when none has been established, each carrier's proportion being designated, one of them cannot increase its share by thereafter establishing a higher through joint rate. *Kansas City S. R. Co. v. Albers Comm. Co.*, 79 Kan. 59, 99 Pac. 819, reversed on other grounds 223 U. S. 573, 59 L. ed. 556, 32 Sup. Ct. Rep. 316.

An initial carrier is not answerable to a shipper for charges exacted for an interstate shipment by the delivering carrier in excess of the contract rate, where the charges were not paid in advance by the shipper, but each carrier advanced the charges of the preceding carrier, and it did not appear that the initial carrier received any portion of the overcharge. *McManus v. Chicago G. W. R. Co.*, 156 Ia. 359, 136 N. W. 769.

**Overcharges Due to Diversion or Misrouting.**

A carrier which, because of a congestion on the line of a connecting carrier over which an interstate shipment was routed, diverted it to another line, is answerable to the shipper for a charge he was thereby compelled to pay in excess of the established tariff rate under which the shipment was made, notwithstanding a stipulation of the bill of lading, which was not incorporated in the tariff, permitting the initial carrier, when necessary, to divert the shipment at the expense of the shipper. *Louisville & N. R. Co. v. Dickerson*, 112 C. C. A. 294, 191 Fed. 705, affirming 187 Fed. 874.

Where a connecting carrier mistakenly and without the knowledge of a shipper, and in violation of the Act to Regulate Commerce, agreed to transport interstate freight at less than the combined local rates of the several connecting carriers, and by reason of the misrouting of the shipment by the initial carrier the shipper was compelled to pay a much greater rate, he may recover the difference from the initial carrier. *Pond-Decker L. Co. v. Spencer*, 30 C. C. A. 430, 86 Fed. 846, reversing 81 Fed. 277, disapproved 82 C. C. A. 135, 153 Fed. 1, 14 L. R. A. (N. S.) 400.

Where by mistake a connecting car-

rier contracted to transport an interstate shipment over the lines of several connecting carriers for less than the amount of their combined local rates, and by reason of the misrouting of the shipment by the initial carrier the shipper was compelled to pay more than the contract rate, the initial carrier, who was ignorant of the contract rate, is answerable to the shipper for such damages only as were reasonably within the contemplation of the parties at the time the contract was made, rather than for the difference between the contract rate and what the shipper was compelled to pay. *Central Trust Co. v. Georgia P. R. Co.*, 81 Fed. 277, reversed 30 C. C. A. 430, 86 Fed. 846, disapproved 82 C. C. A. 135, 153 Fed. 1, 14 L. R. A. (N. S.) 400.

**(d) Action by Interstate Commerce Commission as Condition Precedent.**

**In General.**

There can be no recovery for the exaction of alleged unreasonable interstate freight rates under an established tariff, until the validity of the rates has been determined by the Interstate Commerce Commission. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 462, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075, reversing 38 Tex. Civ. App. 366, 85 S. W. 1052; *Phillips v. Grand Trunk W. R. Co.*, 115 C. C. A. 94, 195 Fed. 17, affirmed 236 U. S. 662, 59 L. ed. 774, 35 Sup. Ct. Rep. 444; *Franklin v. Philadelphia & R. R. Co.*, 203 Fed. 134; *Darnell v. Illinois C. R. Co.*, 190 Fed. 656, appeal dismissed 225 U. S. 243, 56 L. ed. 1072, 32 Sup. Ct. Rep. 760; *Foster Lumber Co. v. Union P. R. Co.*, 97 Neb. 669, 151 N. W. 168; *Robinson v. Baltimore & O. R. Co.*, 64 W. Va. 406, 63 S. E. 323, affirmed 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114.

Notwithstanding that all existing statutory and common-law remedies of a shipper are preserved by section 22 of the Act Regulating Commerce, he cannot maintain an action against a carrier to recover alleged excessive and discriminatory charges for the interstate transportation of freight under duly established tariffs, in the absence of an appropriate finding and order by the Interstate Commerce Commission as to the reasonableness of such rate. *Robinson v. Baltimore & O. R. Co.* 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114, affirming 64 W. Va. 406, 63 S. E. 323; *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 462, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075, reversing 38 Tex. Civ. App. 366, 85 S. W. 1052; *Geraty v. Atlantic C. L. R. Co.*, 211 Fed. 227; *Hunter v. New York, N. H. & H. R. Co.*, — App. Div. —, 161 N. Y. Supp. 10.

Where a requirement of an interstate freight tariff that the ultimate destination must be stated in bills of lading in order to give a shipper the privilege of cumulating and dressing poles in transit under interstate rates, was held void by the Interstate Commerce Commission, and thereafter a shipper, because of noncompliance with such requirement, was denied such privilege at the interstate rates and was compelled to pay higher local rates to the concentration point and thence to destination, he may, under sections 9 and 16 of the Act Regulating Commerce, without first obtaining a reparation order from the Commission, recover from the carrier the difference between the two rates. *National Pole Co. v. Chicago & N. W. R. Co.*, 127 C. C. A. 561, 211 Fed. 65, reversing 200 Fed. 185.

Without previous application to the Interstate Commerce Commission, a shipper may recover from a carrier charges collected in excess of the tariff rate on emigrant's movables on the theory that a portion of the goods did not fall within such designation. *Kansas City S. R. Co. v. Tonn*, 102 Ark. 20, 143 S. W. 577.

**Charges in Excess of Tariff Rates.**

Submission of a claim to the Interstate Commerce Commission is not a condition precedent to a shipper's right of action against a carrier under section 9 of the Act Regulating Commerce, for the recovery of overcharges in excess of a carrier's duly established interstate freight rates. *Gimbel v. Barrett*, 215 Fed. 1004; *Coad v. Chicago, St. P. M. & O. R. Co.*, — Ia. —, 154 N. W. 396.

**Rates Avoided in Proceeding to Which Plaintiff Not a Party.**

A shipper, who was not a party to a proceeding before the Interstate Commerce Commission, may take advantage of a finding of the unreasonableness of an interstate freight rate, and may recover from a carrier overcharges paid by him under such rate without making further application to the Commission for redress. *Phillips Co. v. Grand Trunk W. R. Co.*, 236 U. S. 662, 59 L. ed. 774, 35 Sup. Ct. Rep. 444, affirming 115 C. C. A. 94, 195 Fed. 12.

When a shipper was compelled to pay combined local freight rates instead of lower interstate rates because of noncompliance with a requirement of an interstate tariff with respect to noting on bills of lading the ultimate destination of poles in order to confer the privilege of cumulating and dressing them in transit, he may, without first submitting his claim to the Interstate Commerce Commission, recover the difference between the two rates from the carrier, where such re-



quirement was held void by the Commission in a proceeding to which the plaintiff was not a party. *National Pole Co. v. Chicago & N. W. R. Co.*, 127 C. C. A. 561, 211 Fed. 65, reversing 200 Fed. 185.

#### 4. Effect of Failure to File, Publish or Post Rates.

##### In General.

There can be no recovery for alleged overcharge of interstate freight rates in the absence of evidence that any rates were ever established and published. *Blacklock Hardware Co. v. Seaboard A. L. R. Co.*, — N. C. —, 86 S. E. 1025.

##### Failure to File or Post at Stations.

A shipper may recover the amount collected by a carrier at destination in excess of the rate stipulated in a bill of lading for an interstate shipment, although the rate paid was that prescribed by the established tariff, where it does not appear that a printed copy of such tariff was furnished the carrier's agent at the station where the contract of shipment was made, although one had been filed at a nearby station. *Hunter v. St. Louis & S. F. R. Co.*, 167 Mo. App. 624, 150 S. W. 733.

Where a carrier failed to post its interstate freight schedules at its stations but posted a notice to the effect that they were on file with the agent, a shipper who was compelled to pay the tariff rate, which was higher than that contracted for, can not recover the difference. *Houseman v. Fargo*, 124 N. Y. Supp. 1086.

A rate agreed upon for an interstate shipment, although lower than the established tariff, is binding on the parties, where the station agent at the point of origin had not been informed of the correct rate, nor had the tariff been posted as required by law, and the shipper may recover the difference between the agreed rate and that which he was compelled to pay. *Chicago, R. I. & P. R. Co. v. Gardner*, — Tex. Civ. App. —, 86 S. W. 793.

#### 5. Mistakes in Rates, Classifications and Weights.

##### Mistakes in Tariffs.

Where an initial carrier established a through joint interstate freight rate which by reason of the mistake of one of the connecting carriers was lower than it should have been, the rate as established is valid, and the initial carrier is answerable to a shipper who was compelled on the arrival of freight at destination to pay the difference between the established rate and what it should have been. *Virginia Coal & I. Co. v. Louisville & N. R. Co.*, 98 Va. 776, 37 S. E. 310.

##### Improper Classification.

Where plate iron, punched angle bars, rods, castings and rivets suitable for use as gas reservoir material were, at the suggestion of a carrier, billed as such, although intended for other structural uses for which there was no established tariff, and the delivering carrier collected a higher rate applicable to machinery, the shipper may recover the difference between the two rates, since there was no false classification within the meaning of the Act Regulating Commerce. *Atchison, T. & S. F. R. Co. v. Goetz*, 51 Ill. App. 151.

In an action for the recovery of the difference between the rate under which an interstate shipment was made and the higher rate collected by the delivering carrier on the theory of a wrong classification, the plaintiff may, where the defendant gave testimony tending to establish such fact, show that for a number of years similar shipments were carried for him by the defendant under the lower rate. *Hardaway v. Southern R. Co.*, 90 S. C. 475, 73 S. E. 1020, Ann. Cas. 1913 D. 266.

#### 6. Difference Between Old and New Rates.

##### When Increase Not Legally Established.

A shipper cannot recover the difference between the interstate rate paid by him under a tariff which was filed with the Interstate Commerce Commission but not posted, and a lower rate previously in force. *St. Louis S. W. R. Co. v. Burckett*, 229 U. S. 603, 57 L. ed. 1347, 33 Sup. Ct. Rep. 773.

Since, under the terms of the Act Regulating Commerce and the rules of the Interstate Commerce Commission, an increase in an interstate freight rate does not become effective merely by filing a new schedule with the Commission, but it must also be distributed and posted among the carrier's stations, a shipper may recover from the carrier the difference between the unposted rate he was compelled to pay and the old rate. *Virginia-Carolina Peanut Co. v. Atlantic C. L. R. Co.*, 166 N. C. 62, 82 S. E. 1, rehearing denied — N. C. —, 84 S. E. 705.

A shipper cannot recover the amount of increased interstate freight rates voluntarily paid by him after knowledge that 10 days' notice of the increase had not been given as required by the Act Regulating Commerce, where no shipments were made until 10 days after the shipper was aware of the defective notice. *Strough v. New York, C. & H. R. Co.*, 92 App. Div. 584, 87 N. Y. Supp. 30, affirmed 181 N. Y. 533, 73 N. E. 1133.

## 7. Collection of Interstate Rather Than Intrastate Rates.

### Reconsignment of Interstate Shipment at Destination to Intrastate Point.

One who ships a carload of freight from a point without a state and at destination, without unloading, reships it to an intrastate point, is liable, under the Act Regulating Commerce, for the full through tariff rate from point of origin to final destination, and he cannot recover the difference between the rate paid and the lower intrastate rate, since the shipment was interstate. *Porter v. St. Louis, S. W. R. Co.*, 78 Ark. 182, 95 S. W. 453.

### Reconsignment of Intrastate Shipment to Interstate Point.

Where cross-ties were sold a railway company under a contract for their delivery by rail f. o. b. at an intrastate point from which, without unloading, they were reshipped by the purchaser to another state, the seller may recover the excess above the intrastate freight rate he was compelled to pay on the shipment to the original intrastate destination on the theory that the shipment was interstate. *Louisville & N. R. Co. v. Ohio V. Tie Co.*, 148 Ky. 718, 147 S. W. 421, writ of error dismissed 223 U. S. 737, 58 L. ed. 820, 34 Sup. Ct. Rep. 606.

Where lumber was sold a railway company and transported by rail to an intrastate point for delivery to the purchaser, and there billed to and transported to an interstate point on the line of the purchaser, the shipment was interstate, and the shipper cannot recover the difference between the higher interstate rate he was compelled to pay to the intrastate point and the intrastate rate. *Werner S. M. Co. v. Kansas City S. R. Co.*, — Mo. App. —, 186 S. W. 1118.

### Where Carrier Has Both Interstate and Intrastate Route.

Where a carrier has both an interstate and an intrastate line between two points and transports a shipment over the longer route, the shipper may recover the difference between the rate paid and the lower intrastate rate, since he had the right to have the shipment carried over the shorter route. *Solum v. Northern P. R. Co.*, 133 Minn. 93, 157 N. W. 996; *Monarch Elevator Co. v. Same*, 133 Minn. 461, 157 N. W. 998.

Where a carrier that had both an interstate and an intrastate line between two points, transported a shipment over the longer interstate line, an action for the recovery of the difference between the higher rate paid and the intrastate rate is not one of misrouting over which the Interstate Commerce Commission has

jurisdiction. *Solum v. Northern P. R. Co.*, 133 Minn. 93, 157 N. W. 996; *Monarch Elevator Co. v. Same*, 133 Minn. 461, 157 N. W. 998.

## 8. Furnishing Larger Cars Than Ordered.

### In General.

A shipper who was furnished four small cars in lieu of two large cars he had ordered for interstate use, may recover the difference between the rate he was compelled to pay and the lower rate for the two large cars, where a rule of the Interstate Commerce Commission restricts the freight charges in such a case to the cars ordered. *Yorke Furniture Co. v. Southern R. Co.*, 162 N. C. 138, 78 S. E. 67.

### Action by Interstate Commerce Commission as Condition Precedent.

An interstate shipper cannot, without obtaining a reparation order from the Interstate Commerce Commission, recover from a carrier the difference between the rate he was compelled to pay for cars of double the capacity he ordered, which the carrier furnished for its own convenience, and what he would have paid had the smaller cars been furnished. *Foster Lumber Co. v. Union P. R. Co.*, 97 Neb. 669, 151 N. W. 168.

When, for the convenience of a carrier, an interstate shipper was furnished a larger car than he ordered, such fact being noted on the bill of lading, and at destination the tariff charge for the larger car was collected, he may recover the difference between the two charges without first presenting his claim to the Interstate Commerce Commission, where the tariff did not require the collection of the greater charge under the circumstances. *Western & A. R. Co. v. White Provision Co.*, 142 Ga. 246, 82 S. E. 644.

## 9. Who May Recover.

### In General.

The person who pays the charges on an interstate freight shipment is the only one who can recover the excess above a reasonable rate from the carrier. *Davis v. Mobile & O. R. Co.*, 114 C. C. A. 8, 194 Fed. 374.

A shipper cannot recover from a carrier the difference between a reasonable and an unreasonable interstate freight rate which was not paid by him or any one in his behalf. *Davis v. Mobile & O. R. Co.*, 114 C. C. A. 8, 194 Fed. 374.

A shipper of lumber cannot recover the excess above a reasonable charge for an interstate shipment of freight, on the theory that his profits were reduced and diminished to the extent of the over-

charge, where the freight charges were not paid by him. *Davis v. Mobile & O. R. Co.*, 114 C. C. A. 8, 194 Fed. 374.

#### Assignee.

A claim for damages based on section 8 of the Interstate Commerce Act for overcharges on interstate freight, is assignable so as to transfer the beneficial interest therein. *Edmunds v. Illinois C. R. Co.*, 80 Fed. 78.

#### K. Misquotation of Rates.

Recovery of undercharges by carrier when misquotation of rates, see *supra* IV, I, 3, (b).

##### 1. In General.

(No decisions.)

##### 2. Recovery of Excess Above Quoted Rate.

###### In General.

When a carrier, either intentionally or by mistake, quotes a shipper a lower interstate rate than that established by its schedules and tariffs, the latter cannot recover from the carrier the difference between the quoted rate and the correct one he was compelled to pay. *Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628, reversing 98 Tex. 352, 83 S. W. 800; *Herminghausen v. Adams Express Co.*, 167 Ia. 230, 149 N. W. 234; *Chicago, R. I. & P. R. Co. v. Hubbell*, 54 Kan. 232, 38 Pac. 266; *Dunne v. St. Louis S. W. R. Co.*, 166 Mo. App. 372, 148 S. W. 997; *Wentz v. Union P. R. Co.*, 85 Neb. 548, 123 N. W. 1085; *Baldwin Sheep & L. Co. v. Columbia S. R. Co.*, 58 Ore. 285, 114 Pac. 469; *Wichita F. & W. R. Co. v. Asher*, — Tex. Civ. App. —, 171 S. W. 1114.

##### 3. Liability of Carrier for Misquoting Rates

Measure of damages for losses due to purchasing grain for shipment in reliance on misquoted freight rate, see *infra* XIII, F, 1.

###### Liability for Misrepresentation.

Where, with knowledge of a shipper's purpose, a carrier, unintentionally and without fraud, quoted him a lower interstate freight rate than that fixed by its tariff, and the shipper, in reliance on the quoted rate, contracted to sell grain, and when the shipment was delivered at destination was compelled to pay the correct tariff rate, he cannot recover from the carrier the difference between the two rates on the ground that the transaction was founded on the misrepresentation of the carrier and not on the void contract. *Schenberger v. Union P. R. Co.*, 84 Kan. 79, 113 Pac. 433, 33 L. R. A. (N. S.) 391.

A shipper who was injured by a carrier's misquotation of an interstate freight rate and who was thereby compelled to pay the higher correct rate, cannot recover the difference from the carrier as damages for misrepresentation. *Texas & P. R. Co. v. Leslie*, 62 Tex. Civ. App. 380, 131 S. W. 824, rehearing denied 131 S. W. 827.

##### Negligence in Showing Wrong Rate Sheets.

No common-law right of action arises from the negligence of a carrier's agent in showing an interstate shipper a wrong rate sheet on which the latter relied in purchasing grain for interstate shipment, and in consequence suffered a loss by being compelled to pay a higher rate. *Sloop v. Delano*, 182 Mo. App. 299, 170 S. W. 385.

##### Losses Due to Purchases Made in Reliance on Quoted Rate.

Where a carrier, after quoting a shipper a lower interstate freight rate than that fixed by its tariffs, refused to make shipment except upon the payment of a higher unlawful rate, the carrier is answerable to the shipper who was compelled to sell the proposed shipment at a loss. *Aldrich v. Southern R. Co.*, 95 S. C. 427, 79 S. E. 316.

In a shipper's action for damages resulting from a carrier's refusal to accept an interstate shipment except at an unlawful rate, the defendant cannot contend that the plaintiff could not recover because he did not give the former notice of the number of carloads he intended to ship and the amount of damage he would sustain as the result of the defendant's act, where the only question left to the jury was the loss on the two carloads of goods the plaintiff had bought and loaded before payment of the unlawful rate was demanded. *Aldrich v. Southern R. Co.*, 95 S. C. 427, 79 S. E. 316.

##### 4. Effect of Failure to File, Publish or Post Rates.

###### In General.

A shipper cannot recover from a carrier for damages sustained as the result of the erroneous quotation of a lesser rate for the interstate transportation of freight than that established by the published tariff, which was neither filed nor posted at the place where the quotation was made. *Illinois C. R. Co. v. Henderson Elevator Co.*, 226 U. S. 441, 57 L. ed. 290, 33 Sup. Ct. Rep. 176, reversing 138 Ky. 220, 127 S. W. 779.

When, because of a carrier's failure to file, post and keep a rate schedule open for public inspection at a station, as required by section 6 of the Act to Regula-

late Commerce, a shipper was quoted a lower interstate freight rate than that contained in such schedule, and at destination he was required to pay the difference between the two rates before he could obtain the shipment, he may recover the difference from the carrier, where he might have shipped at a lower rate over another line. *St. Louis S. W. R. Co. v. Lewellen*, 113 C. C. A. 414, 192 Fed. 540, certiorari denied 225 U. S. 701, 56 L. ed. 1264, 32 Sup. Ct. Rep. 835.

## L. Liens and Sales for Charges.

### 1. Liens.

#### In General.

A carrier has a lien on an interstate shipment for freight charges accruing after notice to the consignor of the refusal of the consignee to accept the property. *Baltimore & O. R. Co. v. Luella Coal & C. Co.*, 74 W. Va. 289, 81 S. E. 1044.

#### When Contract for Less Than Tariff Rate.

A carrier that contracts to carry interstate freight for less than the established schedule rate has a lien on the shipment for the legal charges. *Sutton v. St. Louis & S. F. R. Co.*, 159 Mo. App. 685, 140 S. W. 76; *St. Louis, I. M. & S. R. Co. v. McNabb*, — Okla., —, 162 Pac. 811; *San Antonio & A. P. R. Co. v. Clements*, 20 Tex. Civ. App. 489, 49 S. W. 913.

When without fraud or wilful deception a carrier mistakenly inserted a lower interstate freight rate in a bill of lading than that provided by its tariffs, if at destination the owner refuses to pay the correct rate the detention of the shipment by the carrier to enforce payment is not a conversion. *Savannah, F. & W. R. Co. v. Bundick*, 94 Ga. 775, 21 S. E. 995.

#### Demurrage Charges.

A carrier engaged in interstate commerce has a lien for demurrage charges on an interstate shipment left in a car after the expiration of the free time allowed by the tariff under which the shipment is made, since such charge is authorized by section 2 of the Hepburn Act. *Gault Lumber Co. v. Atchison, T. & S. F. R. Co.*, 37 Okla. 24, 130 Pac. 291.

A carrier has a lien on an interstate shipment for demurrage charges accruing after notice to the consignor of the refusal of the consignee to accept the property. *Baltimore & O. R. Co. v. Luella Coal & C. Co.*, 74 W. Va. 289, 81 S. E. 1044.

By "spotting" a car and permitting the consignee to remove a portion of an interstate shipment a carrier does not waive its lien for demurrage charges on the goods not removed from the car within the free time. *Gault Lumber Co. v. Atchi-*

*son, T. & S. F. R. Co.*, 37 Okla. 24, 130 Pac. 291.

#### Liability for Loss While Goods Held Under Lien.

A terminal carrier is not answerable for the loss of an interstate shipment while being held on the refusal of the consignee to pay the correct tariff charges which were higher than the contract rate. *San Antonio & A. P. R. Co. v. Clements*, 20 Tex. Civ. App. 498, 49 S. W. 913.

### 2. Sales.

Effect of limitation of value on liability of carriers for converting shipment by wrongful sale, see *infra* VI, I, (m).

#### Liability of Carrier for Making Sale.

##### — When Proceedings Regular.

A carrier is not answerable in damages to a shipper for the sale of an interstate shipment for demurrage charges imposed by its established schedules, where the proceeding is according to law. *Horton v. Tonopah & G. R. Co.*, 225 Fed. 406.

When by mistake a carrier contracted to transport an interstate shipment of cordwood at its actual weight instead of at the marked capacity of the car as prescribed by the tariff, it is not answerable to the owner where the shipment was sold for the correct charges on his refusal to pay them. *St. Louis, I. M. & S. R. Co. v. Wolf*, 100 Ark. 22, 139 S. W. 536, Ann. Cas. 1913 C. 1384.

##### — For Surplus.

Where a carrier waived the prepayment of the freight on an interstate shipment which the consignee refused to accept and pay the charges, and the carrier sold the shipment in conformity to law to enforce its lien for charges, it is answerable to the consignor for the surplus received above the charges. *Jelks v. Philadelphia & R. R. Co.*, 14 Ga. App. 96, 80 S. E. 216.

##### — When Sale Irregular.

A carrier is guilty of a conversion where it sells an interstate shipment for its established freight and demurrage charges to a purchaser who acts secretly for the carrier. *Horton v. Tonopah & G. R. Co.*, 225 Fed. 406.

Where, on its inability to locate a consignee, a carrier sold an interstate shipment for freight charges without first giving the consignor an opportunity to pay the same, the carrier is answerable for the conversion. *Southern R. Co. v. Born Steel R. Co.*, 126 Ga. 527, 55 S. E. 173.

Where a carrier demanded from the consignee of an interstate shipment of onions the higher of two conflicting tariff rates, and on his refusal to pay the same the car-

rier rendered a corrected bill and one and a half days later sold the shipment for charges, the carrier is answerable, since the consignee was entitled to the lower rate, and the sale was premature. *Dreyfus v. Pennsylvania R. Co.*, 90 Misc. 581, 153 N. Y. Supp. 966.

A carrier that sells an interstate shipment on the refusal of the owner to pay an excessive interstate freight rate is answerable for the conversion. *Pecos & N. T. R. Co. v. Porter*, — Tex. Civ. App. —, 183 S. W. 98, S. C. 156 S. W. 267, 56 Tex. Civ. App. 479, 121 S. W. 897.

A carrier that converts an interstate shipment by miscarrying it and then selling it for the freight charges, is answerable for the conversion. *St. Louis, I. M. & S. R. Co. v. Wallace*, — Tex. Civ. App. —, 176 S. W. 764.

#### **M. Recovery of Shipment When Overcharges Demanded.**

##### **In General.**

The refusal of a carrier to deliver an interstate shipment to the consignee on the tender of the correct freight charges when a greater sum was stated in the bill of lading, amounts to a conversion. *Brown v. Philadelphia & R. R. Co.*, 36 App. D. C. 221, 32 L. R. A. (N. S.) 189.

#### **Recovery by Legal Process.**

##### **— In General.**

Where a terminal carrier refused to deliver a shipment that came from another state when the consignee declined to pay the duly established joint through rate, the latter cannot, by tendering the intrastate rate of the delivering carrier, recover possession of the shipment by legal process on the theory that the transaction was intrastate. *Corcoran v. Louisville & N. R. Co.*, 125 Ky. 634, 101 S. W. 1185.

A void order of a Federal court annulling a published and established increase of interstate freight rates and directing the maintenance of a lower rate, does not authorize a consignee, on the refusal by a carrier of a tender of the lower rate, to recover possession of an interstate shipment by replevin. *Atchison, T. & S. F. R. Co. v. Foster Lumber Co.*, 31 Okla. 661, 122 Pac. 139.

##### **— When Contract Rate Lower Than Tariff Rate.**

Possession of an interstate shipment cannot be obtained from a carrier by legal process on its refusal to make delivery except on the payment of the tariff rate which is higher than that contracted for. *Gerber v. Wabash R. Co.*, 63 Mo. App. 145; *Church v. Minneapolis & St. L. R. Co.*, 14 S. D. 443, 85 N. W. 1001.

Where, as the result of the misapplication of established interstate freight rates to the classification prescribed in a schedule, a carrier quoted and a shipper paid a lower rate than the established one, he cannot on the carrier's refusal to deliver the shipment at destination unless the undercharge was paid, obtain possession of the property by replevin, since he was bound by and required to take notice of the applicable established rates. *Chicago, R. I. & P. R. Co. v. Whedbee*, 106 Ark. 237, 153 S. W. 86.

A shipper cannot recover an interstate shipment from a carrier, or damages for its detention, where it was shipped under a contract for a lower rate than that fixed by the established schedules, and at destination the shipper tendered the contract rate. *St. Louis, I. M. & S. R. Co. v. McNabb*, — Okla. —, 162 Pac. 811.

##### **— When Improper Classification.**

Since burlap horse covers in bales fall within the designation of blankets in an interstate freight tariff, a shipper cannot obtain possession of such property on tendering the carrier the tariff rate on burlap. *Smith v. Great N. R. Co.*, 15 N. D. 195, 107 N. W. 56.

A judgment in replevin in favor of a shipper for the recovery of an interstate shipment which was held by a carrier on the refusal of the former to pay an undercharge, cannot be sustained on the theory that there was no undercharge and that the shipment was properly made under an emigrant rate, where the amount of such rate was not shown, and the findings of the court were based on the idea that the shipper was not bound to take notice of an improper classification or a misquotation of rates. *Chicago, R. I. & P. R. Co. v. Whedbee*, 106 Ark. 237, 153 S. W. 86.

#### **Effect of Failure to Publish Tariffs.**

Where an interstate shipment was made at an agreed rate over the lines of several connecting carriers and the terminal carrier refused to deliver the property unless the correct higher tariff rate was paid, the shipper may obtain possession of the goods by legal process when it does not appear that the carriers ever published such tariff as required by law. *Atlanta, K. & N. R. Co. v. Horne*, 106 Tenn. 73, 59 S. W. 134.

## **V. ALLOWANCES, DISCRIMINATIONS, PREFERENCES AND REBATES.**

### **A. In General.**

#### **Actions.**

The authorization by section 16 of the Act Regulating Commerce of the bring-

ing of an action for damages by persons claiming injury by a carrier's violation of the act, does not impose a penalty in addition to the fines payable to the government, but gives a remedy for the recovery of the damages actually sustained from the wrongful act of the carrier. *Lehigh V. R. Co. v. Clark*, 125 C. C. A. 235, 207 Fed. 717, modified and affirmed 238 U. S. 473, 59 L. ed. 1414, 35 Sup. Ct. Rep. 717.

#### **Giving Mortgage Priority Over Claim for Building Switch Track as Preference.**

Where a railway company constructed a commercial siding for a shipper on his own land under a contract and upon credit, a judgment in favor of the carrier for the cost is not entitled to priority over a mortgage recorded long before the construction of the track, on the theory that as the proceeds of the mortgage sale were insufficient to pay both the mortgage debt and the judgment, there would be an unlawful discrimination in violation of the Act to Regulate Commerce if priority was denied, by permitting the shipper to obtain the siding without cost, while other shippers would be compelled to pay for similar facilities. *Guaranty Trust Co. v. Newark Meadows I. Co.*, — N. J. L. —, 94 Atl. 589.

### **B. Contracts Creating**

See generally *infra* VI, Contracts Pertaining to Interstate Traffic.

#### **C. Allowances for Services in Connection With Shipments.**

##### **1. In General.**

##### **Secret Allowances.**

A secret allowance made to a shipper by a carrier in violation of its published tariffs is not within section 15 of the Act Regulating Commerce pertaining to allowance to shippers for services in connection with interstate shipments, since such provisions apply only to allowances scheduled in the tariffs and, applicable alike to all shippers similarly situated. *Langdon v. Pennsylvania R. Co.*, 194 Fed. 486, S. C. 186 Fed. 237, reversed on other grounds sub nom. *Pennsylvania R. Co. v. Carbon C. & C. Co.*, 125 C. C. A. 361, 208 Fed. 145.

##### **2. Preparing Cars.**

##### **Grain Doors.**

Where the applicable duly filed interstate rate schedules make no reference to allowances for providing grain doors or bulkheads for carload shipments of grain, a shipper cannot recover for constructing such necessary appliances. *Loomis*

*v. Lehigh V. R. Co.*, 240 U. S. 43, 60 L. ed. 517, 36 Sup. Ct. Rep. 228, affirming 208 N. Y. 312, 101 N. E. 907, 147 App. Div. 195, 132 N. Y. Supp. 138.

Where an interstate tariff provides for paying shippers the actual costs of material necessary for repairing cars for the shipment of grain and for providing interior grain doors, there can be no recovery for inspecting and cleaning cars and for attaching grain doors, when the rules of the Interstate Commerce Commission prohibit reimbursement for attaching the doors unless permitted by the tariffs. *Rock Milling & E. Co. vs. Atchison, T. & S. F. R. Co.*, — Kan. —, 154 Pac. 254, S. C. — Kan. —, 158 Pac. 859.

A shipper cannot recover for grain doors provided for box cars by merely showing the total costs thereof, when there cannot be a recovery for an unascertained number of items relating to interstate shipments for which reimbursement was not provided in the carrier's interstate tariffs. *Stockton Elevator & S. Assn. v. Missouri P. R. Co.*, 97 Kan. 235, 154 Pac. 1126.

In a shipper's action for the cost of necessary labor and material for constructing grain doors for box cars used in interstate commerce, no defense is shown by an answer setting up a rule of the Interstate Commerce Commission forbidding the reimbursement of shippers for such services unless permitted by the regular tariffs, and alleging that the defendant's tariffs did not so provide at the time the services were rendered, where it was not also averred that such rule was in force at the time, in question. *Hanks v. Missouri P. R. Co.*, 92 Neb. 594, 138 N. W. 750.

##### **3. Handling Freight.**

##### **Cartage.**

A reduction of two cents per cwt. from the interstate freight rates to designated points on carload shipments in consideration of cartage by the shipper, is not a discrimination or rebate in violation of the Act Regulating Commerce, when the established tariffs provide for such allowance to all shippers, and a shipper who is denied such rebate may recover it from the carrier. *American Sugar R. Co. v. Delaware, L. & W. R. Co.*, 125 C. C. A. 251, 207 Fed. 793, reversing 200 Fed. 652.

##### **Wharfage.**

A carrier is not answerable to a shipper for service performed by him in the handling and wharfage of goods moved in interstate commerce where the published tariff of the carrier did not provide for the payment of such charges. *Southern*

Cotton Oil Co. v. Central of Ga. R. Co.,  
142 C. C. A. 627, 228 Fed. 335.

#### 4. Moving Freight on Part of Journey.

##### In General.

Where a railway company gave a shipper a through interstate rate on grain from an elevator located on a lake off the railway line, across which the grain was transported to the railway station by an independent boat line, the railway company could, without violating the Act to Regulate Commerce, pay the shipper a reasonable sum for hauling the grain across the frozen lake when navigation was closed. *Knapp v. Minneapolis, St. P. & S. S. M. R. Co.*, — N. D. —, 156 N. W. 1019.

#### D. Discriminations and Preferences.

##### 1. In General.

##### Recovery for Preferences and Discriminations.

A person who would recover from a carrier for discriminations in violation of the Act Regulating Commerce, must make out a case showing such violation by clear and direct evidence and not by way of inference, since an infraction of such law will not be presumed. *Parsons v. Chicago & N. W. R. Co.*, 167 U. S. 447, 42 L. ed. 231, 17 Sup. Ct. Rep. 887, affirming 11 C. C. A. 489, 63 Fed. 903.

Since an award of reparation by the Interstate Commerce Commission for damages sustained by a shipper from the exaction of excessive interstate freight rates by a carrier includes all damages that can properly be attributable to the overcharge, whether due to keeping him out of his money, or for injury to his business following as a remote result from the overcharges, and a subsequent action at law cannot be maintained for the alleged malicious conduct of the carrier in making such overcharges for the purpose of forcing the shipper out of business. *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 61 L. ed. —, 37 Sup. Ct. Rep. 120, reversing 161 Ky. 212, 170 S. W. 633.

An action lies against an interstate carrier for injuries sustained by a shipper from the withholding by the carrier of numerous conveniences and accommodations furnished other shippers, placing annoying burdens on him, and imposing extortionate freight rates, notwithstanding that the Interstate Commerce Commission, in establishing reasonable rates, awarded or recommended the repayment to such shipper of the excess of such charges above a reasonable rate, where at

the trial of the action at law no effort was made to recover for overcharges. *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 161 Ky. 212, 170 S. W. 633, reversed 242 U. S. 288, 61 L. ed. —, 37 Sup. Ct. Rep. 120.

##### Discriminations in Transportation Against Rival Restaurant.

An interstate carrier may establish eating-houses for the accommodation of its patrons and employees at points on its lines, and may transport necessary articles and commodities for use therein at less than the full interstate tariff rates under such conditions as the Interstate Commerce Commission may prescribe, without becoming answerable to the owner of a competing restaurant for resulting damages. *Montgomery v. Chicago, B. & Q. R. Co.*, 143 C. C. A. 138, 228 Fed. 616.

##### Action by Interstate Commerce Commission as Condition Precedent.

Where the petition in an action by the proprietor of a restaurant against an interstate carrier for the loss of profits resulting from the establishment by the carrier of an eating-house at a station, alleged that the defendant not only served passengers and employees therein, but the general public as well, and that the carrier transported free of charge most of the commodities and supplies needed and used in such eating-house, while the plaintiff was charged full tariff rates for like services; that the defendant's conduct was to the prejudice of the plaintiff; that the defendant undersold the plaintiff, and that prior to the establishment of such eating-house by the defendant there were ample eating facilities in the town, the plaintiff cannot recover damages under section 8 of the Act Regulating Commerce, without previous action by the Interstate Commerce Commission, since the petition did not show that all supplies for such eating-house were carried free or that the general public was served food prepared from commodities that were carried at less than full tariff rates. *Montgomery v. Chicago, B. & Q. R. Co.*, 143 C. C. A. 138, 228 Fed. 616.

Previous action by the Interstate Commerce Commission is not a condition precedent to a shipper's right of action against a carrier for damages sustained as the result of a combination or conspiracy, between carriers in violation of the Sherman Anti-trust law to drive independent coal dealers from the field by increasing the price of coal at the mines and by raising interstate freight rates so as to make the cost of coal at the mines exceed the market price. *Meeker v. Lehigh V. R. Co.*, 106 C. C. A. 94, 183 Fed. 548, reversing 175 Fed. 320, S. C. 162 Fed. 354.

## 2. Discriminations in Rates.

### Between Shippers.

In order to permit a shipper to recover under section 1 of the Act Regulating Commerce for unjust discriminations in interstate freight rates he must aver either the failure of the carrier to publish its schedule of rates, or its exaction of charges in excess of its published rates, since the rates published and filed are the prima facie criterion for determining the reasonableness of a given charge. *Kinnavey v. Terminal R. Ass'n*, 81 Fed. 802.

A shipper may recover damages from a carrier for unlawful discriminations in interstate freight rates, where the shipments of the former and of the favored shippers are to the same market. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 181 Fed. 403, S. C. 183 Fed. 908, 112 C. C. A. 637, 192 Fed. 475, modified and affirmed 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916.

Discriminations in interstate freight rates are for "contemporaneous services," within the meaning of the Act to Regulate Commerce, so long as the offending rates remain in force, and discrimination is practiced between shippers. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 181 Fed. 403, S. C. 183 Fed. 908, 112 C. C. A. 637, 192 Fed. 475, modified and affirmed 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916.

An independent coal dealer may maintain an action under the Sherman Antitrust Law against interstate carriers who control the greater portion of the anthracite coal output of the country, for damages sustained as the result of a conspiracy between the carriers to force him from business by increasing the price of coal at the mines and the cost of transportation, so as to exceed the price of coal at the market. *Meeker v. Lehigh V. R. Co.*, 106 C. C. A. 94, 183 Fed. 548, reversing 175 Fed. 320, S. C. 162 Fed. 354.

The Interstate Commerce Act does not give a right of action to a shipper merely because a carrier gives to other shippers similarly situated a lower interstate freight rate than that provided in its schedules, unless the plaintiff shows that he was damaged by such discriminations. *Lilly v. Northern P. R. Co.*, 64 Wash. 589, 117 Pac. 401.

### Demurrage.

A shipper cannot recover damages for an alleged discrimination by a carrier with respect to car service charges for shipments made on local bills of lading, where no such charge was imposed on similar shipments made on through bills of lading, if such practice was in accord with the duly established schedules of the car-

rier. *Clement v. Louisville & N. R. Co.*, 153 Fed. 979.

An interstate shipper may, under section 9 of the Act to Regulate Commerce, without previous action by the Interstate Commerce Commission, maintain an action against a carrier for unjust discriminations resulting from permitting a competitor to use cars without demurrage after the expiration of "free time," and denying the same privilege to the plaintiff. *Lynne v. Delaware, L. & W. R. Co.*, 170 Fed. 847, modified 113 C. C. A. 604, 193 Fed. 984.

A shipper cannot recover from a carrier demurrage charges paid on interstate carload shipments of hay at a suburban station, on the ground of unjust discrimination, because at the carrier's main terminal in the city it provided a warehouse for the storage of hay at less than the car demurrage rate, without providing similar facilities at the suburban station. *Michie v. New York, N. H. & H. R. Co.*, 151 Fed. 694.

### Exacting Greater Charge for Short Than for Long Haul.

Where two connecting carriers make a joint through interstate freight rate on grain, the fact that a greater proportionate charge is made all shippers for a shorter haul on the line of one of such carriers, does not violate section 4 of the Act Regulating Commerce prohibiting greater charges for shorter than for longer hauls, since the local tariffs of each carrier are not to be measured by the through joint rate. *Chicago & N. W. R. Co. v. Osborne*, 3 C. C. A. 347, 52 Fed. 912, reversing 48 Fed. 49; *Parsons v. Chicago & N. W. R. Co.*, 11 C. C. A. 489, 63 Fed. 903, affirmed 167 U. S. 447, 42 L. ed. 231, 17 Sup. Ct. Rep. 887.

A shipper may recover damages from a carrier for charging more, in violation of the Act Regulating Commerce, for a short than for a longer haul under similar circumstances, although the rates for the longer haul were duly established. *Junod v. Chicago & N. W. R. Co.*, 47 Fed. 290, reversed 3 C. C. A. 347, 52 Fed. 912, writ of certiorari denied 146 U. S. 354, 36 L. ed. 1002, 13 Sup. Ct. Rep. 281.

The fact that there was secret rate cutting between competing lines will not relieve a carrier from liability to a shipper for exacting a greater sum for a short than for a longer haul made under similar circumstances, where such rate was not established by the Interstate Commerce Commission. *Osborne v. Chicago & N. W. R. Co.*, 48 Fed. 49, reversed 3 C. C. A. 347, 52 Fed. 912, certiorari denied 146 U. S. 354, 36 L. ed. 1002, 13 Sup. Ct. Rep. 281.

The fact that a greater charge was exacted for a short than for a longer haul of freight under similar circum-



stances was the result of basing interstate rates on different points, is no defense to a shipper's action for damages. *Osborne v. Chicago & N. W. R. Co.*, 48 Fed. 49, reversed 3 C. C. A. 347, 52 Fed. 912, certiorari denied 146 U. S. 354, 36 L. ed. 1002, 13 Sup. Ct. Rep. 281.

A recital in a tariff that a higher freight rate must not be charged for a shorter than for a longer haul over the same line in the same direction when the shorter is entirely included in the longer haul, does not, where a lower rate is prescribed for a longer than for a shorter distance, establish the lower charge for the shorter haul, nor constitute an offer to make the shorter transportation for the lower rate so as to permit a recovery of the difference between the two rates by a shipper who was compelled to pay the higher rate. *Sunderland v. Baltimore & O. S. W. R. Co.*, — Mo. App. —, 190 S. W. 650.

A local shipper cannot recover damages for discriminations against him between local and through rates, in violation of the Act to Regulate Commerce, where it does not appear that the local was greater than the through rate. *Parsons v. Chicago & N. W. R. Co.*, 167 U. S. 447, 42 L. ed. 231, 17 Sup. Ct. Rep. 887, affirming 11 C. C. A. 489, 63 Fed. 903.

Since a shipper's action for exacting a greater charge for a short than for a longer haul made under similar circumstances, is for tort, any carrier making the overcharge is liable for the full amount of damages sustained, although such carrier received only its proportionate share of the illegal charge under a joint tariff rate. *Osborne v. Chicago & N. W. R. Co.*, 48 Fed. 49, reversed 3 C. C. A. 347, 52 Fed. 912, certiorari denied 146 U. S. 354, 36 L. ed. 1002, 13 Sup. Ct. Rep. 281.

#### **Liability for Offering to Discriminate.**

A shipper cannot recover damages from an interstate carrier for merely offering a discrimination in rates to a competitor, where the latter made no shipments thereunder. *Lehigh V. R. Co. v. Rainey*, 112 Fed. 487.

### **3. Requiring Prepayment of Charges.**

#### **As Unlawful Discrimination.**

By requiring the prepayment of charges on all freight received from a carrier, a connecting carrier does not subject the former to any undue or unreasonable discrimination in violation of the Act Regulating Commerce, although prepayment of charges is not required from other carriers. *Little Rock & M. R. R. Co. v. St. Louis S. W. R. Co.*, 11 C. C. A. 417, 59 Fed. 400; *Gulf, C. & S. F. R. Co. v. Miami S. S. Co.*, 30 C. C. A. 142, 86 Fed. 407.

A dealer in produce shipped in interstate commerce cannot recover from a carrier,

although the latter is actuated by bad motives, for its refusal, after due notice to him and contrary to general custom and usage, to advance freight charges to connecting carriers or to receive or transport freight consigned to such dealer without the prepayment of all charges, which was not required from other consignees similarly situated, since such dealer was not subjected to any undue or unreasonable prejudice or discrimination in violation of section 3 of the Act to Regulate Commerce. *Gamble-Robinson Comm. Co. v. Chicago & N. W. R. Co.*, 94 C. C. A. 217, 168 Fed. 161, 16 Ann. Cas. 613, 21 L. R. A. (N. S.) 982.

### **4. Against Particular Territory.**

#### **In General.**

Where a certain territory is designated in a carrier's rate schedule as an initial shipping point, irrespective of whether on its own lines or those of connecting carriers, there is a violation of the Act to Regulate Commerce when the carrier discriminates between shipments to the same destination in favor of one shipping over its own line and against a shipper whose traffic originates within the designated territory on the line of a connecting carrier. *Langdon v. Pennsylvania R. Co.*, 194 Fed. 486, S. C. 186 Fed. 237, reversed sub nom. *Pennsylvania R. Co. v. Carbon C. & C. Co.*, 125 C. C. A. 361, 208 Fed. 145.

### **5. Against Other Carriers.**

#### **Exclusive Privileges.**

An interstate carrier cannot exclude a tug boat from a coal pier in navigable waters at which interstate shipments of coal are loaded on vessels, and which was, by the carrier's schedules, made a public terminal for such shipments. *Baker v. Baltimore & O. R. Co.*, 110 C. C. A. 234, 188 Fed. 405, reversing 176 Fed. 632.

Where an interstate railway company contracts with a cartage company for the transfer of all of its through freight across the Mississippi River, there was no discrimination against a competing cartage company in violation of the Act to Regulate Commerce, which conferred a right of action in its favor and against the railway company. *St. Louis Drayage Co. v. Louisville & N. R. Co.*, 65 Fed. 39.

### **6. In Furnishing and Distributing Cars.**

#### **Failure or Refusal to Furnish Cars.**

A shipper may recover damages for a carrier's refusal to furnish cars for interstate shipments, since such refusal is an unjust discrimination in violation of the Act Regulating Commerce. *American T. & L. Co. v. Kansas City S. R. Co.*, 99 C. C. A. 44, 175 Fed. 28.

Since oak cross-ties are "lumber" within the meaning of an interstate freight tariff, a carrier cannot escape liability to a shipper for a refusal to furnish cars for the transportation of such cross-ties on the ground that there was no through joint rate therefor. *American T. & L. Co. v. Kansas City S. R. Co.*, 99 C. C. A. 44, 175 Fed. 28.

#### Discrimination in Distribution of Coal Cars.

A carrier that gives one shipper of coal more cars for daily use than it furnishes another interstate shipper is answerable to the latter for resulting damages. *Puritan Coal M. Co. v. Pennsylvania R. Co.*, 237 Pa. 420, 85 Atl. 426, Ann. Cas. 1914 B. 37, affirmed 237 U. S. 121, 59 L. ed. 867, 35 Sup. Ct. Rep. 484.

An interstate shipper of coal may recover damages for unjust discriminations against him by a carrier in favor of competitors in the distribution of coal cars during normal times when the carrier had an ample supply of cars for distribution at all times. *Sonman Shaft Coal Co. v. Pennsylvania R. Co.*, 241 Pa. 487, 88 Atl. 746, affirmed 242 U. S. 120, 61 L. ed. —, 37 Sup. Ct. Rep. 46.

A carrier cannot escape liability to a shipper for discrimination in the distribution of coal cars by the inclusion in his allotment, contrary to custom, of private cars owned by him, on the ground that in a proceeding to which he was not a party the Interstate Commerce Commission had subsequently held such custom to be in violation of the Act to Regulate Commerce. *Steinman Coal Co. v. Pennsylvania R. Co.*, 241 Pa. 509, 88 Atl. 761, reversed on other grounds 242 U. S. 298, 61 L. ed. —, 37 Sup. Ct. Rep. 118.

A carrier cannot show, in a shipper's action for unjust discrimination in the distribution of coal cars for interstate shipments during normal conditions, that a great number of its cars were constantly on the lines of other carriers moving interstate shipments, since it does not show abnormal conditions which the carrier should not have reasonably foreseen. *Pennsylvania R. Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120, 61 L. ed. —, 37 Sup. Ct. Rep. 46, affirming 241 Pa. 487, 88 Atl. 746.

The failure to take private cars into consideration in determining the extent of a carrier's discrimination against an interstate shipper of coal is immaterial in an action against the carrier for damages, where the exclusion of such cars had been acquiesced in for long time by all shippers in a district, as being fair and equitable. *Puritan Coal M. Co. v. Pennsylvania R. Co.*, 237 Pa. 420, 85 Atl. 426, Ann. Cas. 1914 B. 37, affirmed 237 U. S. 121, 59 L. ed. 867, 35 Sup. Ct. Rep. 484.

Privately owned cars and "foreign fuel cars" must be included by a carrier in apportioning cars among coal mines for interstate use. *Majestic Coal & C. Co. v. Illinois C. R. Co.*, 162 Fed. 810.

A carrier cannot excuse a discrimination against an interstate shipper in distributing coal cars in violation of the Act Regulating Commerce, by an agreement between the carrier and the shippers of a district as to what should constitute an equitable distribution. *Greenbrier Coal & C. Co. v. Norfolk & W. R. Co.*, 74 C. C. A. 404, 143 Fed. 266, reversing 138 Fed. 849.

An interstate shipper is not entitled to recover for unjust discriminations against him by a carrier in the distribution of coal cars in violation of a rule which has been held unjustly discriminatory by Interstate Commerce Commission, where he claims damages because more cars were not delivered to him when, in fact, he received all he was entitled to if the rule had been reasonable. *Pennsylvania R. Co. v. Stineman Coal Co.*, 242 U. S. 298, 61 L. ed. —, 37 Sup. Ct. Rep. 118, reversing 241 Pa. 509, 88 Atl. 761.

In an action against a carrier for damages sustained by a shipper from discriminations against him in the distribution of coal cars for interstate use, damages may be awarded for the carrier's delay in settling the claim. *Puritan Coal M. Co. v. Pennsylvania R. Co.*, 237 Pa. 420, 85 Atl. 426, Ann. Cas. 1914 B. 37, affirmed 237 U. S. 121, 59 L. ed. 867, 35 Sup. Ct. Rep. 484.

#### Action by Interstate Commerce Commission as Condition Precedent.

A shipper who suffers damages from an unjust and discriminatory departure by a carrier from a fair and reasonable rule or system of car distribution may recover therefor in an action at law without preliminary recourse to the Interstate Commerce Commission. *Hillsdale C. & C. Co. v. Pennsylvania R. Co.*, 237 Fed. 272.

A shipper cannot maintain an action against a carrier for unjust discrimination in the distribution of cars for the interstate transportation of coal in violation of section 3 of the Act Regulating Commerce, without producing an order of the Interstate Commerce Commission showing that the rule of distribution is unreasonable. *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. Rep. 938, affirming 106 C. C. A. 269, 183 Fed. 929, and 176 Fed. 748.

A shipper who is damaged by the departure of a carrier from its rules for the distribution of coal cars which had been approved by the Interstate Commerce Commission, does not suffer a legal injury unless the discrimination is of a character

condemned by law as unjust or discriminatory, which can be established only by a finding to that effect by the Interstate Commerce Commission. *Hillsdale C. & C. Co. v. Pennsylvania R. Co.*, 237 Fed. 272.

Action by the Interstate Commerce Commission is a condition precedent to a right of action under section 9 of the Act to Regulate Commerce for a carrier's refusal to furnish cars for the interstate transportation of oak cross-ties beyond its own line, where the refusal was based on the absence of a joint through tariff rate on such commodity, and there was a controversy whether such ties were within a tariff rate on lumber. *Texas & P. R. Co. v. American Tie & T. Co.*, 234 U. S. 138, 58 L. ed. 1255, 34 Sup. Ct. Rep. 885, reversing 111 C. C. A. 673, 190 Fed. 1022.

The fact that a carrier's refusal to furnish cars for the through interstate shipment of cross-ties on the ground that there was no applicable through joint tariff rate, was not made in good faith, does not relieve the shipper of the necessity of applying to the Interstate Commerce Commission for redress as a condition precedent to maintaining an action against the carrier for damages under section 9 of the Act Regulating Commerce. *Texas & P. R. Co. v. American Tie & T. Co.*, 234 U. S. 138, 58 L. ed. 1225, 34 Sup. Ct. Rep. 885, reversing 111 C. C. A. 673, 190 Fed. 1022.

The fact that a carrier accepted three cars of cross-ties for interstate transportation to a point beyond its own line does not absolve the shipper from the necessity of making application to the Interstate Commerce Commission for redress as a condition precedent to an action at law under section 9 of the Act Regulating Commerce against the carrier for its subsequent refusal to furnish cars for further shipments on the ground that there was no established through joint tariff rates for such commodity. *Texas & P. R. Co. v. American Tie & T. Co.*, 234 U. S. 138, 58 L. ed. 1255, 34 Sup. Ct. Rep. 885, reversing 111 C. C. A. 673, 190 Fed. 1022.

Where the right of a shipper to make application to the Interstate Commerce Commission for a determination of the reasonableness of a carrier's rule for the distribution of cars for the interstate transportation of coal, is barred under the Act of June 29, 1916, by the elapse of two years, a Federal court will not stay the dismissal of an action under section 3 of the Commerce Act against such carrier for such discrimination, so as to permit the plaintiff to make application to the Commission for such determination. *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct.

Rep. 938, affirming 106 C. C. A. 269, 183 Fed. 929, and 176 Fed. 748.

#### Action Under State Law.

An action cannot be maintained by a shipper under a state statute relating to unjust discriminations in the distribution of cars, where he previously obtained an order from the Interstate Commerce Commission declaring that a carrier's method of distribution was unjustly discriminatory, notwithstanding that the Commission did not make an award of damages, since section 9 of the Interstate Commerce Act permitting a proceeding before such Commission or in a Federal court precludes an action in the first instance in a state court. *Pennsylvania R. Co. v. Clark Bros. C. M. Co.*, 238 U. S. 456, 59 L. ed. 1406, 35 Sup. Ct. Rep. 896, reversing 241 Pa. 515, 88 Atl. 754.

#### 7. Milling in Transit Privilege.

##### Discrimination Regarding.

Where cotton for interstate shipment was compressed en route in the state where the shipment originated, and then reshipped to destination on a through joint rate from the place of origin, there was no discrimination against another shipper in violation of sections 2 and 3 of the Act Regulating Commerce, which entitled him to damages from the carrier, where the same rates and privilege were open to all shippers from the same point. *Cowan v. Bond*, 39 Fed. 54.

That a milling in transit privilege existed at a certain point may be established by a printed interstate tariff purporting to emanate from a carrier and shown to be identical with the schedule of rates kept by the carrier at the place in question for inspection of the public, since, in an action by a shipper for the denial of such privilege, the existence thereof may be shown by other means than a certified copy of the tariffs filed with the Interstate Commerce Commission. *Priebe v. Southern R. Co.*, 189 Ala. 427, 66 So. 573.

#### 8. In Transportation and Delivery.

##### Delivery at Destination.

No unlawful preference is created in violation of section 3 of the Act to regulate commerce, by the refusal of a carrier to accept live stock for interstate transportation and delivery at a point of physical connection at destination between its road and that of another company for ultimate delivery at the stock yards of the latter, where the initial carrier also maintained stock yards of its own at such place. *Central Stock Yards Co. v. Louisville & N. R. Co.*, 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339, affirming 55 C. C. A. 63, 118 Fed. 113, S. C. 112 Fed. 823.

### 9. Allowance of Damage Claims.

Allowance of damage claim as rebate, see *infra* V, E, 3.

#### In General.

An agreement by a carrier to pay a shipper for injuries caused an interstate shipment when the damages are ascertained does not create a discrimination in the latter's favor in violation of the Act Regulating Commerce. *Missouri, K. & T. R. Co. v. Want*, — Tex. Civ. App. —, 179 S. W. 903.

#### Payment by Delivering Carrier for Negligence of Initial Carrier.

The promise of a delivering carrier to pay damages for an injury to an interstate shipment occurring on the line of the initial carrier is a perversion of the Elkins Act against rebating. *Cedar Rapids F. Co. v. Illinois C. R. Co.*, — Iowa —, 160 N. W. 353.

#### E. Rebates.

Allowance of rebate as affecting liability for loss of shipment, see *infra* VIII, D. Measure of damages in actions for giving rebates to competitors, see *infra* XIII, F, 1.

##### 1. In General.

(No decisions.)

##### 2. Allowance of Rebates to Competitors.

#### Liability.

A shipper cannot recover damages from a carrier for discriminations in interstate freight rates by the giving of rebates to competitors, where the rates paid by such competitors were in fact higher than those paid by the plaintiff. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 181 Fed. 403, S. C. 183 Fed. 908, 112 C. C. A. 637, 192 Fed. 475, modified and affirmed 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916.

An interstate shipper of coal may recover damages from a carrier for unlawful discriminations against him in violation of the Act to Regulate Commerce, by means of rebates given competitors for similar shipments to the same market. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 181 Fed. 403, S. C. 183 Fed. 908, 112 C. C. A. 637, 192 Fed. 475, modified and affirmed 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916.

Payment of freight charges under protest is not a condition precedent to a shipper's right of action against a carrier for damages resulting from discriminations against him by the giving of unlawful rebates to competitors. *Mitchell Coal &*

*C. Co. v. Pennsylvania R. Co.*, 181 Fed. 403, S. C. 183 Fed. 908, 112 C. C. A. 637, 192 Fed. 475, modified and affirmed 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916.

A shipper is not entitled to damages, in an action under section 8 of the Interstate Commerce Act against a carrier for granting unlawful rebates to competitors on interstate shipments, where there is no evidence of any injury sustained by the plaintiff either in the decrease of his business, loss of profits, expenses incurred or other damage of any kind sustained by him in consequence of the granting of such rebates. *Pennsylvania R. Co. v. International Coal M. Co.*, 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915 A. 315, reversing 97 C. C. A. 383, 173 Fed. 1.

#### Giving Larger Rebates to One Shipper Than to Another.

An interstate shipper who receives illegal rebates from a carrier cannot recover for unlawful discriminations resulting from the conduct of the carrier in granting larger rebates to competitors during the same period. *International Coal M. Co. v. Pennsylvania R. Co.*, 162 Fed. 996.

#### Action by Interstate Commerce Commission as Condition Precedent.

Whether a carrier may make different rates for the interstate transportation of "free" and "contract" coal, when there is but one recognized tariff rate, is not an administrative question that must be determined by the Interstate Commerce Commission before an action can be maintained by a shipper under section 8 of the Interstate Commerce Act, rendering a carrier liable for the damages sustained by any person in consequence of the carrier's violation of the terms thereof, for injuries sustained from the granting by a carrier of unlawful rebates to a competitor. *Pennsylvania R. Co. v. International Coal M. Co.*, 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915 A. 315, reversing 97 C. C. A. 383, 173 Fed. 1.

Notwithstanding the provisions of sections 9 and 22 of the Act Regulating Commerce relating to suits by shippers against carriers, action by the Interstate Commerce Commission is a condition precedent to an action by an interstate shipper for damages sustained from the giving of unlawful rebates to competitors for doing their own hauling from mines to railway stations, where the established rates included such haul, since allowances for such services, when performed by the shipper, are unlawful only when unreasonable. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 57 L. ed. 1472, 33 Sup.

Ct. Rep. 916, affirming and modifying in part 183 Fed. 908.

A shipper who is injured by the giving of unlawful rebates to his competitors on interstate shipments in violation of the Act to Regulate Commerce may maintain an action against the carrier without first seeking redress before the Interstate Commerce Commission. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 181 Fed. 403, S. C. 183 Fed. 908, 112 C. C. A. 637, 192 Fed. 475, modified and affirmed 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916.

An interstate shipper who is injured by the granting to others of rebates by a carrier in violation of its published tariffs and schedules, may, under section 9 of the Act Regulating Commerce, maintain an action against the carrier without previous action by the Interstate Commerce Commission. *Langdon v. Pennsylvania R. Co.*, 194 Fed. 486, S. C. 186 Fed. 237, reversed sub nom. *Pennsylvania R. Co. v. Carbon C. & C. Co.*, 125 C. C. A. 361, 208 Fed. 145.

A shipper who was compelled to pay full tariff rates for interstate shipments of coal cannot recover damages from the carrier under the Act to Regulate Commerce, for giving secret rebates to his competitors on similar shipments, since only the Interstate Commerce Commission can give relief if the rates paid by the plaintiff were unreasonable. *American U. Coal Co. v. Pennsylvania R. Co.*, 159 Fed. 278.

### 3. Allowance of Damage Claims.

Allowance of damage claim as creating unlawful preference, see *supra*, V, D, 9.

#### In General.

A shipper is not given a rebate in violation of the Act Regulating Commerce by permitting a recovery of the full value of an interstate shipment when made under a contract limiting the carrier's liability in consideration of the lower of two established freight rates. *Cramer v. Chicago, R. I. & P. R. Co.*, 153 Ia. 103, 133 N. W. 387, reversed 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383.

An award of more than nominal damages to a shipper for a carrier's delay in moving an interstate shipment, does not create a rebate in violation of section 10 of the Act Regulating Commerce, and the difference between the market value of goods when delivered and what they should have been delivered may be awarded, as well as special damages within the contemplation of the parties at the time the shipment was made. *Detmer-Wallen Co. v. Delaware, L. & W. R. Co.*, 89 Misc. 252, 153 N. Y. Supp. 287.

A carrier's contract to pay a certain sum in settlement of an unliquidated claim for damages to an interstate shipment in consideration of a shipper's agreement to make all future shipments of freight over the lines of such carrier at regular tariff rates, is unenforceable and void, because it provides for a rebate in violation of the Act Regulating Commerce. *St. Louis, I. M. & S. R. Co. v. Landa*, — Tex. Civ. App. —, 187 S. W. 358.

Performance by a shipper of an agreement to make all future freight shipments over the line of a certain carrier at regular rates, when made in consideration of the latter's agreement to pay the shipper a designated sum in settlement of an unliquidated demand for injuries to an interstate shipment, does not estop the carrier from setting up the invalidity of such agreement because it grants a rebate in violation of the Act Regulating Commerce. *St. Louis, I. M. & S. R. Co. v. Landa*, — Tex. Civ. App. —, 187 S. W. 358.

### 4. Who Answerable for Giving.

#### Connecting Carriers.

A connecting carrier that receives loaded cars from an initial carrier for interstate transportation is not, because of the adoption of a joint through rate, answerable under section 8 of the Act to Regulate Commerce, to a shipper for the wrongful discriminations or overcharges of the initial carrier for which reparation is ordered by the Interstate Commerce Commission. *Penn. Refining Co. v. Western N. Y. & P. R. Co.*, 208 U. S. 208, 52 L. ed. 456, 28 Sup. Ct. Rep. 268, affirming 70 C. C. A. 23, 137 Fed. 343.

#### Lessors.

The lessor of a portion of a through interstate route is not answerable for discriminations practiced by the lessee against a shipper in violation of the Act Regulating Commerce. *Western N. Y. & P. R. Co. v. Penn. Refining Co.*, 70 C. C. A. 23, 137 Fed. 343, affirmed on other grounds 208 U. S. 208, 52 L. ed. 456, 32 Sup. Ct. Rep. 268.

### 5. Recovery by Carrier.

#### From Shippers.

Where a carrier refunds a shipper a portion of an interstate freight rate on the theory of an overcharge, the carrier cannot, if the refund was in violation of the Act Regulating Commerce and both parties were aware of the correct tariff rate, recover the amount of the refund, since both parties are in *pari delicto*. *Southern P. Co. v. Frye*, 82 Wash. 9, 143 Pac. 163.

## VI. CONTRACTS PERTAINING TO SHIPMENTS.

### A. In General.

#### Recovery on Contract Which Violates Act Regulating Commerce.

There can be no recovery for a carrier's breach of a contract that violates the Interstate Commerce Act. *Southern R. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144.

#### B. For Switch Tracks and Shipping Facilities.

##### Switch Track.

A contract to construct a spur track for a private shipper does not create an unlawful preference in violation of the Act Regulating Commerce, unless it in fact involves or contemplates some discrimination against others who seek to or who do enjoy like privileges. *Cedar R. & I. C. R. & L. Co. v. Chicago, R. I. & P. R. Co.*, 145 Ia. 528, 124 N. W. 323.

### C. Transportation.

#### 1. In General.

(No decisions.)

#### 2. Furnishing Cars.

##### In General.

A common carrier's contract to furnish an interstate shipper a particular number of cars on certain days is not in contravention of the Act to Regulate Commerce unless it appears that in fact the agreement, if performed, will extend to the shipper an undue or unreasonable preference over other shippers similarly situated. *Ferrell v. Great N. R. Co.*, 119 Minn. 302, 138 N. W. 284.

##### What Constitutes Contract.

An oral agreement between a shipper and a carrier for the delivery of cars for the interstate shipment of live stock, under section 1 of the Act Regulating Commerce, amounts merely to a request for cars, and does not constitute the contract of affreightment to the exclusion of a subsequently executed written agreement, which the shipper knew, at the time he made application for the cars, that he would be required to execute in order to make the shipment. *Atchison, T. & S. F. R. Co. v. White*, — Tex. Civ. App. —, 188 S. W. 714.

An oral agreement of a carrier to furnish cars on a certain day for the interstate shipment of live stock is, under the terms of the Act to Regulate Commerce, merged in a subsequently executed written agreement or bill of lading and is governed by the conditions thereof.

*Atchison, T. & S. F. R. Co. v. Smyth*, — Tex. Civ. App. —, 189 S. W. 70.

In a shipper's action against a carrier for failing to furnish cars on a designated day for the interstate shipment of live stock, the defendant may show that its agent could not and would not make an agreement for a definite date until he communicated with the train dispatcher, and that the shipper agreed to call again to learn on what day the cars would be furnished, but did not do so. *Atchison, T. & S. F. R. Co. v. Smyth*, — Tex. Civ. App. —, 189 S. W. 70.

##### When Part of Contract Illegal.

Since a carrier's contract to furnish a shipper with sufficient cars, and providing for the division of interstate freight rates between them in consideration of the construction by the shipper of a branch road and the making of all his shipments over the line of such carrier, is indivisible and void under the Act to Regulate Commerce, an action will not lie against the carrier for its refusal to supply cars to the shipper. *Taenzer v. Chicago, R. I. & P. R. Co.*, 112 C. C. A. 153, 191 Fed. 543, certiorari denied 223 U. S. 746, 56 L. ed. 640, 32 Sup. Ct. Rep. 553.

##### Agreement to Furnish Car for Designated Train.

Where for ten years a carrier ran an interstate stock train on certain days, although designated as an extra train, which was occasionally annulled on one of the days when there was not sufficient freight, such train was a regular one, so that a contract to furnish a shipper a car for transportation on such train on a designated day was not for a special service in violation of the Act to Regulate Commerce, and the shipper may recover damages for the carrier's breach of such agreement. *Stewart v. Chicago, R. I. & P. R. Co.*, 172 Ia. 313, 151 N. W. 485.

##### Breach of Agreement to Furnish.

An action will lie against a carrier for the breach of its contract to furnish cars to an interstate shipper, since the agreement is not for any special facilities not open to all other shippers, nor does it discriminate against them in violation of the Act to Regulate Commerce. *Chicago, R. I. & P. R. Co. v. Beatty*, 42 Okla. 528, 141 Pac. 442.

Where a carrier agreed in May to furnish 200 cars in the following autumn for the interstate shipment of live stock without then informing the shipper of a car shortage, or without afterwards giving him timely notice that it was impossible to furnish the cars, the liability of the carrier to the shipper became fixed on the tender

of the cattle for shipment and the failure of the carrier to provide the necessary facilities; and such liability cannot be avoided because the carrier was not responsible for the car shortage. *Eastern R. Co. v. Littlefield*, 237 U. S. 140, 59 L. ed. 878, 35 Sup. Ct. Rep. 489, dismissing writ of error to — Tex. —, 154 S. W. 543.

Damages due to a falling market may be recovered for a carrier's breach of its agreement to furnish a particular number of cars on certain days for the interstate transportation of live stock, since the agreement is not in contravention of the Act to Regulate Commerce. *Ferrell v. Great N. R. Co.*, 119 Minn. 302, 138 N. W. 284.

#### **Action by Interstate Commerce Commission as Condition Precedent.**

A Federal question calling for administrative action by the Interstate Commerce Commission does not arise in an action by a shipper against a carrier for a failure to furnish cars for the interstate transportation of live stock, where the carrier, when it agreed with the shipper in May to furnish cars in the autumn, was aware of and failed to inform the shipper of, or afterwards to give him timely notice of a car shortage that would prevent the carrier from fulfilling its agreement without neglecting or discriminating against other shippers. *Eastern R. Co. v. Littlefield*, 237 U. S. 140, 59 L. ed. 878, 35 Sup. Ct. Rep. 489, dismissing writ of error to — Tex. —, 154 S. W. 543.

### **3. Special Trains.**

Damages for mental anguish for delay of special train moving sick person, see *infra* XIII, F, 6.

#### **Breach of Agreement to Furnish.**

A shipper cannot recover damages for the breach of a carrier's oral contract to furnish a special train for the interstate transportation of live stock, since the agreement created a preference in violation of section 3 of the Act Regulating Commerce. *Siemonsma v. Chicago, M. & St. P. R. Co.*, 158 Ia. 483, 139 N. W. 1077.

### **4. Holding Trains.**

#### **Breach of Agreement to Hold Connecting Train.**

A carrier's breach of its contract to hold a connecting train for the transportation of an interstate shipment of live stock will not sustain an action, since the agreement creates an undue or unreasonable preference in violation of the Act Regulating Commerce. *Louisville & N. R. Co. v. Jones*, 6 Ala. App. 617, 60 So. 945.

### **5. Time for and Expediting Transportation.**

Measure of damages for failure to transport opera company or orchestra within agreed time, see *infra* XIII, F, 2.

#### **Contract to Expedite Shipment.**

A contract for expediting the transportation of an interstate shipment is void when there is no established tariff regulations governing such special service. *Clegg v. St. Louis & S. F. R. Co.*, 122 C. C. A. 273, 203 Fed. 971; *Roberts v. Nashville, C. & St. L. R. Co.*, 135 Tenn. 48, 185 S. W. 69.

A contract of a carrier to expedite an interstate shipment of horses and to deliver them to a connecting carrier in time for a designated train, when based on the regularly established through joint tariff rate which did not provide for such special service, constitutes an unlawful preference within the meaning of sections 3 and 6 of the Interstate Commerce Act. *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 56 L. ed. 1053, 32 Sup. Ct. Rep. 648, Ann. Cas. 1915 A. 501, reversing 242 Ill. 418, 90 N. E. 252.

When the complaint, in an action for the breach of a contract for expediting an interstate shipment, does not show that the carrier's published tariffs did not cover the same, such pleading does not show that the contract was invalid as an unjust discrimination under the Interstate Commerce and the Elkins Acts. *Roberts v. Nashville, C. & St. L. R. Co.*, 135 Tenn. 48, 185 S. W. 69.

Where the invalidity of a contract for the expedition of an interstate shipment of live stock does not appear from the face of the pleadings in an action against a carrier for the breach of such agreement, nor arise from legitimate presumptions, it is a matter of defense, and a new trial, rather than a judgment for the defendant, should be granted where such defense was established, since the proof at the second trial might be different. *Engemoen v. Chicago, St. P. M. & O. R. Co.*, 127 C. C. A. 426, 210 Fed. 896.

#### **Time for Transportation.**

A contract for the transportation of live stock to destination within 24 hours is void when not authorized by or provided for in the carrier's published tariffs. *Engemoen v. Chicago, St. P. M. & O. R. Co.*, 127 C. C. A. 426, 210 Fed. 896.

A carrier that failed to deliver the baggage and instruments of an orchestra in time for a matinee performance, in accordance with a contract for the interstate transportation of the members at regular tariff rates, is answerable in damages where the same services were open to all persons, and the carrier was aware of the

nature of the plaintiff's business and knew that in fixing dates for performances he relied on an itinerary or schedule prepared by the carrier, since such contract did not give the plaintiff any special favor or advantage in violation of the Interstate Commerce Act. *Altschuler v. Atchison, T. & S. F. R. Co.*, 155 Wis. 146, 144 N. W. 294, 49 L. R. A. (N. S.) 491.

The owner of an opera troupe may recover for the breach of a carrier's agreement to transport it on a party ticket from one state to another within a stated time, since the contract did not create an undue or unreasonable preference or advantage in violation of section 3 of the Act Regulating Commerce. *Foster v. Cleveland C. C. & St. L. R. Co.*, 56 Fed. 434.

A stipulation of a contract for the interstate shipment of live stock that it was not to be transported within any specified time, nor delivered at destination at any particular hour, nor in season for any particular market, is, under the Act Regulating Commerce, a valid limitation on the liability of the carrier, except for delays due to its negligence. *Hunt v. St. Louis, I. M. & S. R. Co.*, 187 Mo. App. 639, 173 S. W. 61.

A carrier is answerable for a negligent delay in the transportation of an interstate shipment of live stock, notwithstanding a stipulation of the bill of lading, valid under the Act Regulating Commerce, that the stock should not be transported within any specified time, nor delivered at destination at any particular hour, nor in season for any particular market. *Hunt v. St. Louis, I. M. & S. R. Co.*, 187 Mo. App. 639, 173 S. W. 61.

## 6. Diversion of Shipment.

### Breach of Agreement to Divert.

A shipper cannot recover for the failure of a carrier to divert an interstate shipment where the agreement to do so did not conform to the requirements of the carrier's published tariff and the conditions prescribed by the Interstate Commerce Commission. *Norfolk S. R. Co. v. Whitehurst*, 117 Va. 542, 85 S. E. 458.

## D. Contract of Affreightment.

Burden of showing validity of contract of carriage, see *infra* XIII, G, 5.

### Binding Effect.

In order to avoid discrimination by separating the various services, a shipper is charged with knowledge that under the Act to Regulate Commerce a written bill of lading will be issued for an interstate shipment, which will include all the terms and conditions of the transportation. *Atchison, T. & S. F. R. Co. v. Smyth*, — Tex. Civ. App. —, 189 S. W. 70.

A uniform bill of lading prepared by a shipper and signed by a carrier, when forming a part of the freight specifications and schedules filed with the Interstate Commerce Commission, is the contract of affreightment between the parties and its terms and conditions are binding on them. *Bers v. Erie R. Co.*, 163 N. Y. Supp. 114.

An express receipt setting out the precise terms under which a carrier undertakes an interstate shipment, when accepted by the consignor, constitutes a contract between the parties, and the reasonable stipulations thereof are binding on the shipper. *Lynch v. Southern Express Co.*, — Ga. App. —, 90 S. E. 655.

Where a shipper who for many years had made frequent shipments of live stock knew, when he delivered cattle to a carrier for interstate transportation, that he would be required, as he always had previously been, to execute a written contract of affreightment, and just after his cattle were loaded and when the train was about to start, signed a contract, he was bound by its terms although he did not read them and had never read any of the previous contracts. *Atchison, T. & S. F. R. Co. v. White*, — Tex. Civ. App. —, 188 S. W. 714.

## E. Rates.

### 1. In General.

#### Agreement to Pay Import or Export Duties.

When a carrier contracted to transport household goods to a foreign country for the rate established by tariffs on file with the Interstate Commerce Commission, the shipper cannot recover damages for a delay at the port of entry caused by the failure of the carrier to pay the import duties as a part of the rate charged, which its agent had agreed to do, since the latter did not have power to make such a contract. *Galveston, H. & S. A. R. Co. v. Breaux*, — Tex. Civ. App. —, 150 S. W. 287.

#### Contract to Furnish Broker Tickets at Cut Rates.

A contract between a railway company and a ticket broker, whereby the latter was enabled to sell interstate passenger tickets for less than the regular established rates, is void under the Act Regulating Commerce, and will not sustain a recovery by the broker for its breach. *Raleigh & G. R. Co. v. Swanson*, 102 Ga. 754, 28 S. E. 601, 39 L. R. A. 275.

### 2. Contracts Antedating Interstate Commerce Act.

#### In General.

When the Interstate Commerce Act became effective it abrogated all existing



contracts with common carriers for special commercial interstate rates. *Fitzgerald v. Fitzgerald & M. Const. Co.*, 41 Neb. 374, 59 N. W. 838.

As the passage of the Interstate Commerce Act avoided an existing contract of a carrier to give an interstate shipper lower freight rates than offered the public generally, the carrier is not answerable for its subsequent refusal to observe the contract. *Southern Wire Co. v. St. Louis, Bridge & T. Co.*, 38 Mo. App. 191.

### 3. Contracts to Maintain Rates.

#### In General.

In an action by a manufacturer to enforce a carrier's contract to maintain the same rates between competitive points where similar manufactures were located, a demurrer was erroneously sustained to a plea setting up that the carrier was engaged in interstate commerce and that the contract rates were in violation of the schedules filed with the Interstate Commerce Commission. *Gulf & S. I. R. Co. v. Laurel Cotton Mills*, 91 Miss. 166, 45 So. 982, S. C. 84 Miss. 339, 37 So. 134, 66 L. R. A. 453.

An agreement between a carrier and a manufacturer for the maintenance of the same interstate freight rates on shipments made by him as those from competitive points where similar manufacturers were located, does not create an unjust discrimination in violation of the Act Regulating Commerce, since it does not confer a privilege that other shippers similarly situated could not enjoy. *Laurel Cotton Mills v. Gulf & S. I. R. Co.*, 84 Miss. 339, 37 So. 134, 66 L. R. A. 453, S. C. 91 Miss. 166, 45 So. 982.

### 4. Contracts for Less Than Established Rates.

Recovery by carrier of tariff rate when lower contract rate, see *supra* IV, 1, 2.

Recovery by shipper of charges collected in excess of contract rate, see *supra* IV, J, 3, (c).

#### Validity.

A contract of a carrier to transport an interstate shipment for less than the established freight rates is void. *Illinois C. R. Co. v. Segari*, 205 Fed. 998; *Atchison, T. & S. F. R. Co. v. Kinkade*, 203 Fed. 165; *Southern R. Co. v. Harrison*, 119 Ala. 539, 24 So. 552, 43 L. R. A. 385; *Central of Ga. R. Co. v. Birmingham Sand & B. Co.*, 9 Ala. App. 419, 64 So. 202; *Kizer v. Texarkana & Ft. S. R. Co.*, 66 Ark. 348, 50 S. W. 871, writ of error dismissed 179 U. S. 199, 45 L. ed. 152, 21 Sup. Ct. Rep. 100; *McManus v. Chicago G. W. R. Co.*, 156 Ia. 359, 136 N. W. 769; *Louisiana R. & N. Co. v. Holly*, 127 La. 615, 53 So. 882

*Chicago, R. I. & P. R. Co. v. Hubbell*, 54 Kan. 232, 38 Pac. 266; *Sunderland v. Baltimore & O. S. W. R. Co.*, — Mo. App. —, 190 S. W. 650; *Sutton v. St. Louis & S. F. R. Co.*, 159 Mo. App. 685, 140 S. W. 76; *Gerber v. Wabash R. Co.*, 63 Mo. App. 145; *Pecos V. & N. E. R. Co. v. Harris*, 14 N. Mex. 410, 94 Pac. 951; *St. Louis, I. M. & S. R. Co. v. McNabb*, — Okla. —, 162 Pac. 811; *Atchison, T. & S. F. R. Co. v. Ehret*, — Okla. —, 152 Pac. 1107, *St. Louis & S. F. R. Co. v. Pickens*, — Okla. —, 151 Pac. 1055; *Atchison, T. & S. F. R. Co. v. Holmes*, 18 Okla. 92, 90 Pac. 22; *Church v. Minneapolis & St. L. R. Co.*, 14 S. D. 443, 85 N. W. 1001; *San Antonio & A. P. R. Co. v. Clements*, 20 Tex. Civ. App. 498, 49 S. W. 913; *Houston & T. C. R. Co. v. Dumas*, — Tex. Civ. App. —, 43 S. W. 609.

Under the Interstate Commerce Act the rates of a carrier, as duly filed, are the only lawful charges that can be made for interstate transportation, and there can be no deviations therefrom on any pretext. *Louisville & N. R. Co. v. Maxwell*, 237 U. S. 94, 59 L. ed. 853, 35 Sup. Ct. Rep. 494.

A shipper may enforce a carrier's contract to transport an interstate shipment for less than schedule rates, although the agreement is void under the Act Regulating Commerce, where the shipper had no knowledge of the true rate. *Mobile & O. R. Co. v. Dismukes*, 94 Ala. 131, 10 So. 145, 17 L. R. A. 113, overruled 119 Ala. 539, 24 So. 552, 43 L. R. A. 385, 72 Am. St. Rep. 936.

The fact that a carrier, in the manner required by law, altered an interstate freight schedule to meet a rate given a shipper under a contract that, when entered into, violated the Act Regulating Commerce, does not validate the agreement so as to give the shipper a right of action for the subsequent restoration of the old rate. *Southern R. Co. v. Wilcox*, 90 Va. 394, 39 S. E. 144.

#### When No Established Rate.

Under section 3 of the Act Regulating Commerce a contract by a carrier to transport an interstate shipment over the lines of connecting carriers for less than the established local rates is void even in the absence of an established through joint rate. *Kansas City S. R. Co. v. Albers Comm. Co.*, 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316, reversing 79 Kan. 59, 99 Pac. 819.

When connecting carriers establish local rates but not a through joint interstate freight rate and one of them contracts for the carriage of an interstate shipment for less than their combined local rates, the contract is void under section 6 of the Act Regulating Commerce. *Atchison, T. & S. F. R. Co. v. Bell*, 31

Okl. 238, 120 Pac. 987, 38 L. R. A. (N. S.) 351.

A rate agreed upon for an interstate shipment is binding, although lower than the established tariff rate, where the agent at the point of origin had not been notified of the true rate, nor had the tariff been posted as required by law. *Chicago, R. I. & P. R. Co. v. Gardner*, — Tex. Civ. App. —, 86 S. W. 793.

#### 5. Contracts as to Foreign Rates.

##### In General.

Where a railway company contracts to transport a shipment from a foreign country to a point in the United States for the rate shown by its established tariffs, it cannot demand a greater sum for the ocean rate than that shown by the tariff, when the conditions attending ocean competition do not show that the lower rate was unjustified and unlawful under the Act Regulating Commerce. *Fisher v. Great N. R. Co.*, 49 Wash. 205, 95 Pac. 77.

The fact that a railway company's portion of a through contract rate for a shipment from a foreign country to an inland point, is less than its established interstate rate, does not show the invalidity of the contract under the Act Regulating Commerce, and the carrier must abide by its contract and cannot collect a higher tariff rate. *Southern P. R. Co. v. Redding*, 17 Tex. Civ. App. 440, 43 S. W. 1061.

A contract by a railway company for a through shipment by rail and water to a foreign country is valid and will sustain a recovery where it does not appear that the agreed rate violated the Interstate Commerce Act by reducing the railway company's charge to less than the tariff rate from the point of origin to the domestic seaport. *St. Louis, S. F. & T. R. Co. v. Birge-Forbes Co.*, — Tex. Civ. App. —, 139 S. W. 3.

##### Guaranty of Amount of Rate.

A carrier that has not established a through rail and ocean rate to a foreign country is not liable to a shipper on a guaranty of an ocean rate made by it, since to permit a recovery would amount to a discrimination in violation of the Act Regulating Commerce. *Hamlen v. Illinois C. R. Co.*, 212 Fed. 324.

#### 6. Credit for Charges.

##### Action on Guaranty.

Since a carrier's agreement to transport a number of persons in interstate commerce at the regular tariff rates, and to extend credit therefor, is not an unjust discrimination which is precluded by the Act Regulating Commerce relating to uniformity of charges and fares, the carrier may recover on a guaranty given for the

payment of such fares. *Atchison, T. & S. F. R. Co. v. Bowman*, — Colo. —, 138 Pac. 814.

#### F. Milling in Transit and Stopover Privileges.

Contracts for milling in transit privileges in connection with rebates, see *infra* VI, H, 3.

#### Breach of Agreement to Give Milling in Transit Privilege.

A shipper cannot recover for a carrier's breach of an agreement for an interstate shipment with a milling in transit privilege, where it does not appear that such privilege at the rate in question was under the defendant's tariffs open to all shippers similarly situated. *Riverside Mill & P. Co. v. Seaboard A. L. R. Co.*, 10 Ga. App. 303, 73 S. E. 606.

A demurrer was properly sustained in an action for the breach of an agreement for a milling in transit privilege, where the petition did not allege that such privilege, at the rate in question, had been established by the defendant carrier as required by the Interstate Commerce Act, nor allege that such privilege, at such rate, was open to all shippers similarly situated, or that the charge agreed on by the plaintiff and defendant had been fixed in accordance with the law, or that the defendant was under a duty to the plaintiff to make shipments in accordance with such agreement. *Riverside Mill & P. Co. v. Seaboard A. L. R. Co.*, 10 Ga. App. 303, 73 S. E. 606.

A contract to give a manufacturer a milling in transit privilege will not be sustained when not in accordance with the carrier's established interstate schedules and tariffs. *Gulf & S. I. R. Co. v. Laurel Cotton Mills Co.*, 91 Miss. 166, 45 So. 982, S. C. 84 Miss. 339, 37 So. 134, 66 L. R. A. 453.

#### Agreement to Permit Stoppage of Shipment.

Since a carrier's agreement to permit a shipper to stop an interstate shipment of syrup en route, in order to make a sale, is void when not provided for in the established tariff, the latter cannot recover for the breach of the agreement although he paid for such privilege the extra charge fixed by the tariff for stopovers of shipments of a commodity of a different class. *Bergin v. Missouri, K. & T. R. Co.*, — Tex. Civ. App. —, 150 S. W. 1184.

#### G. Exclusive Privileges.

#### Contract to Move Animal in Covered Wagon at Terminal.

An interstate shipper cannot recover for the breach of an express company's

agreement to move a hog by itself at a terminal in a single covered wagon, during hot weather, where such special service was not provided for in the carrier's published tariff, since a preference was created in violation of the Act Regulating Commerce. *Winn v. American Express Co.*, 149 Ia. 259, 128 N. W. 663.

#### **Contract as to Removal of Freight from Warehouse.**

A contract, in consideration of a person shipping all of his freight over one line of railway and not patronizing a competing boat line, by which he was not required to remove his goods from the possession of the carrier within a reasonable time after their arrival at destination, but was permitted to remove them at his convenience, is unenforceable, since it creates a special privilege or preference in violation of the Act Regulating Commerce. *Central of Ga. R. Co. v. Patterson*, 6 Ala. App. 494, 60 So. 465.

#### **Handling Milk.**

A contract by a carrier to give a person the exclusive privilege, for a term of years, "so far as it was permitted to do so by law," of building up, developing, increasing, facilitating and conducting the business of transporting milk over the lines of the carrier, in consideration of the payment to him of 20 per cent of the transportation charges, does not, by giving him an undue or unreasonable preference in the transportation of such commodity, violate the Act to Regulate Commerce, nor does the agreement violate the Sherman Anti-trust Law. *Delaware, L. & W. R. Co. v. Kutter*, 77 C. C. A. 315, 147 Fed. 51, certiorari denied 203 U. S. 588, 51 L. ed. 330, 27 Sup. Ct. Rep. 776.

A railway company is answerable for its breach of a contract to give a person the exclusive privilege, for a term of years, so far as the law permitted it to do so, of building up, developing, increasing, facilitating and conducting the business of transporting milk over the carrier's road in consideration of the payment to him of 20 per cent of the transportation charges, since the agreement violated neither the Act Regulating Commerce nor the Sherman Anti-trust Law. *Delaware, L. & W. R. Co. v. Kutter*, 77 C. C. A. 315, 147 Fed. 51, certiorari denied 203 U. S. 588, 51 L. ed. 330, 27 Sup. Ct. Rep. 776.

#### **H. Contracts for Allowances, Rebates, Discriminations and Preferences.**

##### **1. In General.**

#### **Transportation of Commodities to Central Point.**

A shipper cannot recover on a carrier's agreement to reimburse all shippers of

hops for all local freight, cartage, warehouse and similar charges necessary to the transportation of such freight to central points for further interstate shipment, since the agreement, although open to all shippers of like commodities, constituted an unlawful discrimination in violation of the Act Regulating Commerce as amended by the Elkins Law. *Davis v. Southern P. R. Co.*, 235 Fed. 731.

#### **2. Contracts Antedating Interstate Commerce Act.**

##### **In General.**

Contracts for the giving of rebates to interstate shippers or for other allowances or concessions were avoided by the passage of the Act Regulating Commerce. *Elwood Grain Co. v. St. Joseph & G. I. R. Co.*, 121 C. C. A. 153, 202 Fed. 845; *Carter Planing Mill Co. v. New Orleans, M. & C. R. Co.*, — Miss. —, 72 So. 884; *Bullard v. Northern P. R. Co.*, 10 Mont. 168, 25 Pac. 120, 11 L. R. A. 246.

##### **3. Rebates.**

##### **In General.**

The Interstate Commerce Act precludes a shipper from recovering for a carrier's breach of an agreement to give a rebate on interstate freight shipments, where the rate prescribed by the duly established tariff was collected, although the shipper was not aware that the contract gave a lower rate. *Louisville & N. R. Co. v. Coquillard Wagon Works*, 147 Ky. 530, 144 S. W. 1080.

Where a lumber company contracted with a competing company for the transportation of lumber by a railway owned by stockholders of such competing company, and the contract protected the first company from discriminations in favor of its rival, the first company cannot recover from the latter company portions of rebates received by it from a connecting carrier on interstate shipments, since to permit a recovery would amount to granting a rebate in violation of the Act Regulating Commerce. *Fourche River L. Co. v. Bryant L. Co.*, 230 U. S. 316, 57 L. ed. 1498, 33 Sup. Ct. Rep. 887, reversing 97 Ark. 623, 135 S. W. 796.

#### **On Raw Materials in Connection with Milling in Transit Privilege.**

Where corn and oats were shipped in interstate commerce, under an agreement with a carrier giving the shipper the privilege of milling in transit and reshipping the product as a saccharine stock feed containing but 50 per cent of such grain, the remainder being composed of ingredients received from other points, the inbound local rates being paid on the grain and the outbound proportional rates being paid on the feed, with the privilege of

shipping out 100 pounds of stock feed for every 50 pounds of grain shipped in, the shipper being afterwards reimbursed by refunds from the carrier on the theory that all the ingredients entering into the feed were transit articles like the corn and oats, such rebates were in violation of the Interstate Commerce and the Elkins Acts, and the shipper is not entitled to damages for the breach by the carrier of such agreement. *Lewis v. Southern R. Co.*, 133 C. C. A. 237, 217 Fed. 321.

In an action by a manufacturer to enforce a carrier's contract for a milling in transit privilege, providing for a rebate on raw materials from the freight charges on manufactured products, a demurrer was improperly sustained to a plea that the defendant was an interstate carrier and that the contract rates were not in accordance with the rates established by the schedules filed with the Interstate Commerce Commission. *Gulf & S. I. R. Co. v. Laurel Cotton Mills Co.*, 91 Miss. 166, 45 So. 982, S. C. 84 Miss. 339, 37 So. 134, 66 L. R. A. 453.

A carrier's contract for a milling in transit privilege, with a rebate of freight charges on raw material from the charges on finished goods shipped in interstate commerce, will not, in the absence of a showing that the contract rates differ from the established rates, be presumed to be in violation of the legal rates. *Laurel Cotton Mills v. Gulf & S. I. R. Co.*, 84 Miss. 339, 37 So. 134, 66 L. R. A. 453. But see S. C. 91 Miss. 166, 45 So. 982.

A carrier's contract for a milling in transit privilege, with a rebate of freight charges on raw materials from the charges on manufactured goods shipped in interstate commerce, does not give a rebate in violation of the Act Regulating Commerce. *Laurel Cotton Mills v. Gulf & S. I. R. Co.*, 84 Miss. 339, 37 So. 134, 66 L. R. A. 453. But see S. C. 91 Miss. 166, 45 So. 982.

#### **Rebates in Consideration of Building Facilities for Handling Shipments.**

A contract of a railway company to pay an elevator company \$1.75 a car for all grain received and unloaded by the latter from points on the line of such carrier, is void when not incorporated in the carrier's tariffs, although the contract was entered into prior to the passage of the Hepburn and Elkins Acts, in consideration of the construction of the elevator by the elevator company. *Elwood Grain Co. v. Joseph & G. I. R. Co.*, 121 C. C. A. 153, 202 Fed. 845.

A shipper of railroad cross-ties cannot recover for a carrier's breach of its contract fixing at less than tariff rate the freight charge for the interstate transportation of ties, and agreeing to repay the

shipper 10 per cent of all freight charges paid by him until he was reimbursed in full for the construction by him for his exclusive use of a tie-hoist for loading cars, since the contract gave him an undue preference in violation of the Act to Regulate Commerce. *Chesapeake & O. R. Co. v. Standard L. Co.*, 98 C. C. A. 81, 174 Fed. 107.

A contract between a carrier and a shipper for the division of interstate freight rates in consideration of the building by the shipper of a branch line and the making of all his shipments over the line of such carrier, is void under the Act Regulating Commerce. *Taenzer v. Chicago, R. I. & P. R. Co.*, 112 C. C. A. 153, 191 Fed. 543, certiorari denied 223 U. S. 746, 56 L. ed. 640, 32 Sup. Ct. Rep. 553.

#### **Waiving Illegality of Contract.**

The defense that a contract by which an interstate shipper is allowed rebates conflicts with the Federal laws cannot be avoided by an agreement between the parties. *First Trust & S. Bank v. Southern Ind. R. Co.*, 195 Fed. 330.

#### **4. Switching Charges.**

##### **In General.**

A carrier is not answerable to an interstate shipper for the breach of a contract giving him lower switching charges than were afforded other shippers similarly situated, notwithstanding that such agreement was executed prior to the enactment of the Act Regulating Commerce, since it created an unlawful discrimination in violation of such law. *Carter Planing Mill Co. v. New Orleans, M. & C. R. Co.*, — Miss. —, 72 So. 884.

#### **5. Handling Freight at Terminals.**

##### **Shipper Performing Part of Transportation.**

A shipper may recover on a carrier's agreement to pay him five cents a bushel for hauling grain across a frozen lake, where a through interstate rate was made from an elevator situated off the railway line on a lake across which the grain was ordinarily transported by an independent boat line, since there was no violation of the Act Regulating Commerce by making such agreement; and such compensation will not be held unreasonable in the absence of a finding by the Interstate Commerce Commission. *Knapp v. Minneapolis, St. P. & S. S. M. R. Co.*, — N. D. —, 156 N. W. 1019.

#### **6. Moving Cars on Private Tracks.**

##### **In General.**

A manufacturing company having 12 miles of switch tracks within its plant

over which it moved cars with its own engines and crews between storage tracks, on which they were placed by a carrier, and the platforms of many buildings, cannot recover for the carrier's breach of its agreement to make an allowance to the manufacturing company for such switching, which was no part of delivery or transportation for which the Act Regulating Commerce permits allowances to be made to shippers when performed by them. *New York C. & H. R. R. Co. v. General Electric Co.*, 219 N. Y. 227, 114 N. E. 115, reversing 167 App. Div. 726, 153 N. Y. Supp. 478, and affirming 83 Misc. 529, 146 N. Y. Supp. 322, certiorari denied 242 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. —.

Where a manufacturing company owning 12 miles of switch tracks over which it moved cars with its own engines and crews, the movement of cars between storage tracks on which they were placed by a common carrier and the platforms of the many buildings of the plant, is not a part of interstate transportation or delivery for which such carrier may, under the Act Regulating Commerce, make an allowance to the shipper for switching. *New York C. & H. R. R. Co. v. General Electric Co.*, 219 N. Y. 227, 114 N. E. 115, reversing 167 App. Div. 726, 153 N. Y. Supp. 478, and affirming 83 Misc. 529, 146 N. Y. Supp. 322, certiorari denied 242 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. —.

## 7. Lease of Railway Property to Shipper.

### Lessee Shipping Exclusively Over Lessor's Road.

A lease of land by an interstate carrier for a term of years for a nominal consideration on condition that the lessee should make all of his shipments over the road of the lessor at the regular tariff rates, is void, since it creates an unlawful preference or rebate in violation of the Act Regulating Commerce. *Cleveland, C. C. & St. L. R. Co. v. Hirsch*, 133 C. C. A. 145, 204 Fed. 849.

The fact that the Act Regulating Commerce was violated by a lease of land by an interstate railway company for a term of years with a renewal privilege, when based on a nominal consideration and the condition that the lessee should make all shipments over the line of the lessor at regular tariff rates, does not make the carrier participis criminis so that it cannot obtain a cancellation of the lease in equity at the end of the original term. *Cleveland, C. C. & St. L. R. Co. v. Hirsch*, 133 C. C. A. 145, 204 Fed. 849.

A carrier cannot require an accounting in equity for accrued rentals under a lease of its land for a term of years for a nominal consideration on the condition

that the lessee make all shipments over the line of the lessor, since the lease was a violation of the Act Regulating Commerce, although the lessor may recover a reasonable rental value of the land from the time it refused to countenance the illegal agreement. *Cleveland, C. C. & St. L. R. Co. v. Hirsch*, 133 C. C. A. 145, 204 Fed. 849.

## I. Contracts Relating to Carrier's Liability.

Effect of Carmack Amendment on contracts limiting carrier's liability, see *infra* XI, I.

### 1. In General.

#### Binding Effect of Condition of Uniform Bills of Lading.

##### — In General.

If a shipper fails to notify a carrier that he will not ship goods from a foreign country into the United States under the terms of a uniform bill of lading, but on the contrary avails himself of the reduced rate thereby prescribed in consideration of such conditions, they are, under section 1 of the Act Regulating Commerce, binding on all parties to the shipment, including subsequent domestic carriers. *Siebert v. Erie R. Co.*, 163 N. Y. Supp. 111.

##### — Property in Cars on Sidings At Owner's Risks.

Where a shipment of silver ore from Canada was, under the terms of the bill of lading, unloaded en route in this country for sampling by a stranger to the contract of carriage, and after being reloaded by him and the car receipted for and sealed by the carrier, a part of the ore was stolen before the car was placed in a train, the shipment was an initial shipment, under the provisions of the Interstate Commerce Act, and within the terms of the bill of lading declaring that property should be at the owner's risk when received from private or other sidings until the cars are attached to trains. *Siebert v. Erie R. Co.*, 163 N. Y. Supp. 111.

A track having bumpers at each end and connected by switches with and lying parallel to a main track adjoining the private warehouses of shippers, is, when used by the carrier for the receipt of freight and the making up and distribution of cars, within the terms of a uniform bill of lading for an interstate shipment providing that goods received on private or other sidings should be at the owner's risk until the cars were attached to trains, although the shipment in question was receipted for by the carrier and the car sealed by it. *Bers v. Erie R. Co.*, 163 N. Y. Supp. 114.

## 2. Value of Shipment.

Burden of showing validity of contract for released valuation, see *infra* XIII, G, 5.

Validity under Carmack Amendment of limitation of liability, see *infra* XI, I.

### (a) In General.

#### Validity and Consideration.

A stipulation in a contract of affreightment limiting a carrier's liability for the loss of or injury to an interstate shipment to an agreed valuation is valid when fairly entered into in consideration of the lower of two duly established freight rates. *Christl v. Missouri P. R. Co.*, 92 Kan. 580, 141 Pac. 587; *Wyatt v. Missouri P. R. Co.*, 173 Mo. App. 210, 158 S. W. 720; *Wright v. Adams Express Co.*, 54 Pa. Super. Ct. 485; *Hertz v. Adams Express Co.*, 55 id. 378; *Louisville & N. R. Co. v. Hobbs*, — Tenn. —, 190 S. W. 461; *Texas & N. O. R. Co. v. Hancock*, — Tex. Civ. App. —, 178 S. W. 654.

There is no consideration for a released valuation where no reduced rate is given. *Harrington v. Chicago, R. I. & P. R. Co.*, 143 Mo. App. 418, 128 S. W. 807.

A limitation of a carrier's liability for an interstate shipment is void when not made in consideration of a reduced rate. *Lacey v. Oregon R. & N. Co.*, 63 Oreg. 596, 128 Pac. 999.

An agreement that, in consideration of a reduced freight rate, in the event of a total loss of an interstate shipment of live stock, the carrier's liability should not exceed a stated amount, is valid, since not a contract against negligence. *St. Louis & S. F. R. Co. v. Rinkle*, 37 Okla. 631, 133 Pac. 199.

Where there was an express declaration of the value of an interstate shipment in a bill of lading and by inadvertence a carrier charged a lower rate than such valuation called for, the fact that reference was made to the published schedules which stated that there were two alternative rates, the higher of which should have been exacted if the carrier relied on the valuation declared by the shipper, does not preclude the latter from relying on the valuation stated in the contract. *Aradalou v. New York, N. H. & H. R. Co.*, — Mass. —, 114 N. E. 297.

#### Where No Rate Agreed On.

Where no rate was agreed on for an interstate shipment, either verbally or in writing, and the bill of lading did not state that a reduced rate was given, there was no consideration for a limitation of the carrier's liability, although its schedules filed with the Interstate Commerce Commission contained two rates,

the lower of which was that for which the shipment was alleged to have been transported. *Phoenix Powder Mfg. Co. v. Wabash R. Co.*, 120 Mo. App. 566, 97 S. W. 256, S. C. 196 Mo. 663, 94 S. W. 235, 101 Mo. App. 442, 74 S. W. 492.

#### Agreed Valuation Exceeding That Carried by Charge Made.

When interstate freight charges were paid by a shipper on the basis of a released valuation of \$10 per hundredweight, as indicated by the rate established by the carrier's tariffs, although a greater valuation was stated in the bill of lading, the liability of the carrier was not controlled by such lower valuation, where there was no misstatement, silence or wrongful conduct on the part of the shipper, since, if by mistake the carrier charged too low a rate it could collect the correct one from the shipper. *Aradalou v. New York, N. H. & H. R. Co.*, — Mass. —, 114 N. E. 297.

Where a bill of lading for an interstate shipment limited a carrier's liability for injury or loss to \$1,000, the agreement thereby expressed cannot be affected by an alleged release to \$10 per hundredweight endorsed on the shipping order when the figures thereon were indicated by an indecipherable scrawl. *Aradalou v. New York, N. H. & H. R. Co.*, — Mass. —, 114 N. E. 297.

When a released valuation of \$1,000 was endorsed on a bill of lading with a rubber stamp, the fact that the carrier used such stamp only when the value declared was \$10 per hundredweight, is of no consequence in an action by the shipper for the loss of an interstate shipment where it does not appear that the latter was aware of such custom. *Aradelou v. New York, N. H. & H. R. Co.*, — Mass. —, 114 N. E. 297.

#### Acceptance of Shipment Without Valuation.

An express company that, in violation of the rules of the Interstate Commerce Commission, accepts for interstate transportation an unmarked package bearing no indication of its value, is answerable for the full value of the shipment in the event of its loss. *Southern Express Co. v. Essig*, 17 Ga. App. 657, 87 S. E. 1090.

#### Unreasonableness of Rate With Unlimited Liability.

The unreasonableness of an interstate freight rate with unlimited liability of a carrier, is not open to question in an action by a shipper for injuries to an interstate shipment made under a limited liability contract in consideration of a reduced freight rate, since the only question for consideration is whether such contract was fairly entered into. Rather

v. Nashville, C. & St. L. R. Co., 131 Tenn. 289, 174 S. W. 1113.

**Intention of Carrier to State Value in Contract of Carriage.**

The intention of a carrier's agent in filling the blank spaces of the limitation clause of a contract for an interstate shipment, when not communicated to the shipper, is immaterial in an action for the loss of the goods, where the contract evidenced by such writing was signed by both parties and the figures indicating the value of the property were an indecipherable scrawl. *Aradalous v. New York, N. H. & H. R. Co.*, — Mass. —, 114 N. E. 297.

It cannot be shown, in an action against an express company for damages to a colt shipped in interstate commerce, that the carrier's agent erred in not inserting the value of the animal in the express receipt. *United States Horseshoe Co. v. American Express Co.*, 250 Pa. 527, 95 Atl. 706.

**(b) Baggage.**

Validity under Carmack Amendment of limitation of liability for baggage, see *infra* XI, I, 4, (a), and 5.

**In General.**

A carrier's liability for the loss of the baggage of an interstate passenger depends on the Act Regulating Commerce, the agreement between the parties and the common-law principles accepted and enforced by the Federal courts. *New York C. & H. R. R. Co. v. Beaham*, 242 U. S. 148, 61 L. ed. —, 37 Sup. Ct. Rep. 43.

**Limitations in Tickets.**

A passenger's acceptance and use for interstate transportation of a ticket limiting the liability of a carrier for the loss of baggage to \$100, is sufficient to establish an agreement to that effect between the parties which is *prima facie* valid, and the presumption of his assent thus created is not overcome by his failure to read the matter plainly placed before him by the ticket. *New York C. & H. R. R. Co. v. Beaham*, 242 U. S. 148, 61 L. ed. —, 37 Sup. Ct. Rep. 43.

A condition of a passenger ticket limiting a carrier's liability for baggage to \$100 is valid when in accordance with its duly established tariffs and notices of such limitation were posted in a station. *Bars-tow v. New York, N. H. & H. R. Co.*, 158 App. Div. 665, 143 N. Y. Supp. 983.

A condition of an interstate passenger ticket limiting a carrier's liability for baggage to \$100 unless a greater value was agreed to in writing, although in accordance with rules and regulations filed with the Interstate Commerce Commission, does not preclude a recovery by the passenger of the full value of baggage lost

through the negligence of the carrier or through acts over which it has control, since such rules and regulations when fairly construed were not intended to and did not amount to more than a limitation of the carrier's common-law liability as an insurer. *Homer v. Oregon S. L. R. Co.*, 42 Utah 15, 128 Pac. 522, reversed 235 U. S. 693, 59 L. ed. 429, 35 Sup. Ct. Rep. 207.

**Limitations in Tariffs and Schedules.**

An interstate passenger is not bound by a tariff provision limiting a carrier's liability for baggage to \$100 unless a greater value is declared in writing and a higher rate paid at the time of checking, where the former did not have actual knowledge of such limitation. *St. Louis, I. M. & S. R. Co. v. Faulkner*, 111 Ark. 430, 164 S. W. 763.

A limitation in a schedule of passenger rates filed with the Interstate Commerce Commission of a carrier's liability for baggage is not binding on a passenger so as to preclude the recovery by him of the full value of baggage lost through the negligence of the carrier. *Wells v. Great N. R. Co.*, 59 Oreg. 165, 116 Pac. 1070, 34 L. R. A. (N. S.) 818.

There is nothing in the Act Regulating Commerce that makes a statement in a carrier's passenger tariffs limiting its liability for baggage enforceable by the Interstate Commerce Commission or binding on a passenger. *Wells v. Great N. R. Co.*, 59 Oreg. 165, 116 Pac. 1070, 34 L. R. A. (N. S.) 818.

A provision of a duly established interstate passenger tariff limiting a carrier's liability for the loss of baggage to \$100 unless a greater amount is agreed upon in writing and an excess charge paid, will control in the event of the loss of a passenger's baggage, even though he did not have actual knowledge of such limitation. *Harris v. Southern R. Co.*, 100 S. C. 469, 85 S. E. 158.

**Dividing Journey Into Stages to Escape Provisions of Interstate Tariff.**

**— Loss of Show Outfit.**

Where a show outfit was checked as baggage between intrastate points, and without being unloaded, was rechecked from its destination to an interstate point, the owner at the time of the original checking intending to make an interstate trip, but dividing it into stages for the purpose of defeating the interstate rate, the shipment was interstate and the liability of the carrier for its loss while at the intrastate destination is governed by a provision of its established tariffs, making the transportation of such property subject to the owner's risk. *Reynolds v. St. Louis S. W. R. Co.*, — Mo. App. —, 190 S. W. 423.

(c) **Knowledge of and Assent to Limitation.**

Effect of Carmack Amendment, see generally, *infra* XI, I, 4, (d), (e).

**In General.**

A contract limiting a carrier's liability for an interstate shipment is not binding on a shipper unless executed with his knowledge and assent. *Warren v. Cleveland, C. C. & St. L. R. Co.*, 156 Ill. App. 111.

A shipper cannot be held to have had knowledge of a special rate accorded him under a contract of interstate affreightment by which the carrier's liability was limited, where he did not assent to such limitation. *Warren v. Cleveland, C. C. & St. L. R. Co.*, 156 Ill. App. 111.

**From Recitals of Receipts or Bills of Lading.**

A shipper may recover the actual value of an interstate shipment where its value was not stated nor requested by the carrier, although the printed form of receipt issued by the latter stated that the rate charged was based on a valuation not exceeding \$50, and that the shipper agreed thereto unless a greater amount was stated. *Adams Express Co. v. Mellichamp*, 138 Ga. 443, 75 S. E. 596, Ann. Cas. 1913 D. 976, 11 Ga. App. 448, 75 S. E. 673, writ of error dismissed 232 U. S. 730, 58 L. ed. 818, 34 Sup. Ct. Rep. 480; *Adams Express Co. v. Chamberlain-Johnson-Du Bose Co.*, 138 Ga. 455, 75 S. E. 601, writ of error dismissed 229 U. S. 632, 57 L. ed. 1359, 33 Sup. Ct. Rep. 779.

A shipper is bound by a carrier's limitation of its liability contained in a contract for an interstate shipment, and based on a graduated tariff charge regulated by the declared value of shipments, although the shipper was not aware of such limitation, nor was his attention called thereto. *Robinson v. Louisville & N. R. Co.*, 160 Ky. 235, 169 S. W. 831.

A shipper who does not declare nor who is not required to state the value of an interstate shipment, and who pays the minimum rate, is, in the event of loss, bound by a stipulation of an express receipt limiting the carrier's liability to a stated sum. *Dodge v. Adams Express Co.*, 54 Pa. Super. Ct. 422, reversing 51 id. 481.

An interstate shipper is charged with notice of a limitation in a carrier's published schedules of liability for interstate shipments, where the bill of lading referred to alternative rates established by the carrier, and that the shipper accepted the lower rate in consideration of a limitation of the carrier's liability. *Louisville & N. R. Co. v. Hobbs*, — Tenn. —, 190 S. W. 461.

A clause in an interstate bill of lading limiting a carrier's liability to a lower valuation than that stated, "determined by the classifications or tariffs upon which the rate is based," is not applicable where a valuation is actually represented in writing by a shipper and a rate lower than that permitted by the tariffs is charged without the collusion of the shipper or his actual knowledge of the classifications or rates. *Aradalou v. New York, N. H. & H. R. Co.*, — Mass. —, 114 N. E. 297.

(d) **Who May Bind Shipper.**

**Contracts of Agent.**

A storage company and a freight forwarding company were the agents of the owner of household goods for the purpose of releasing the value of an interstate shipment, where they informed the owner that a lower rate might thereby be obtained, and they also procured insurance on the property for him. *Michelson v. Judson Freight Forwarding Co.*, 268 Ill. 546, 109 N. E. 281, affirming 189 Ill. App. 568.

When the plaintiff alleges, in an action for the loss of an interstate shipment, that it was made by his agent, the former is not in a position to question the authority of the latter to place a released value on the property limiting the liability of the carrier. *Enderstein v. Atchison, T. & S. F. R. Co.*, 21 N. Mex. 548, 157 Pac. 670.

By suing three times on a contract made in behalf of a shipper with a connecting carrier in relation to the movement of an interstate shipment, the shipper ratifies the contract and cannot assert that it was executed by a third person without the authority of the shipper. *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131.

A consignor cannot bind a consignee by a limitation of the value of an interstate shipment where the former did not have authority to make such limitation. *Nonotuck Silk Co. v. Adams Express Co.*, 256 Ill. 66, 76, 99 N. E. 893, 897, affirming 166 Ill. App. 519, 525.

A shipper is not bound by a limitation of value in a contract for the interstate shipment of freight executed by a transfer company which was authorized merely to deliver goods to the carrier for shipment. *Grice v. Oregon, W. R. & N. Co.*, — Wash. —, 150 Pac. 862.

(e) **Provisions in Schedules and Tariffs.**

Effect of Carmack Amendment, see generally XI, I, 4, (d).

**When Binding on Shipper.**

An interstate shipper is bound to know that a carrier's duly established tariffs contain two freight rates one with and one



without limitation of liability. *Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 137 Mo. App. 479, 119 S. W. 1.

When a carrier files and publishes a tariff containing two interstate freight rates, one based on a declared valuation with a limitation of the carrier's liability, and higher rate with unlimited liability, a shipper is bound thereby, although he testifies that he was not informed of the existence of the two rates and that he objected to the limitation in the bill of lading given him, but did not offer to pay the higher rate. *Christl v. Missouri P. R. Co.*, 92 Kan. 580, 141 Pac. 587.

When a contract of interstate affreightment referred to alternative rates established by a carrier, and set forth the shipper's acceptance of the rate granted because of a limitation of the carrier's liability, the shipper was sufficiently notified that there were two applicable rates, and he cannot be heard to say that he did not know the contents of the carrier's schedules, as filed with the Interstate Commerce Commission and published as required by law, which contained a reference to the rates applicable to the varying liability of the carrier. *Louisville & N. R. Co. v. Hobbs*, — Tenn. —, 190 S. W. 461.

#### When no Rate Agreed on.

Where no rate was fixed either verbally or in writing for an interstate shipment and no allusion was made to a reduced one, the shipper is not presumed to know that a rate was charged which carried a limitation of the carrier's liability in accordance with its established tariffs, merely because the printed receipt issued by the carrier contained a limitation clause. *Phoenix Powder Mfg. Co. v. Wabash R. Co.*, 196 Mo. 663, 94 S. W. 235, S. C. 101 Mo. App. 442, 74 S. W. 492, 120 Mo. App. 566, 97 S. W. 256.

#### (f) When But One Established Rate.

Validity of limitation under Carmack Amendment when but one rate, see *infra*, XI, I, 4, (g).

#### In General.

A shipper who was not given an opportunity to make an interstate shipment under any other contract except that with a limited liability, is not bound thereby, and in the event of a loss may recover the full value of the shipment. *Southern Express Co. v. Meyer*, 94 Ark. 103, 125 S. W. 642.

A contract of interstate affreightment reciting a limitation of a carrier's liability in consideration of a reduced rate, is not binding on the shipper, although the rate was that fixed by the tariffs filed with the Interstate Commerce Commission, when

it does not appear that there was another established rate carrying unlimited liability. *Summers v. Wabash R. Co.*, 114 Mo. App. 452, 79 S. W. 481.

#### (g) When No Through Rate.

##### Limitations in Local Tariffs.

When a through joint rate has not been established between interstate points, a shipper is bound by a limitation of a carrier's liability in accordance with the terms of the duly established local tariffs of the several carriers. *Robinson v. Louisville & N. R. Co.*, 160 Ky. 235, 169 S. W. 831.

#### (h) Contract For Less Than Tariff Rate.

##### In General.

A provision of a contract of interstate affreightment limiting a carrier's liability to an agreed amount in consideration of a rate less than that shown by the established tariffs is not binding on the shipper, since it creates a special privilege in violation of section 2 of the Act Regulating Commerce. *Ward v. Missouri P. R. Co.*, 158 Mo. 226, 58 S. W. 28.

#### (i) Effect of Failure to File, Publish or Post Rates.

##### On Limitation of Carrier's Liability.

##### — When Tariff Not Filed With Interstate Commerce Commission.

The true value of a lost interstate shipment may be recovered where the limitation of value agreed on in consideration of the rate charged, was not based on a schedule filed with the Interstate Commerce Commission. *Yazoo & M. V. R. Co. v. Peeples*, 106 Miss. 604, 64 So. 262.

When it does not appear that a carrier has filed with the Interstate Commerce Commission a schedule of freight rates graduated by the value of shipments and limiting its liability with respect thereto, a shipper is not concluded by such limitation unless it is reasonable. *Adams Express Co. v. Cook*, 162 Ky. 592, 172 S. W. 1096.

Where a contract for an interstate shipment does not show that a reduced rate was the consideration for a limitation of the carrier's liability, and it does not appear that the carrier's tariff was ever filed with the Interstate Commerce Commission, although it was duly posted, the carrier cannot show that, in accordance with its tariff, the reduced rate was the consideration for such limitation. *Meyers v. Missouri, K. & T. R. Co.*, 120 Mo. App. 288, 96 S. W. 737.

##### — When Tariff Not Posted at Station.

Where an interstate freight tariff had been posted at a station but was torn down

and not replaced, a carrier had but one rate in effect, and a limitation of its liability for an interstate shipment in consideration of a reduced rate is not binding on the shipper. *Griffin v. Wabash R. Co.*, 115 Mo. App. 549, 91 S. W. 1015.

#### **When Recitals of Contract Show Filing of Tariff.**

Recitals in an interstate contract of afreightment of the establishment of alternative rates by a carrier and setting forth a shipper's acceptance of a reduced rate in consideration of a limitation of the carrier's liability, establishes a prima facie showing of a compliance with the Act Regulating Commerce as to filing and publishing schedules showing two rates, one with and the other without limitation of liability. *Louisville & N. R. Co. v. Hobbs*, — Tenn. —, 190 S. W. 461.

#### **(j) Effect of Failure to Issue Receipt or Bill of Lading.**

Effect of failure to issue receipt or bill of lading on liability under Carmack Amendment, see *infra* XI, L, 3.

#### **In General.**

When it does not appear that a bill of lading or other written contract was made or issued for an interstate shipment, or that the shipper understandingly accepted a lower rate and assented to the valuation it carried under the terms of the established tariffs, he is not bound by such valuation nor charged with knowledge of such limitation from the fact that such tariffs were posted as required by law. *Drey v. Missouri P. R. Co.*, 156 Mo. App. 178, 136 S. W. 757.

Where a bill of lading containing a valuation clause is not shown to have been issued for an interstate shipment, classifications of the Interstate Commerce Commission based on valuation, are not admissible in an action by a shipper for injuries to the property. *Smith v. Atlantic C. L. R. Co.*, 163 N. C. 143, 79 S. E. 433.

#### **(k) Particular Valuations.**

See also *infra* XI, I, 4, (o).

#### **In General.**

A limitation of a carrier's liability to \$10 per hundredweight for an interstate shipment is valid. *Bass v. Erie R. Co.*, 195 Ill. App. 508.

Where a rug worth \$21 and weighing less than 100 pounds was shipped in interstate commerce, under a bill of lading limiting a carrier's liability to \$10 per hundredweight, and there were two rates in force, one with and one without restricted liability, the shipper can recover for the loss of the rug only at the agreed valua-

tion according to its weight. *Collins v. Union P. R. Co.*, 96 Kan. 581, 152 Pac. 649.

#### **(l) Value at Particular Time or Place.**

See also *infra* XI, I, 4, (o).

#### **Invoice Price.**

A stipulation that the amount of a carrier's liability for the loss of an interstate shipment should be computed on the basis of the bona fide invoice price to the consignee, if any, is valid. *Coleman v. New York, N. H. & H. R. Co.*, 215 Mass. 45, 102 N. E. 92.

Premium merchandise shipped in interstate commerce has a determinable price within the meaning of a uniform bill of lading declaring that the liability of a carrier for loss or injury to a shipment shall be the "bona fide invoice price, if any, to the consignee," where such merchandise, in addition to being given as premiums with other purchases, was also sold separately at a definite price shown by the shipper's catalogue. *Larkin Co. v. New York, C. & St. L. R. Co.*, 162 N. Y. Supp. 870.

A stipulation of a bill of lading for an interstate shipment fixing the value of the property at its true invoice price at the place of shipment, including freight charges paid, establishes the measure of damages for its injury or loss. *Wegener v. Chicago & N. W. R. Co.*, 162 Wis. 322, 156 N. W. 201.

#### **(m) What Losses Within Limitation.**

What losses are within limitation of liability under Carmack Amendment, see *infra* XI, I, 6.

#### **Conversion of Shipment.**

A carrier is answerable for the full value of an interstate shipment which was stolen by an agent, notwithstanding a condition of the contract of carriage in consideration of a lower rate limiting the carrier's liability to a stipulated sum. *Adams Express Co. v. Berry*, 35 App. D. C. 208, 31 L. R. A. (N. S.) 309.

A carrier that converts an interstate shipment by changing a bill of lading from an "order-notify" to a "straight" shipment, cannot, in an action for the conversion, rely on a stipulation limiting its liability to an agreed valuation. *People's State Sav. Bank v. Missouri, K. & T. R. Co.*, 192 Mo. App. 614, 178 S. W. 292.

The amount recoverable for the conversion of an interstate shipment by a carrier is not governed by a stipulation of a bill of lading made in consideration of the lower of two established rates, limiting the carrier's liability to an agreed sum. *Kansas City, M. & O. R. Co. v. Corn*, — Tex. Civ. App. —, 186 S. W. 807.

A carrier that converts a shipment by miscarrying it and then selling it for the freight charges is answerable for the full value of the property, notwithstanding a limitation of its liability to an agreed valuation. *St. Louis, I. M. & S. R. Co. v. Wallace*, — Tex. Civ. App. —, 176 S. W. 764.

**When Express Shipped by Freight.**

The full value of an interstate shipment may be recovered, notwithstanding a limitation of an express company's liability in consideration of a reduced rate, where a carrier abandoned the contemplated mode of transportation and moved a car of horses by freight. *Reynolds v. Adams Express Co.*, — N. C. —, 90 S. E. 510.

**Failure to Unload Live Stock for Feed, Water and Rest.**

A limitation of a carrier's liability for live stock to a maximum sum per head applies to an action for damages sustained from a violation of the 28 Hour Act. *Pierson v. Northern P. R. Co.*, 61 Wash. 450, 112 Pac. 509.

**(n) Effect of Undervaluation.**

Effect of undervaluation on liability under Carmack Amendment, see *infra* XI, I, 4 (b).

**On Liability of Carrier.**

Where, with knowledge that an interstate express rate was based on valuation of goods shipped, and that if the true valuation were not stated the rate would be based on a valuation of \$50, and that if it were truly stated the rate would be higher, a shipper who knowingly and willfully failed to state the true value of property and thereby obtained interstate transportation for less than the regular rate, was guilty of violating section 3 of the Act to Regulate Commerce by obtaining interstate transportation at less than the established rates, and he cannot recover more than \$50 for loss of the shipment. *Ellison v. Adams Express Co.*, 245 Ill. 410, 92 N. E. 277.

When a shipper makes an express representation of value for the purpose of enabling a carrier to fix an interstate freight rate, which, by mistake, the latter based on the theory that a lower valuation was stated in the bill of lading, the rights of the shipper with respect to value established by his declaration, cannot be affected by the rate which the carrier exacts. *Aradalou v. New York, N. H. & H. R. Co.*, — Mass. —, 114 N. E. 297.

When, without fraudulent intent, a lower freight rate was obtained by a misstatement of the nature of an interstate shipment, the carrier is not relieved from liability for a loss in the absence of a

stipulation to that effect. *Goldberg v. New York, C. & H. R. Co.*, 164 App. Div. 389, 149 N. Y. Supp. 629.

The provisions of the Interstate Commerce Act making it a fraud and a misdemeanor for a shipper to obtain a preference in interstate freight rates by knowingly and wilfully making a shipment under a false billing or other means, does not preclude a shipper from recovering the true value of an interstate shipment, where without knowledge of any difference in the classifications or ratings, he paid the charges demanded by the carrier and was not informed of the valuation made by the carrier or that any valuation was in fact placed on the property, since he was not indirectly given any preference in rates in violation of such law. *Kessinger v. Fitzgerald*, 152 N. C. 247, 67 S. E. 588.

An undervaluation of property in fixing interstate freight rates so that a shipper obtains a lower tariff rate than the actual value of the property requires, is prohibited by law, and a stipulation in the contract of shipment releasing the carrier from liability for the loss thereof in excess of such undervaluation is void, and cannot be made the basis of an action nor of a defense, where the carrier was aware of such undervaluation. *St. Louis & S. F. R. Co. v. Mounts*, 44 Okla. 359, 144 Pac. 1036, reversed 241 U. S. 654, 60 L. ed. 1223, 36 Sup. Ct. Rep. 725.

The fact that a shipper by placing a lower valuation than its actual worth on an interstate shipment, obtained a lower tariff rate, is not an undervaluation within the meaning of the Act Regulating Commerce, which will prevent a recovery up to the declared valuation for the loss of the shipment. *Geyer v. United States Express Co.*, 50 Pa. Super. Ct. 301, 306.

A shipper who placed a lower valuation on an interstate express shipment than its actual worth and thereby obtained a lower rate, fixed the carrier's liability for the loss of the property, without violating the provision of the Act Regulating Commerce against obtaining transportation at less than established rates. *Visanka v. Southern Express Co.*, 92 S. C. 573, 75 S. E. 962.

The fact that a shipper, by falsely representing the value of an interstate shipment, obtained a lower rate of transportation in violation of section 10 of the Interstate Commerce Act, will not, in the event of loss, prevent him from recovering the apparent value of the goods to the amount fraudulently represented. *Adams Express Co. v. Green*, 112 Va. 527, 72 S. E. 102.

Where there was an undervaluation of an interstate shipment of cattle which in their damaged condition were worth as much as their declared value, the owner

is not precluded from recovering damages from the negligent carrier up to such valuation. *Cincinnati, N. O. & T. P. R. Co. v. Smith*, 165 Ky. 235, 176 S. W. 1013.

**(o) When Value of Property in Injured State Exceeds Limitation.**

**Effect on Liability of Carrier.**

There may be a recovery of damages to the extent of the stipulated valuation although live stock in its injured condition is worth more. *Southern P. Co. v. Stewart*, 147 C. C. A. 630, 233 Fed. 956; *Cincinnati, N. O. & T. P. R. Co. v. Smith*, 165 Ky. 235, 176 S. W. 1013; *Illinois C. R. Co. v. Wilson*, 131 Tenn. 699, 176 S. W. 1036; *Atchison, T. & S. F. R. Co. v. Smyth*, — Tex. Civ. App. —, 189 S. W. 70; *Baird v. Denver & R. G. R. Co.*, — Utah —, 162 Pac. 79; *Chesapeake & O. R. Co. v. Rebman*, — Va. —, 90 S. E. 629.

Actual damages not exceeding the stipulated value may be recovered for injuries sustained by live stock during interstate transportation, rather than the proportion the damages bear to the stipulated valuation. *Castner v. Oregon, W. R. & N. Co.*, 89 Wash. 694, 155 Pac. 167.

When live stock is shipped under a contract of carriage limiting the carrier's liability to a stipulated sum per animal, in the event of loss the carrier is answerable only for the proportion that the declared valuation bears to the actual value of the animals. *Frank v. Michigan C. R. Co.*, 169 App. Div. 69, 154 N. Y. Supp. 701.

**(p) Measure of Damages When Partial Loss or Injury**

**In General.**

When property worth nearly \$700 was shipped under a declared valuation of \$400, the measure of damages for the loss of a portion worth less than the latter sum, is the actual value of the lost property instead of the proportion its value bears to the actual value of the whole shipment. *Visanka v. Southern Express Co.*, 92 S. C. 573, 75 S. E. 962.

**3. Waiver of Claim for Damages.**

**Validity.**

A provision of a contract for the interstate transportation of live stock by which a shipper waived all claim for damages, constitutes a discrimination in violation of the Elkin's Act. *Stewart v. Chicago, R. I. & P. R. Co.*, 172 Ia. 313, 151 N. W. 485.

**4. Contracts Against Negligence.**  
(No decisions.)

**5. Enforcement by State Courts.**

Jurisdiction of state courts in general, see *infra* XIII, B, 4.

**In General.**

A limitation of a carrier's liability for live stock to an agreed valuation per head will not be enforced by a state court, irrespective of the Interstate Commerce Act. *Betts v. Chicago, B. & Q. R. Co.*, 150 Ia. 252, 129 N. W. 963.

The Interstate Commerce Act does not prevent the application by a state court to interstate shipments of a local rule of law precluding contracts limiting a carrier's liability or relieving it from liability for the loss of goods when not occasioned by the act of God. *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb. 463, 56 N. W. 957, 22 L. R. A. 335.

The refusal of a state court to uphold a stipulation of a contract of carriage limiting a carrier's liability for negligence to an agreed valuation, does not violate any provision of the Act Regulating Commerce. *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132, affirming 202 Pa. 222, 51 Atl. 990.

The fact that a limitation of a carrier's liability for an interstate shipment contained in an express receipt, is in harmony with the provisions of its tariffs and schedules filed with and approved by the Interstate Commerce Commission, will not prevent a state court from refusing to enforce such limitation when it would reduce a carrier's liability for valuable property to approximately the amount of the express rate paid, since under such conditions the limitation was unreasonable. *Blair v. Wells Fargo & Co.*, 155 Ia. 190, 135 N. W. 615.

A stipulation limiting a carrier's liability for animals moved in interstate commerce will not be enforced by a state court, notwithstanding the Interstate Commerce Act, when contrary to state law. *Winn v. American Express Co.*, 149 Ia. 259, 128 N. W. 663.

**6. Notice of Injury, Loss or Damage Claims.**

Burden of showing compliance or non-compliance with requirement for giving notice of loss or injury, see *infra* XIII, G, 5.

Burden of showing reasonableness of requirement for notice of loss or injury, see *infra* XIII, G, 5.

Compliance with requirement for notice of loss or injury as question for jury, see *infra* XIII, J.

Instructions relating to notice of damage claims, see *infra* XIII, H, 6.

Necessity of pleading want of notice, see *infra* XIII, E, 5.

Notice of damage claims under Carmack Amendment, see *infra* XI, J.

Reasonableness of time for giving notice of loss or injury as jury question, see *infra* XIII, J.

Effect of Carmack Amendment on requirement for notice, see in general *infra* XI, J.

(a) In General.

(No Decisions.)

(b) Validity of Requirement For.

Validity of requirement for notice under Carmack Amendment, see *infra* XI, J, 1, 2.

In General.

The time for filing a claim against a carrier for failure to make delivery of interstate shipment may be limited by contract. *Lynch v. Southern Express Co.*, — Ga. App. —, 90 S. E. 655.

The validity of a stipulation of a contract for an interstate shipment limiting the time in which claims for failure to deliver shall be filed with the carrier, must be determined in a state court under the rules adopted by the Federal courts. *Lynch v. Southern Express Co.*, — Ga. App. —, 90 S. E. 655.

Consideration.

A consideration, such as a reduced freight rate, is necessary to support a stipulation for the giving of written notice of loss or injury to an interstate shipment within a designated period as a condition precedent to a carrier's liability. *Botts v. St. Louis & H. R. Co.*, 191 Mo. App. 676, 177 S. W. 746; *Moore v. St. Louis & S. F. R. Co.*, 143 Mo. App. 675, 127 S. W. 921; *Blackmer & Post P. Co. v. Mobile & O. R. Co.*, 137 Mo. App. 479, 119 S. W. 1; *Chicago, R. I. & P. R. Co. v. Whaley*, — Tex. Civ. App. —, 177 S. W. 543; *Chicago, R. I. & G. R. Co. v. Scott*, — Tex. Civ. App. —, 156, S. W. 294.

A stipulation for giving written notice of loss or damage within a designated period is based on a sufficient consideration when a shipper is given the choice of two rates and accepts the lower one with limited liability. *Illinois C. R. Co. v. Davis*, — Miss. —, 72 So. 874.

A stipulation for written notice of damage claims within a designated time is valid and based on a sufficient consideration, if a shipper pays the lower of two established freight rates, although he was not aware that there was more than one rate. *St. Louis S. W. R. Co. v. Haynie*, 120 Ark. 26, 179 S. W. 170.

A requirement for written notice within 10 days is void when not based on any consideration. *Chicago, R. I. & G. R. Co. v. Whaley*, — Tex. Civ. App. —, 177 S. W. 543.

A stipulation for written notice within 90 days is void when not in fact based on a reduced rate, notwithstanding a recital of the contract of carriage to the contrary. *Chicago, R. I. & P. R. Co. v. Scott*, — Tex. Civ. App. —, 156 S. W. 294.

A requirement for written notice of injury or loss within 5 days as a condition precedent to a carrier's liability, is valid, although not based on a reduced freight rate. *Hamilton v. Chicago & A. R. Co.*, 177 Mo. App. 145, 164 S. W. 248.

Absence of Knowledge of Requirement.

The failure of a shipper to read a contract of interstate shipment because he was called upon to sign it just before the departure of a train bearing his live stock does not relieve him from the effect of a condition requiring the giving to the carrier, within five days, written notice of loss or damage, where the shipper had ample time to read the contract before the expiration of such period. *Sweetser v. Chicago & A. R. Co.*, 196 Ill. App. 623.

Necessity for Notice When Stipulated Time Is Unreasonable.

Although a requirement for written notice of injury or loss within 30 days may be unreasonable and void, yet notice must be given within a reasonable time in order to bind a carrier. *Deans v. Atlantic C. L. R. Co.*, 152 N. C. 171, 67 S. E. 332.

Although a provision of an interstate contract of affreightment prohibiting the removal of injured live stock at destination until 3 hours after notice is given the carrier, may be void, it does not release the shipper from the duty of giving written notice of a claim for damages as a condition precedent to the carrier's liability. *Panhandle & S. F. R. Co. v. Bell*, — Tex. Civ. App. —, 189 S. W. 1097.

Effect of Failure to File Schedule.

The fact that a carrier has not filed a schedule of interstate freight rates with the Interstate Commerce Commission does not absolve a shipper from the duty of giving notice of loss within the time limited by the bill of lading. *Adams Express Co. v. Cook*, 162 Ky. 592, 172 S. W. 1096.

(c) Extension of Time for Giving.

See also *infra* XI, J, 6.

In General.

By extending the time for filing written notice of a damage claim a carrier

does not give a preference in violation of the Act Regulating Commerce. *Clingan v. Cleveland, C. C. & St. L. R. Co.*, 184 Ill. App. 202.

The time for filing written notice of damages is extended by an endorsement by a station agent to that effect on a freight bill. *Clingan v. Cleveland, C. C. & St. L. R. Co.*, 184 Ill. App. 202.

#### (d) Particular Periods.

Particular periods for giving notice under Carmack Amendment, see *infra* XI, J, 2 (b).

#### Prompt Notice at Destination.

A requirement for the giving of written notice of damages to a carrier at destination promptly after delivery of a shipment, as a condition precedent to its liability, is unreasonable and void with respect to a shipment from Alabama to St. Louis, Mo. *Nashville, C. & St. L. Co. v. Long*, 163 Ala. 165, 50 So. 130.

#### Before Removal of Stock and Mingling With Other Animals.

A provision of a contract for the interstate shipment of live stock requiring the shipper to give the carrier notice of loss or damage before the stock is intermingled with other stock or slaughtered is valid under the Federal laws. *Potter v. Kansas City S. R. Co.*, 187 Mo. App. 56, 172 S. W. 1153; *Atchison, T. & S. F. R. Co. v. Smyth*, — Tex. Civ. App. —, 189 S. W. 70.

#### Five Hours.

A requirement for giving written notice of injury to or loss of an interstate shipment of live stock within five hours after unloading is reasonable and valid. *Bowman v. Missouri, K. & T. R. Co.*, 185 Mo. App. 25, 171 S. W. 642.

#### One Day.

A requirement of a contract of interstate carriage that, as a condition precedent to a carrier's liability, written notice of loss or injury shall be given it within one day after the arrival of live stock at destination and before it is removed and mingled with other animals, is reasonable and valid. *Clegg v. St. Louis & S. F. R. Co.*, 122 C. C. A. 273, 203 Fed. 971; *St. Louis S. W. R. Co. v. Burnett*, 117 Ark. 656, 174 S. W. 1165; *St. Louis & S. F. R. Co. v. Haynie*, 120 Ark. 26, 179 S. W. 170; *St. Louis & S. F. R. Co. v. Pearce*, 82 Ark. 358, 101 S. W. 760, 12 Ann. Cas. 125; *Atchison, T. & S. F. R. Co. v. Baldwin*, 53 Colo. 416, 128 Pac. 449; *Smith v. St. Louis S. W. R. Co.*, 186 Mo. App. 401, 171 S. W. 635; *Riddler v. Missouri P. R. Co.*, 184 App. 709, 171 S. W. 632; *Moore*

*v. St. Louis & S. F. R. Co.*, 143 Mo. App. 675, 127 S. W. 921; *McElvain v. St. Louis & S. F. R. Co.*, 176 Mo. App. 379, 158 S. W. 464, S. C. — Mo. App. —, 180 S. W. 1018; *Sims v. Missouri P. R. Co.*, 177 Mo. App. 18, 163 S. W. 275; *Sheldon v. St. Louis & S. F. R. Co.*, 131 Mo. App. 560, 110 S. W. 627; *Baldwin v. Atlantic C. L. R. Co.*, 170 N. C. 12, 86 S. E. 776; *Austin-Stephenson Co. v. Southern R. Co.*, 151 N. C. 107, 65 S. E. 757; *St. Louis & S. F. R. Co. v. Pickens*, — Okla. —, 151 Pac. 1055; *Chicago, R. I. & P. R. Co. v. Brightwell*, — Okla. —, 162 Pac. 484; *Kansas City, M. & O. R. Co. v. Gleason*, — Okla. —, 158 Pac. 365; *Chicago, R. I. & P. R. Co. v. Conway*, 34 Okla. 356, 125 Pac. 1110; *St. Louis & S. F. R. Co. v. Ladd*, 33 Okla. 160; 124 Pac. 461; *St. Louis & S. F. R. Co. v. Young*, 30 Okla. 588, 120 Pac. 999.

A requirement for the giving of written notice of loss or injury within 1 day is valid when made in consideration of a reduced freight rate. *Moore v. St. Louis & S. F. R. Co.*, 143 Mo. App. 675, 127 S. W. 921.

#### Thirty-six Hours.

A requirement for giving written notice of damages within 36 hours is valid. *St. Louis, I. M. & S. R. Co. v. Cumbie*, 118 Ark. 478, 177 S. W. 910, S. C. 105 Ark. 406, 151 S. W. 237; *St. Louis, I. M. & S. R. Co. v. Starbird*, 118 Ark. 485, 177 S. W. 912.

#### Five Days.

A provision for the giving of written notice of loss or damage within 5 days is reasonable and valid. *Sweetser v. Chicago & A. R. Co.*, 196 Ill. App. 623; *Dunlap v. Chicago & A. R. Co.*, 187 Mo. App. 201, 172 S. W. 1178; *Hamilton v. Chicago & A. R. Co.*, 177 Mo. App. 145, 164 S. W. 248.

#### Ten Days.

A provision for written notice of damages within 10 days after the unloading of an interstate shipment of live stock at destination and before it is mingled with other stock, is reasonable and valid. *Kidwell v. Oregon S. L. R. Co.*, 125 C. C. A. 313, 208 Fed. 1; *Howard v. Illinois C. R. Co.*, 161 Ky. 783, 171 S. W. 442; *Armstrong v. Illinois C. R. Co.*, 162 Ky. 539, 172 S. W. 947; *Illinois C. R. Co. v. Davis*, — Miss. —, 72 So. 874.

A requirement that written notice of damages shall be given at destination within 10 days after the arrival of live stock is unreasonable when it does not appear that there was an agent at such place to whom notice could be given. *Chicago, R. I. & G. R. Co. v. Whaley*, — Tex. Civ. App. —, 177 S. W. 543.

### Thirty Days.

A requirement for written notice of damages within 30 days is reasonable and valid. *Adams Express Co. v. Cook*, 162 Ky. 592, 172 S. W. 1096; *Bowman v. Missouri, K. & T. R. Co.*, 185 Mo. App. 25, 171 S. W. 642; *Missouri, K. & T. R. Co. v. Hancock*, 26 Okla. 265, 109 Pac. 223.

### Ninety-one Days.

A stipulation for giving notice of loss or damages within 91 days is reasonable and valid. *Potter v. Kansas City S. R. Co.*, 187 Mo. App. 56, 172 S. W. 1153.

### Four Months.

A stipulation for written notice of damages within 4 months is reasonable and valid. *Chicago, R. I. & P. R. Co. v. Williams*, 101 Ark. 436, 142 S. W. 826; *Dodge v. Pennsylvania R. Co.*, — App. Div. —, 162 N. Y. Supp. 549; *Forney v. Seaboard A. L. R. Co.*, 167 N. C. 641, 83 S. E. 686.

### (e) Effect of Noncompliance.

Necessity of pleading want of notice, see *infra* XIII, E, 5.

### In General.

Noncompliance with a requirement of a contract of carriage that a written notice of loss or injury to an interstate shipment shall be given within a designated period as a condition precedent to a carrier's liability, will bar a recovery of damages. *Kidwell v. Oregon S. L. R. Co.*, 125 C. C. A. 313, 208 Fed. 1; *Clegg v. St. Louis & S. F. R. Co.*, 122 C. C. A., 273, 203 Fed. 971; *St. Louis, I. M. & S. R. Co. v. Cumbie*, 118 Ark. 478, 177 S. W. 910, S. C. 105 Ark. 406, 151 S. W. 237; *St. Louis, I. M. & S. R. Co. v. Starbird*, 118 Ark. 485, 177 S. W. 912; *St. Louis S. W. R. Co. v. Burnett*, 117 Ark. 656, 174 S. W. 1165; *St. Louis & S. F. R. Co. v. Heynie*, 120 Ark. 26, 179 S. W. 170; *St. Louis & S. F. R. Co. v. Pearce*, 82 Ark. 358, 101 S. W. 760, 12 Ann. Cas. 125; *Chicago, R. I. & P. R. Co. v. Williams*, 101 Ark. 436, 142 S. W. 826; *Atchison, T. & S. F. R. Co. v. Baldwin*, 53 Colo. 416, 128 Pac. 449; *Sweetser v. Chicago & A. R. Co.*, 196 Ill. App. 623; *Armstrong v. Illinois C. R. Co.*, 162 Ky. 539, 172 S. W. 947; *Adams Express Co. v. Cook*, 162 Ky. 592, 172 S. W. 1096; *Howard v. Illinois C. R. Co.*, 161 Ky. 783, 171 S. W. 442; *Illinois C. R. Co. v. Davis*, — Miss. —, 72 So. 874; *Potter v. Kansas City S. R. Co.*, 187 Mo. App. 56, 172 S. W. 1153; *Dunlap v. Chicago & A. R. Co.*, 187 Mo. App. 201, 172 S. W. 1178; *Smith v. St. Louis S. W. R. Co.*, 186 Mo. App. 401, 171 S. W. 635; *Bowman v. Missouri, K. & T. R. Co.*, 185 Mo. App. 25, 171 S. W. 642; *Riddler v. Missouri P. R. Co.*, 184 Mo. App. 709,

171 S. W. 632; *Sims v. Missouri P. R. Co.*, 177 Mo. App. 18, 163 S. W. 275; *Hamilton v. Chicago & A. R. Co.*, 177 Mo. App. 145, 164 S. W. 248; *McElvain v. St. Louis & S. F. R. Co.*, 176 Mo. App. 379, 158 S. W. 464, S. C. — Mo. App. —, 180 S. W. 1018; *Moore v. St. Louis & S. F. R. Co.*, 143 Mo. App. 675, 127 S. W. 921; *Sheldon v. St. Louis & S. F. R. Co.*, 131 Mo. App. 560, 110 S. W. 627; *Dodge v. Pennsylvania R. Co.*, — App. Div. —, 162 N. Y. Supp. 549; *Baldwin v. Atlantic C. L. R. Co.*, 170 N. C. 12, 86 S. E. 776; *Forney v. Seaboard A. L. R. Co.*, 167 N. C. 641, 83 S. E. 686; *Austin-Stephenson Co. v. Southern R. Co.*, 151 N. C. 107, 65 S. E. 757; *Chicago, R. I. & P. R. Co. v. Brightwell*, — Okla. —, 162 Pac. 484; *Kansas City, M. & O. R. Co. v. Gleason*, — Okla. —, 158 Pac. 365; *St. Louis & S. F. R. Co. v. Pickens*, — Okla. —, 151 Pac. 1055; *Chicago, R. I. & P. R. Co. v. Conway*, 34 Okla. 356, 125 Pac. 1110; *St. Louis & S. R. Co. v. Ladd*, 33 Okla. 160, 124 Pac. 461; *St. Louis & S. F. R. Co. v. Young*, 30 Okla. 588, 120 Pac. 999; *Missouri, K. & T. R. Co. v. Hancock*, 26 Okla. 265, 109 Pac. 223.

### (f) What Shipments Within Requirement for Notice.

#### Shipments Reconsigned to Intrastate Point.

Where, during the transportation of an interstate shipment within the state of destination, the shipper alters the original place of consignment to another intrastate point, and there was an injury to the property during the latter portion of the journey, the shipment was still moving in interstate commerce so that the stipulations of the original contract of shipment limiting the carrier's liability apply. *Kirby v. Union P. R. Co.*, 94 Kan. 485, 146 Pac. 1183, L. R. A. 1916 E. 528.

### (g) What Losses Within Requirements for Notice.

See also *infra* XI, J, 3.

### Failure to Furnish Cars.

Since the Interstate Commerce Act covers an interstate shipment of live stock from the request for cars or other instrumentalities until the cattle are delivered at destination, a claim for damages for a carrier's breach of an agreement to furnish cars on a certain day is within a condition of a bill of lading requiring the giving of notice of claim for loss or damage to the carrier within a stipulated time, and the parties cannot substitute a special agreement therefor. *Atchison, T. & S. F. R. Co. v. Smyth*, — Tex. Civ. App. —, 189, S. W. 70.

### Injuries Received Before Commencement of Transportation.

Injuries inflicted on live stock by dipping them and which are apparent before transportation is begun are not within a requirement for written claims for damages before removal of the stock at destination. *Broadhead v. Atchison, T. & S. F. R. Co.*, 97 Kan. 222, 155 Pac. 20.

### Conversion.

A stipulation requiring written notice of loss or damage within 30 days is not available to a carrier who converts an interstate shipment by altering it from an "order-notify" to a "straight" consignment. *Peoples State Sav. Bank v. Missouri, K. & T. R. Co.*, 192 Mo. App. 614, 178 S. W. 292.

Where a shipment never reached destination, the carrier having taken and sold a portion of it, compliance with a requirement for giving written notice of loss at destination is unnecessary. *Harrington v. Chicago, R. I. & P. R. Co.*, 143 Mo. App. 418, 128 S. W. 807.

### Delay.

A claim for damages for the delay of an interstate shipment not connected with an injury to property is within a requirement of a bill of lading for the giving of written notice of damage claims within 4 months. *Bailey v. Missouri P. R. Co.*, 184 Mo. App. 457, 171 S. W. 44.

Requirement for written notice of claim for damages within a specified time does not include claims due to delay in transportation. *Williamsport Hardwood L. Co. v. Baltimore & O. R. Co.*, 71 W. Va., 741, 77 S. E. 333.

### Decline in Market.

Damages resulting from a decline in market price in consequence of a delay in transportation is within a requirement for giving written notice of damage claims within a designated time. *Jett v. Southern R. Co.*, 130 Tenn. 237, 169 S. W. 767.

A loss sustained by a shipper from a decline in the market price where there was a delay in the transportation of an interstate shipment of live stock is not within a requirement of the bill of lading for giving notice of claim for damages before the removal of the cattle at destination. *Riddler v. Missouri P. R. Co.*, 184 Mo. App. 709, 171 S. W. 632; *Panhandle & S. F. R. Co. v. Bell*, — Tex. Civ. App. —, 189 S. W. 1097.

### Deviations.

Claim for damages from deviating a shipment from the designated route is not within a requirement for written notice of damages. *Watson v. Missouri P. R. Co.*, 187 Ill. App. 220; *Lynch v. New*

*York C. & H. R. R. Co.*, 89 Misc. 472, 153 N. Y. Supp. 633, affirmed 156 N. Y. Supp. 1131.

### Failure to Give Stopover.

Damages caused by the failure of a carrier to give a stopover privilege in accordance with a condition of the bill of lading is not within a requirement for written notice of damage claims. *Cincinnati, N. O. & T. P. R. Co. v. Luke*, 169 Ky. 560, 184 S. W. 1132.

### Cattle Dying in Transit.

A requirement for the giving of written notice of damages before the removal of injured live stock at destination and mingling it with other stock does not include claims for cattle that died in transit. *Pierson v. Northern P. R. Co.*, 61 Wash. 450, 112 Pac. 509.

### Misdelivery.

A claim for damages from misdelivery of a shipment is not within a requirement that written notice of claims for loss or damage must be given within 30 days. *Sheldon v. New York C. & H. R. R. Co.*, 61 Misc. 274, 113 N. Y. Supp. 676.

### Shrinkage.

A loss resulting from the shrinkage of cattle in consequence of delay during interstate transportation is within a requirement of the bill of lading for giving written notice of claim for damage as a condition precedent to the carrier's liability. *St. Louis S. W. R. Co. v. Burnett*, 117 Ark. 656, 174 S. W. 1165; *Riddler v. Missouri P. R. Co.*, 184 Mo. App. 709, 171 S. W. 632.

Shrinkage of live stock in consequence of a delay in interstate transportation is not within a requirement for written notice of damages. *Gault v. Atchison, T. & S. F. R. Co.*, 92 Kan. 464, 139 Pac. 1014.

### Special Damages.

Special damages sustained from the idleness of a mill in consequence of a delay in transporting repairs is not within a requirement for written notice of damages within 36 hours after arrival of shipment. *Morrow v. Missouri P. R. Co.*, 140 Mo. App. 200, 123 S. W. 1034.

### Undeveloped Injuries.

A requirement for written notice of damage claims before the removal of live stock and mingling it with other stock at destination does not apply where the nature and extent of the injuries are not discernible within that time. *Eoff v. Scullin*, 120 Ark. 452, 179 S. W. 663; *McKinstry v. Chicago, R. I. & P. R. Co.*, 153 Mo. App. 546, 134 S. W. 1061; *Crawford v. Southern R. Co.*, 101 S. C. 532, 86 S. E.



19; *Pierson v. Northern P. R. Co.*, 61 Wash. 450, 112 Pac. 509.

**(h) Form and Sufficiency.**

See also *infra* XI, J, 4.

Form and sufficiency of notice under Carmack Amendment, see *infra* XI, J, 4.

Sufficiency of verbal notice under Carmack Amendment, see *infra* XI, J, 4, (b).

**In General.**

A requirement of a uniform bill of lading that, as a condition precedent to the liability of a carrier for damages to or the loss of an interstate shipment of live stock, written notice should be given within 24 hours to some general officer or the nearest station agent before the removal of the stock from the cars or the place of unloading and before it is mingled with other cattle, being for the benefit of the carrier, a substantial and not a literal compliance therewith is all that is necessary. *New Orleans & N. E. R. Co. v. Wood*, — Miss. —, 73 So. 615.

A substantial compliance with a requirement for the giving of written notice of injury to live stock within 36 hours and before removal at destination and mingling with other animals, is all that is required. *St. Louis & S. F. R. Co. v. Young*, 30 Okla. 588, 120 Pac. 999.

The fact that the year was erroneously stated in a claim for damages to an interstate shipment does not affect the validity of the notice, where it was accepted by a carrier and the claim finally rejected on its merits. *Baird v. Denver & R. G. R. Co.*, — Utah —, 162 Pac. 79.

**Written Notice.**

**— In General.**

A requirement for written notice is satisfied where a station agent noted on a bill of lading the condition of injured animals and mailed it to headquarters the same day. *McElvain v. St. Louis & S. F. R. Co.*, — Mo. App. —, 180 S. W. 1018.

**— When Provision for Void.**

The giving of written notice of damages within 60 days is sufficient, where the requirement of a contract of carriage for notice within 30 days is unreasonable and void. *Deans v. Atlantic C. L. R. Co.*, 152 N. C. 171, 67 S. E. 332.

**— When Carrier Has Actual Knowledge.**

Written notice of damage to a shipment is not necessary where a carrier has actual knowledge of the injury. *St. Louis, I. M. & S. R. Co. v. Cumbie*, 118 Ark. 478, 177 S. W. 910, S. C. 105 Ark. 406, 151 S. W. 237.

When the delivering carrier had actual notice of an injury to an interstate shipment which the consignee refused to accept, and the carrier's agent was given a copy of a telegram sent by the consignee to the consignor stating that the shipment was a total loss, there was a sufficient compliance with requirement for written notice within 36 hours after the arrival of the shipment at destination, to bind the initial carrier. *St. Louis, I. M. & S. R. Co. v. Cumbie*, 101 Ark. 172, 141 S. W. 939, S. C. 118 Ark. 478, 177 S. W. 910.

No unlawful preference or discrimination is created by permitting the actual knowledge of a carrier to take the place of written notice of injuries to live stock. *Baldwin v. Atlantic C. L. R. Co.*, 170 N. C. 12, 86 S. E. 776.

**— On Discovery of Injuries.**

Where live stock inferior to that shipped was delivered at destination and notice of damages was given as soon as the carrier's negligence was discovered, there was a sufficient compliance with a requirement for notice within 5 days. *Chesapeake & O. R. Co. v. Rebman*, — Va. —, 90 S. E. 629.

**Commencement of Suit as Notice.**

The filing of suit within 30 days after an interstate shipment was damaged satisfies a requirement for written notice of damages within such period. *Missouri, K. & T. Co. v. Neale*, — Tex. Civ. App. —, 176 S. W. 85.

**Verbal Notice.**

A verbal claim is a sufficient compliance with a stipulation that any claim for damages shall be presented within 10 days. *Blair H. & M. Co. v. St. Joseph & G. I. R. Co.*, — Mo. App. —, 180 S. W. 412.

A verbal notice of a damage claim is sufficient, although a contract of carriage calls for written notice, where oral notices had been uniformly accepted by the carrier during a long course of dealing with the shipper. *Blackmer & Post P. Co. v. Mobile & O. R. Co.*, 137 Mo. App. 479, 119 S. W. 1.

A statement by a shipper to an agent of a carrier that the former intends to make a claim for damages to an interstate shipment, is not a sufficient compliance with a requirement for written notice. *Kidwell v. Oregon S. L. R. Co.*, 125 C. C. A. 313, 208 Fed. 1.

Oral notice to a dock foreman at destination of the injury to a shipment which was examined by him excuses the failure of a shipper to give written notice. *St. Louis, I. M. & S. R. Co. v. Starbird*, 118 Ark. 485, 177 S. W. 912.

**(i) Service.**

See also *infra* XI, J, 5.

**Sufficiency.**

The giving of a written notice of damages 4 months and 11 days after a shipper was informed of the misdelivery of a shipment is a sufficient compliance with a requirement for notice within 4 months after a reasonable time for delivery. *St. Louis, I. M. & S. R. Co. v. Bliss-Cook Oak Co.*, 118 Ark. 323, 176 S. W. 325.

**(j) Waiver.**

See also *infra* XI, J, 7.

Waiver as unlawful preference or discrimination, see also *infra* XI, J, 7 (a).

Waiver of requirement for giving notice of loss or injury as question for jury, see *infra* XIII, J.

**In General.**

A carrier may waive compliance by a shipper with a requirement for giving written notice of claims for loss or injury within a designated time as a condition precedent to the former's liability. *Louisville & N. R. Co. v. Tharpe*, 11 Ga. App. 465, 75 S. E. 677; *Howard v. Illinois C. R. Co.*, 161 Ky. 783, 171 S. W. 442; *New Orleans & N. E. R. Co. v. Wood*, — Miss. —, 73 So. 615; *Blackmer & Post P. Co. v. Mobile & O. R. Co.*, 137 Mo. App. 479, 119 S. W. 1; *Baldwin v. Atlantic C. L. R. Co.*, 170 N. C. 12, 86 S. E. 776.

**Waiver as Unlawful Preference.**

The prohibition of the Act Regulating Commerce against undue preferences or advantages precludes a carrier from waiving the defense that notice of loss or damages to an interstate shipment was not given within the time limited by the contract of carriage. *Wall v. Northern P. R. Co.*, — Mont. —, 161 Pac. 518, S. C. 50 Mont. 122, 145 Pac. 291, last case reversed 241 U. S. 87, 60 L. ed. 905, 36 Supt. Ct. Rep. 493.

**When Contract of Carriage Prohibits Waiver.**

The service of notice of damages claims cannot be waived where the contract of carriage declares that no agent of the carrier can waive any of its provisions. *Clegg v. St. Louis & S. F. R. Co.*, 122 C. C. A. 273, 203 Fed. 971; *McElvain v. St. Louis & S. F. R. Co.*, — Mo. App. —, 180 S. W. 1018.

**Who May Waiver Requirement for Notice.**

A requirement for giving written notice of loss or damage within a designated period may be waived by any agent of a carrier who is authorized to receive such

notices. *Howard v. Illinois C. R. Co.*, 161 Ky. 783, 171 S. W. 442.

An agent of a carrier cannot waive the giving of written notice of loss or injury where he is not authorized to receive such notice or to deal with damage claims. *St. Louis, I. M. & S. Co. v. Cumbie*, 118 Ark. 478, 177 S. W. 910, S. C. 105 Ark. 406, 151 S. W. 237; *Illinois C. R. Co. v. Davis*, — Miss. —, 72 So. 874.

The failure to give written notice of a claim for damages to live stock is not excused by the fact that at destination an employee of a carrier saw the condition of the stock, where he had no authority to investigate or report on damage claims. *St. Louis, I. M. & S. R. Co. v. Cumbie*, 118 Ark. 478, 177 S. W. 910, S. C. 105 Ark. 406, 151 S. W. 237.

The fact that at destination a longshoreman was aware of the damaged condition of a shipment unloaded by him does not excuse the failure to give written notice, where he did not have authority to inspect shipments or receive notice of damage claims. *St. Louis, I. M. & S. R. Co. v. Starbird*, 118 Ark. 485, 177 S. W. 912.

**What Constitutes Waiver.****— In General.**

The failure to give written notice is waived where a carrier does not set up such a defense until the trial of an action 3 years after a shipment was made. *Cincinnati, N. O. & T. P. & R. Co. v. Smith*, 165 Ky. 235, 176 S. W. 1013.

A carrier does not waive a condition of a contract limiting the time for the filing of claims for damages to an interstate shipment, where its refusal to pay the claim did not induce the shipper to delay action to his injury, and such refusal was based on a different ground than that finally relied on. *Lynch v. Southern Express Co.*, — Ga. App. —, 90 S. E. 655.

A requirement of a contract for the interstate shipment of live stock for the giving of written notice of claim for damages within one day after arrival at destination, as condition precedent to carrier's liability, is not waived by a letter from the carrier to the shipper stating that the validity of such requirement with respect to a claim for shrinkage had been submitted to the carrier's legal department, and that the carrier was ready to settle a claim not covered by such requirement. *Riddler v. Missouri P. R. Co.*, 184 Mo. App. 709, 171 S. W. 632.

**— Continued Opportunity for Examination.**

The failure of a shipper to give written notice of injuries to an interstate shipment of live stock within the time

required by the bill of lading is not waived by the fact that the carrier, after the expiration of the stipulated time, had undiminished opportunity to investigate the merits of the claim. *Dunlap v. Chicago & A. R. Co.*, 187 Mo. App. 201, 172 S. W. 1178.

**— Agreement as to Amount of Damages.**

A stipulation between a carrier and a shipper as to the amount of damage sustained by an interstate shipment of live stock is not a waiver of a requirement of the bill of lading for written notice of a claim for damages. *Riddler v. Missouri P. R. Co.*, 184 Mo. App. 709, 171 S. W. 632.

**— Rejection of Claim on Grounds Other Than Delayed Notice.**

The failure of a shipper to file a damage claim within the time stipulated in a contract of carriage is waived by the conduct of a carrier in accepting the claim after the expiration of the prescribed period and subsequently rejecting it on the merits or on grounds other than the failure to file it within the proper time. *St. Louis, I. M. & S. R. Co. v. Laser Grain Co.*, 120 Ark. 119, 179 S. W. 189; *Post v. Atlantic C. L. R. Co.*, 138 Ga. 763, 76 S. E. 45; *Banks v. Pennsylvania R. Co.*, 111 Minn. 48, 126 N. W. 410; *Magnus v. Platt*, 62 Misc. 499, 115 N. Y. Supp. 824; *Frankfurt v. Weir*, 40 Misc. 683, 83 N. Y. Supp. 112; *Chicago, R. I. & G. R. Co. v. Linger*, — Tex. Civ. App. —, 156 S. W. 298.

The failure of a shipper to file a written claim of damages within the proper time is waived where the carrier has actual knowledge of the loss and negotiates for a settlement, and finally denies liability on grounds other than the failure to give timely notice. *Watkins M. Co. v. Missouri, K. & T. R. Co.*, 82 Kan. 308, 108 Pac. 116.

Failure to file a damage claim within the stipulated time was waived where a carrier returned the claim to the shipper for the attachment of the bill of lading and afterwards rejected the claim on its merits. *Wallace v. Lake Shore & M. S. R. Co.*, 133 Mich. 633, 95 N. W. 750.

Where a notice of a damage claim was dispatched but not received by a carrier within the stipulated time and it was afterwards rejected on the merits, noncompliance with the terms of the contract of carriage was waived. *Ingwersen v. St. Louis, K. C. & C. R. Co.*, 116 Mo. App. 139, 92 S. W. 357.

The holding of a claim by a carrier for three months and then rejecting it on the merits is a waiver of the failure of the claimant to file written notice within the stipulated period. *Isham v. Erie R. Co.*, 112 App. Div. 612, 98 N. Y. Supp. 609, affirmed 191 N. Y. 547, 85 N. E. 1111.

A requirement of a bill of lading that a claim for the loss or injury to an interstate shipment should be presented to carrier within 4 months is waived where, after the expiration of such period, the carrier suggested that the shipper present his claim, which the former entertained on its merits and at one time stated that it would be paid, and liability on the ground that the claim was not presented within the proper time was not denied until 15 months thereafter. *Cheney Piano Action Co. v. New York C. & H. R. R. Co.*, 166 App. Div. 706, 152 N. Y. Supp. 285, affirmed 85 Misc. 157, 148 N. Y. Supp. 1081.

**— Actual Knowledge of Loss or Injury.**

Where a carrier was, at the time a shipment was injured, fully aware of the extent thereof, the failure of the shipper to give notice of injury within the stipulated time is waived. *Southern P. Co. v. Stewart*, 147 C. C. A. 630, 233 Fed. 956.

A requirement for giving written notice of injuries to live stock before its removal from destination and mingling with other animals is waived where a carrier has actual knowledge of their damaged condition. *Baldwin v. Atlantic C. L. R. Co.*, 170 N. C. 12, 86 S. E. 776.

Where a carrier had actual knowledge of a loss and did not, until the trial of the action, question the shipper's non-compliance with a requirement for written notice within a designated time, there was a waiver. *Eckert v. Pennsylvania R. Co.*, 211 Pa. 267, 60 Atl. 781.

Where a carrier is aware of the destruction of an interstate shipment by fire, the failure of the shipper to give written notice of the loss within the time stipulated is not a bar to a recovery. *Deaver-Jeter Co. v. Southern R. Co.*, 91 S. C. 503, 74 S. E. 1071, Ann. Cas. 1914 A. 230, writ of error dismissed 235 U. S. 710, 59 L. ed. 436, 35 Sup. Ct. Rep. 198.

The giving of written notice of an injury to live stock is not a condition precedent to the carrier's liability where the latter had the injured animals examined by a veterinary during transportation. *Castner v. Oregon, W. R. & N. Co.*, 89 Wash. 694, 155 Pac. 167.

An examination of injured live stock by a veterinary surgeon at the instance of a carrier and a report of their condition by him to the carrier is not a waiver of a requirement for written notice within a designated period. *Crawford v. Southern R. Co.*, 101 S. C. 522, 86 S. E. 19.

**— Acting on Oral Notice.**

A requirement for written notice was not waived where shipper complained orally to a carrier's claim agent of an injury to live stock and was told to put his

claim in writing and take it up with the home office. *St. Louis, I. M. & S. R. Co. v. Shepherd*, 113 Ark. 248, 168 S. W. 137.

Compliance by shipper with a requirement for the giving of written notice of injury to live stock before its removal and mingling with other animals at destination is waived where, without objection, the agent of the carrier received and acted on an oral notice. *Louisville & N. R. Co. v. Tharpe*, 11 Ga. App. 465, 75 S. E. 677.

A requirement for verified written notice within 10 days from unloading live stock at destination was waived by a carrier where its agent saw the stock and knew the cause of their injury and was informed by the owner that the cattle would not be accepted by him because of their damaged condition, the agent noting their condition on the bill of lading and informing the shipper to do the best he could for the injured stock, which the carrier employed a veterinary to look after. *Howard v. Illinois C. R. Co.*, 161 Ky. 783, 171 S. W. 442.

A requirement for written notice to the nearest station agent before the removal of live stock and its mingling with other cattle was waived, where the station agent at destination was immediately notified of an injury to some of the stock, which he examined, noted their condition on the expense bill, and assured the shipper that he would have ample time to file a claim for damages, which he did a few days later. *New Orleans & N. E. R. Co. v. Wood*, — Miss., 73 So. 615.

A requirement for notice within 1 day was waived where, an oral notice being given within that time, the carrier's agent directed the shipper to sell the injured property, and on the following day he filed a written claim. *Clubb v. St. Louis & S. F. R. Co.*, 136 Mo. App. 1, 117 S. W. 110.

A requirement for written notice of injury is waived where oral notice was given a carrier and he examined live stock within a few hours after they were injured. *Bernstein v. Yazoo & M. V. R. Co.*, 41 Miss. 697, 72 So. 132.

Where, at destination, a shipper notified the carrier's agent of the damaged condition of live stock, and stated that he wanted to file a damage claim, and the agent examined the animals and made a memorandum of their condition, the nature of their injuries, and the damages claimed, which he filed with the carrier, there was a waiver of the requirement for written notice. *St. Louis & S. F. R. Co. v. Young*, 30 Okla. 580, 120 Pac. 999.

The failure to file a written damage claim within the stipulated time is waived by the conduct of a carrier's agent in

examining a damaged shipment, directing its disposal, and promising to adjust the claim. *Kelly v. Southern R. Co.*, 84 S. C. 249, 66 S. E. 198.

Where a carrier's agent conferred with a shipper respecting an injury to an interstate shipment and promised to help him collect damages, a requirement for written notice within a designated period was waived. *St. Louis, S. F. & T. R. Co. v. Wall*, — Tex. Civ. App. —, 165 S. W. 527.

A requirement for the giving of a verified claim of damages was not waived by the carrier, where a shipper orally mentioned his loss to a traveling freight agent who had no authority to receive the verified notice or to deal with such claims. *Illinois C. R. Co. v. Davis*, — Miss. —, 72 So. 874.

#### — Customary Failure to Take Advantage of Notice.

Noncompliance with a requirement for the giving of notice of damages within one day and before the removal of live stock at destination and mingling it with other animals, is not excused because the carrier had universally failed to avail itself of the opportunity of examining cattle after receiving notice of their injury. *Chicago, R. I. & P. R. Co. v. Brightwell*, — Okla. —, 162 Pac. 484.

#### — Inducing Belief That Written Notice Will Not Be Required.

A requirement for a verified written notice of damage claims within 10 days was waived, notwithstanding a condition of the bill of lading that none of its conditions could be changed or waived by any employee of the carrier, where, with knowledge of the condition of live stock and the cause of their injury, and of the owner's intention to assert a claim for damages, an agent of the carrier, who was authorized to accept service of notice, led the shipper to believe that written notice would not be required. *Howard v. Illinois C. R. Co.*, 161 Ky. 783, 171 S. W. 442.

#### — Tracing Lost Goods.

The fact that a carrier, after the failure of a shipper to give notice of damages as required by a contract of shipment, attempted to find a lost shipment, is not a waiver of such noncompliance. *Atlantic C. L. R. Co. v. Bryan*, 109 Va. 523, 65 S. E. 30.

#### — Requesting Proof.

The failure of a shipper to give written notice of damages within the time prescribed by a contract of carriage is not waived by the conduct of a carrier in

thereafter requesting a verified invoice of the lost goods, and stating that on the receipt thereof the matter would receive attention. *Atlantic C. L. R. Co. v. Bryan*, 109 Va. 523, 63 S. E. 30.

By requesting proof of his claim from a shipper and leading him to believe that it would be settled, a carrier waived a failure to give written notice within the required time. *St. Louis S. W. R. Co. v. Grayson*, 89 Ark. 154, 115 S. W. 933.

#### — Failure to Plead.

The failure of a shipper to give written notice of a damage claim within the time stipulated in the contract of carriage is waived by the failure of the carrier to plead such noncompliance. *Tobin v. Lake Shore & M. S. R. Co.*, — Mich. —, 159 N. W. 389.

### 7. Time for Bringing Actions.

See also *infra* XI, K.

Effect of Carmack Amendment on limitation of time for action, see *infra* XI, K.

Reasonableness of time prescribed for bringing action as jury question, see *infra* XIII, J.

#### (a) In General.

#### What Law Governs When Stipulated Time Unreasonable.

When the requirement of a contract of carriage for giving written notice of loss within 30 days is unreasonable and void, an action for damages is not governed by the general statute of limitations, but by giving notice within a reasonable time. *Deans v. Atlantic C. L. R. Co.*, 152 N. C. 171, 67 S. E. 332.

#### (b) Validity.

Validity under Carmack Amendment of limitation of time for action, see *infra* XI, K, 1.

#### In General.

A provision of an interstate freight contract requiring an action for damages to be brought within 40 days from the time of injury, when such contract was declared to be in consideration of a reduced rate, will not be held invalid on the ground that it provided for interstate transportation at less than the established rates, where the evidence does not show what such rates were nor what was the meaning of the term "reduced rates," since it is fair to assume that it refers to the lesser of two established rates. *Betka v. Houston & T. R. Co.*, — Tex. Civ. App. —, 189 S. W. 532.

#### Consideration.

A requirement that suit shall be brought within a stipulated time is based on a sufficient consideration where a shipper paid the lower of two established freight rates, although not aware that there were two applicable rates. *St. Louis S. W. R. Co. v. Haynie*, 120 Ark. 26, 179 S. W. 170.

Want of consideration for a contract limiting the time for bringing action for injuries to an interstate shipment of freight is not in issue when not raised by the pleadings or evidence. *Betka v. Houston & T. C. R. Co.*, — Tex. Civ. App. —, 189 S. W. 532.

#### Absence of Knowledge of Limitation.

A person who for 13 years has shipped live stock, making weekly shipments during the latter portion of the time, and who always executed written contracts of affreightment, is bound by a condition of a bill of lading that action for damages to an interstate shipment should be brought within 6 months, although he never read any of the contracts executed by him. *Atchison, T. & S. F. R. Co. v. White*, — Tex. Civ. App. —, 188 S. W. 714.

#### Stipulation Made After Shipment Under Parol Agreement.

A stipulation of a written contract requiring actions for loss or damage to an interstate shipment to be brought within 91 days is not binding on a shipper when executed after the shipment was made under a parole contract. *Kansas City, M. & O. R. Co. v. Hansard*, — Tex. Civ. App. —, 184 S. W. 329.

#### Insufficient Time to Ascertain Extent of Injuries.

The fact that a shipper was not able to discover the full extent of the injuries sustained by live stock within the 40 days prescribed by an interstate shipping contract for bringing actions for damages, did not excuse his failure to comply therewith, since he was not required to know the exact amount of his damages in order to sue. *Betka v. Houston & T. C. R. Co.*, — Tex. Civ. App. —, 189 S. W. 532.

#### (c) Particular Periods.

Validity under Carmack Amendment of particular periods, see *infra* XI, K, 3.

#### Forty Days.

A stipulation of a contract of carriage requiring an action for the loss of or injury to an interstate shipment to be commenced within 40 days is reasonable and valid. *Betka v. Houston & T. C. R. Co.*, — Tex. Civ. App. —, 189 S. W. 532; *McCarthy v. Gulf, C. & S. F. R. Co.*, 79 Tex. 33, 15 S. W. 164; *Gulf, C. & S. F. R. Co.*

does not give a preference in violation of the Act Regulating Commerce. *Clingan v. Cleveland, C. C. & St. L. R. Co.*, 184 Ill. App. 202.

The time for filing written notice of damages is extended by an endorsement by a station agent to that effect on a freight bill. *Clingan v. Cleveland, C. C. & St. L. R. Co.*, 184 Ill. App. 202.

#### (d) Particular Periods.

Particular periods for giving notice under Carmack Amendment, see *infra* XI, J, 2 (b).

#### Prompt Notice at Destination.

A requirement for the giving of written notice of damages to a carrier at destination promptly after delivery of a shipment, as a condition precedent to its liability, is unreasonable and void with respect to a shipment from Alabama to St. Louis, Mo. *Nashville, C. & St. L. Co. v. Long*, 163 Ala. 165, 50 So. 130.

#### Before Removal of Stock and Mingling With Other Animals.

A provision of a contract for the interstate shipment of live stock requiring the shipper to give the carrier notice of loss or damage before the stock is intermingled with other stock or slaughtered is valid under the Federal laws. *Potter v. Kansas City S. R. Co.*, 187 Mo. App. 56, 172 S. W. 1153; *Atchison, T. & S. F. R. Co. v. Smyth*, — Tex. Civ. App. —, 189 S. W. 70.

#### Five Hours.

A requirement for giving written notice of injury to or loss of an interstate shipment of live stock within five hours after unloading is reasonable and valid. *Bowman v. Missouri, K. & T. R. Co.*, 185 Mo. App. 25, 171 S. W. 642.

#### One Day.

A requirement of a contract of interstate carriage that, as a condition precedent to a carrier's liability, written notice of loss or injury shall be given it within one day after the arrival of live stock at destination and before it is removed and mingled with other animals, is reasonable and valid. *Clegg v. St. Louis & S. F. R. Co.*, 122 C. C. A. 273, 203 Fed. 971; *St. Louis S. W. R. Co. v. Burnett*, 117 Ark. 656, 174 S. W. 1165; *St. Louis & S. F. R. Co. v. Haynie*, 120 Ark. 26, 179 S. W. 170; *St. Louis & S. F. R. Co. v. Pearce*, 82 Ark. 358, 101 S. W. 760, 12 Ann. Cas. 125; *Atchison, T. & S. F. R. Co. v. Baldwin*, 53 Colo. 416, 128 Pac. 449; *Smith v. St. Louis S. W. R. Co.*, 186 Mo. App. 401, 171 S. W. 635; *Riddler v. Missouri P. R. Co.*, 184 App. 709, 171 S. W. 632; *Moore*

*v. St. Louis & S. F. R. Co.*, 143 Mo. App. 675, 127 S. W. 921; *McElvain v. St. Louis & S. F. R. Co.*, 176 Mo. App. 379, 158 S. W. 464, S. C. — Mo. App. —, 180 S. W. 1018; *Sims v. Missouri P. R. Co.*, 177 Mo. App. 18, 163 S. W. 275; *Sheldon v. St. Louis & S. F. R. Co.*, 131 Mo. App. 560, 110 S. W. 627; *Baldwin v. Atlantic C. L. R. Co.*, 170 N. C. 12, 86 S. E. 776; *Austin-Stephenson Co. v. Southern R. Co.*, 151 N. C. 107, 65 S. E. 757; *St. Louis & S. F. R. Co. v. Pickens*, — Okla. —, 151 Pac. 1055; *Chicago, R. I. & P. R. Co. v. Brightwell*, — Okla. —, 162 Pac. 484; *Kansas City, M. & O. R. Co. v. Gleason*, — Okla. —, 158 Pac. 365; *Chicago, R. I. & P. R. Co. v. Conway*, 34 Okla. 356, 125 Pac. 1110; *St. Louis & S. F. R. Co. v. Ladd*, 33 Okla. 160; 124 Pac. 461; *St. Louis & S. F. R. Co. v. Young*, 30 Okla. 588, 120 Pac. 999.

A requirement for the giving of written notice of loss or injury within 1 day is valid when made in consideration of a reduced freight rate. *Moore v. St. Louis & S. F. R. Co.*, 143 Mo. App. 675, 127 S. W. 921.

#### Thirty-six Hours.

A requirement for giving written notice of damages within 36 hours is valid. *St. Louis, I. M. & S. R. Co. v. Cumbie*, 118 Ark. 478, 177 S. W. 910, S. C. 105 Ark. 406, 151 S. W. 237; *St. Louis, I. M. & S. R. Co. v. Starbird*, 118 Ark. 485, 177 S. W. 912.

#### Five Days.

A provision for the giving of written notice of loss or damage within 5 days is reasonable and valid. *Sweetser v. Chicago & A. R. Co.*, 196 Ill. App. 623; *Dunlap v. Chicago & A. R. Co.*, 187 Mo. App. 201, 172 S. W. 1178; *Hamilton v. Chicago & A. R. Co.*, 177 Mo. App. 145, 164 S. W. 248.

#### Ten Days.

A provision for written notice of damages within 10 days after the unloading of an interstate shipment of live stock at destination and before it is mingled with other stock, is reasonable and valid. *Kidwell v. Oregon S. L. R. Co.*, 125 C. C. A. 313, 208 Fed. 1; *Howard v. Illinois C. R. Co.*, 161 Ky. 783, 171 S. W. 442; *Armstrong v. Illinois C. R. Co.*, 162 Ky. 539, 172 S. W. 947; *Illinois C. R. Co. v. Davis*, — Miss. —, 72 So. 874.

A requirement that written notice of damages shall be given at destination within 10 days after the arrival of live stock is unreasonable when it does not appear that there was an agent at such place to whom notice could be given. *Chicago, R. I. & G. R. Co. v. Whaley*, — Tex. Civ. App. —, 177 S. W. 543.

### Thirty Days.

A requirement for written notice of damages within 30 days is reasonable and valid. *Adams Express Co. v. Cook*, 162 Ky. 592, 172 S. W. 1096; *Bowman v. Missouri, K. & T. R. Co.*, 185 Mo. App. 25, 171 S. W. 642; *Missouri, K. & T. R. Co. v. Hancock*, 26 Okla. 265, 109 Pac. 223.

### Ninety-one Days.

A stipulation for giving notice of loss or damages within 91 days is reasonable and valid. *Potter v. Kansas City S. R. Co.*, 187 Mo. App. 56, 172 S. W. 1153.

### Four Months.

A stipulation for written notice of damages within 4 months is reasonable and valid. *Chicago, R. I. & P. R. Co. v. Williams*, 101 Ark. 436, 142 S. W. 826; *Dodge v. Pennsylvania R. Co.*, — App. Div. —, 162 N. Y. Supp. 549; *Forney v. Seaboard A. L. R. Co.*, 167 N. C. 641, 83 S. E. 686.

### (e) Effect of Noncompliance.

Necessity of pleading want of notice, see *infra* XIII, E, 5.

### In General.

Noncompliance with a requirement of a contract of carriage that a written notice of loss or injury to an interstate shipment shall be given within a designated period as a condition precedent to a carrier's liability, will bar a recovery of damages. *Kidwell v. Oregon S. L. R. Co.*, 125 C. C. A. 313, 208 Fed. 1; *Clegg v. St. Louis & S. F. R. Co.*, 122 C. C. A., 273, 203 Fed. 971; *St. Louis, I. M. & S. R. Co. v. Cumbie*, 118 Ark. 478, 177 S. W. 910, S. C. 105 Ark. 408, 151 S. W. 237; *St. Louis, I. M. & S. R. Co. v. Starbird*, 118 Ark. 485, 177 S. W. 912; *St. Louis S. W. R. Co. v. Burnett*, 117 Ark. 656, 174 S. W. 1165; *St. Louis & S. F. R. Co. v. Heynie*, 120 Ark. 26, 179 S. W. 170; *St. Louis & S. F. R. Co. v. Pearce*, 82 Ark. 358, 101 S. W. 760, 12 Ann. Cas. 125; *Chicago, R. I. & P. R. Co. v. Williams*, 101 Ark. 436, 142 S. W. 826; *Atchison, T. & S. F. R. Co. v. Baldwin*, 53 Colo. 416, 128 Pac. 449; *Sweetser v. Chicago & A. R. Co.*, 196 Ill. App. 623; *Armstrong v. Illinois C. R. Co.*, 162 Ky. 539, 172 S. W. 947; *Adams Express Co. v. Cook*, 162 Ky. 592, 172 S. W. 1096; *Howard v. Illinois C. R. Co.*, 161 Ky. 783, 171 S. W. 442; *Illinois C. R. Co. v. Davis*, — Miss. —, 72 So. 874; *Potter v. Kansas City S. R. Co.*, 187 Mo. App. 56, 172 S. W. 1153; *Dunlap v. Chicago & A. R. Co.*, 187 Mo. App. 201, 172 S. W. 1178; *Smith v. St. Louis S. W. R. Co.*, 186 Mo. App. 401, 171 S. W. 635; *Bowman v. Missouri, K. & T. R. Co.*, 185 Mo. App. 25, 171 S. W. 642; *Riddler v. Missouri P. R. Co.*, 184 Mo. App. 709,

171 S. W. 632; *Sims v. Missouri P. R. Co.*, 177 Mo. App. 18, 163 S. W. 275; *Hamilton v. Chicago & A. R. Co.*, 177 Mo. App. 145, 164 S. W. 248; *McElvain v. St. Louis & S. F. R. Co.*, 176 Mo. App. 379, 158 S. W. 464, S. C. — Mo. App. —, 180 S. W. 1018; *Moore v. St. Louis & S. F. R. Co.*, 143 Mo. App. 675, 127 S. W. 921; *Sheldon v. St. Louis & S. F. R. Co.*, 131 Mo. App. 560, 110 S. W. 627; *Dodge v. Pennsylvania R. Co.*, — App. Div. —, 162 N. Y. Supp. 549; *Baldwin v. Atlantic C. L. R. Co.*, 170 N. C. 12, 86 S. E. 776; *Forney v. Seaboard A. L. R. Co.*, 167 N. C. 641, 83 S. E. 686; *Austin-Stephenson Co. v. Southern R. Co.*, 151 N. C. 107, 65 S. E. 757; *Chicago, R. I. & P. R. Co. v. Brightwell*, — Okla. —, 162 Pac. 484; *Kansas City, M. & O. R. Co. v. Gleason*, — Okla. —, 158 Pac. 365; *St. Louis & S. F. R. Co. v. Pickens*, — Okla. —, 151 Pac. 1055; *Chicago, R. I. & P. R. Co. v. Conway*, 34 Okla. 356, 125 Pac. 1110; *St. Louis & S. R. Co. v. Ladd*, 33 Okla. 160, 124 Pac. 461; *St. Louis & S. F. R. Co. v. Young*, 30 Okla. 588, 120 Pac. 999; *Missouri, K. & T. R. Co. v. Hancock*, 26 Okla. 265, 109 Pac. 223.

### (f) What Shipments Within Requirement for Notice.

#### Shipments Reconsigned to Intrastate Point.

Where, during the transportation of an interstate shipment within the state of destination, the shipper alters the original place of consignment to another intrastate point, and there was an injury to the property during the latter portion of the journey, the shipment was still moving in interstate commerce so that the stipulations of the original contract of shipment limiting the carrier's liability apply. *Kirby v. Union P. R. Co.*, 94 Kan. 485, 146 Pac. 1183, L. R. A. 1916 E. 528.

### (g) What Losses Within Requirements for Notice.

See also *infra* XI, J, 3.

### Failure to Furnish Cars.

Since the Interstate Commerce Act covers an interstate shipment of live stock from the request for cars or other instrumentalities until the cattle are delivered at destination, a claim for damages for a carrier's breach of an agreement to furnish cars on a certain day is within a condition of a bill of lading requiring the giving of notice of claim for loss or damage to the carrier within a stipulated time, and the parties cannot substitute a special agreement therefor. *Atchison, T. & S. F. R. Co. v. Smyth*, — Tex. Civ. App. —, 189, S. W. 70.

### **Injuries Received Before Commencement of Transportation.**

Injuries inflicted on live stock by dipping them and which are apparent before transportation is begun are not within a requirement for written claims for damages before removal of the stock at destination. *Broadhead v. Atchison, T. & S. F. R. Co.*, 97 Kan. 222, 155 Pac. 20.

### **Conversion.**

A stipulation requiring written notice of loss or damage within 30 days is not available to a carrier who converts an interstate shipment by altering it from an "order-notify" to a "straight" consignment. *Peoples State Sav. Bank v. Missouri, K. & T. R. Co.*, 192 Mo. App. 614, 178 S. W. 292.

Where a shipment never reached destination, the carrier having taken and sold a portion of it, compliance with a requirement for giving written notice of loss at destination is unnecessary. *Harrington v. Chicago, R. I. & P. R. Co.*, 143 Mo. App. 418, 128 S. W. 807.

### **Delay.**

A claim for damages for the delay of an interstate shipment not connected with an injury to property is within a requirement of a bill of lading for the giving of written notice of damage claims within 4 months. *Bailey v. Missouri P. R. Co.*, 184 Mo. App. 457, 171 S. W. 44.

Requirement for written notice of claim for damages within a specified time does not include claims due to delay in transportation. *WilliamSPORT Hardwood L. Co. v. Baltimore & O. R. Co.*, 71 W. Va., 741, 77 S. E. 333.

### **Decline in Market.**

Damages resulting from a decline in market price in consequence of a delay in transportation is within a requirement for giving written notice of damage claims within a designated time. *Jett v. Southern R. Co.*, 130 Tenn. 237, 169 S. W. 767.

A loss sustained by a shipper from a decline in the market price where there was a delay in the transportation of an interstate shipment of live stock is not within a requirement of the bill of lading for giving notice of claim for damages before the removal of the cattle at destination. *Riddler v. Missouri P. R. Co.*, 184 Mo. App. 709, 171 S. W. 632; *Panhandle & S. F. R. Co. v. Bell*, — Tex. Civ. App. —, 189 S. W. 1097.

### **Deviations.**

Claim for damages from deviating a shipment from the designated route is not within a requirement for written notice of damages. *Watson v. Missouri P. R. Co.*, 187 Ill. App. 220; *Lynch v. New*

*York C. & H. R. R. Co.*, 89 Misc. 472, 153 N. Y. Supp. 633, affirmed 156 N. Y. Supp. 1131.

### **Failure to Give Stopover.**

Damages caused by the failure of a carrier to give a stopover privilege in accordance with a condition of the bill of lading is not within a requirement for written notice of damage claims. *Cincinnati, N. O. & T. P. R. Co. v. Luke*, 169 Ky. 560, 184 S. W. 1132.

### **Cattle Dying in Transit.**

A requirement for the giving of written notice of damages before the removal of injured live stock at destination and mingling it with other stock does not include claims for cattle that died in transit. *Pierson v. Northern P. R. Co.*, 61 Wash. 450, 112 Pac. 509.

### **Misdelivery.**

A claim for damages from misdelivery of a shipment is not within a requirement that written notice of claims for loss or damage must be given within 30 days. *Sheldon v. New York C. & H. R. R. Co.*, 61 Misc. 274, 113 N. Y. Supp. 676.

### **Shrinkage.**

A loss resulting from the shrinkage of cattle in consequence of delay during interstate transportation is within a requirement of the bill of lading for giving written notice of claim for damage as a condition precedent to the carrier's liability. *St. Louis S. W. R. Co. v. Burnett*, 117 Ark. 656, 174 S. W. 1165; *Riddler v. Missouri P. R. Co.*, 184 Mo. App. 709, 171 S. W. 632.

Shrinkage of live stock in consequence of a delay in interstate transportation is not within a requirement for written notice of damages. *Gault v. Atchison, T. & S. F. R. Co.*, 92 Kan. 464, 139 Pac. 1014.

### **Special Damages.**

Special damages sustained from the idleness of a mill in consequence of a delay in transporting repairs is not within a requirement for written notice of damages within 36 hours after arrival of shipment. *Morrow v. Missouri P. R. Co.*, 140 Mo. App. 200, 123 S. W. 1034.

### **Undeveloped Injuries.**

A requirement for written notice of damage claims before the removal of live stock and mingling it with other stock at destination does not apply where the nature and extent of the injuries are not discernible within that time. *Eoff v. Scullin*, 120 Ark. 452, 179 S. W. 663; *McKinstry v. Chicago, R. I. & P. R. Co.*, 153 Mo. App. 546, 134 S. W. 1061; *Crawford v. Southern R. Co.*, 101 S. C. 522, 86 S. E.



19; *Pierson v. Northern P. R. Co.*, 61 Wash. 450, 112 Pac. 509.

### (h) Form and Sufficiency.

See also *infra* XI, J, 4.

Form and sufficiency of notice under Carmack Amendment, see *infra* XI, J, 4.

Sufficiency of verbal notice under Carmack Amendment, see *infra* XI, J, 4, (b).

### In General.

A requirement of a uniform bill of lading that, as a condition precedent to the liability of a carrier for damages to or the loss of an interstate shipment of live stock, written notice should be given within 24 hours to some general officer or the nearest station agent before the removal of the stock from the cars or the place of unloading and before it is mingled with other cattle, being for the benefit of the carrier, a substantial and not a literal compliance therewith is all that is necessary. *New Orleans & N. E. R. Co. v. Wood*, — Miss. —, 73 So. 615.

A substantial compliance with a requirement for the giving of written notice of injury to live stock within 36 hours and before removal at destination and mingling with other animals, is all that is required. *St. Louis & S. F. R. Co. v. Young*, 30 Okla. 588, 120 Pac. 999.

The fact that the year was erroneously stated in a claim for damages to an interstate shipment does not affect the validity of the notice, where it was accepted by a carrier and the claim finally rejected on its merits. *Baird v. Denver & R. G. R. Co.*, — Utah —, 162 Pac. 79.

### Written Notice.

#### — In General.

A requirement for written notice is satisfied where a station agent noted on a bill of lading the condition of injured animals and mailed it to headquarters the same day. *McElvain v. St. Louis & S. F. R. Co.*, — Mo. App. —, 180 S. W. 1018.

#### — When Provision for Void.

The giving of written notice of damages within 60 days is sufficient, where the requirement of a contract of carriage for notice within 30 days is unreasonable and void. *Deans v. Atlantic C. L. R. Co.*, 152 N. C. 171, 67 S. E. 332.

#### — When Carrier Has Actual Knowledge.

Written notice of damage to a shipment is not necessary where a carrier has actual knowledge of the injury. *St. Louis, I. M. & S. R. Co. v. Cumbie*, 118 Ark. 478, 177 S. W. 910, S. C. 105 Ark. 406, 151 S. W. 237.

When the delivering carrier had actual notice of an injury to an interstate shipment which the consignee refused to accept, and the carrier's agent was given a copy of a telegram sent by the consignee to the consignor stating that the shipment was a total loss, there was a sufficient compliance with requirement for written notice within 36 hours after the arrival of the shipment at destination, to bind the initial carrier. *St. Louis, I. M. & S. R. Co. v. Cumbie*, 101 Ark. 172, 141 S. W. 939, S. C. 118 Ark. 478, 177 S. W. 910.

No unlawful preference or discrimination is created by permitting the actual knowledge of a carrier to take the place of written notice of injuries to live stock. *Baldwin v. Atlantic C. L. R. Co.*, 170 N. C. 12, 86 S. E. 776.

#### — On Discovery of Injuries.

Where live stock inferior to that shipped was delivered at destination and notice of damages was given as soon as the carrier's negligence was discovered, there was a sufficient compliance with a requirement for notice within 5 days. *Chesapeake & O. R. Co. v. Rebman*, — Va. —, 90 S. E. 629.

### Commencement of Suit as Notice.

The filing of suit within 30 days after an interstate shipment was damaged satisfies a requirement for written notice of damages within such period. *Missouri, K. & T. Co. v. Neale*, — Tex. Civ. App. —, 176 S. W. 85.

### Verbal Notice.

A verbal claim is a sufficient compliance with a stipulation that any claim for damages shall be presented within 10 days. *Blair H. & M. Co. v. St. Joseph & G. I. R. Co.*, — Mo. App. —, 180 S. W. 412.

A verbal notice of a damage claim is sufficient, although a contract of carriage calls for written notice, where oral notices had been uniformly accepted by the carrier during a long course of dealing with the shipper. *Blackmer & Post P. Co. v. Mobile & O. R. Co.*, 137 Mo. App. 479, 119 S. W. 1.

A statement by a shipper to an agent of a carrier that the former intends to make a claim for damages to an interstate shipment, is not a sufficient compliance with a requirement for written notice. *Kidwell v. Oregon S. L. R. Co.*, 125 C. C. A. 313, 208 Fed. 1.

Oral notice to a dock foreman at destination of the injury to a shipment which was examined by him excuses the failure of a shipper to give written notice. *St. Louis, I. M. & S. R. Co. v. Starbird*, 118 Ark. 485, 177 S. W. 912.

### Injuries Caused by "Dipping" as Result of Use of Infected Pens.

Where it was necessary to transport an interstate shipment of live stock through a quarantine territory, and the carrier, in order to avoid a violation of the 28 Hour Act, unloaded the stock within such territory into infected pens, when, in order to make further transportation, the cattle had to be dipped by Federal inspectors, and in consequence of their negligence some of the cattle died and others were injured, the carrier is not answerable, since the negligence of such inspectors and not the failure of the carrier to have clean pens was the proximate cause of the loss. *Kansas City, M. & O. R. Co. v. McCuningham*, — Tex. Civ. App. —, 149 S. W. 420.

Where it was necessary to transport an interstate shipment of live stock through quarantine territory, and on the refusal of the shipper to consent to their further confinement in the cars for two hours until nonquarantine territory could be reached, the cattle were unloaded into unclean pens in order to avoid a violation of the 28 Hour Act, and in order to permit further transportation the cattle were dipped by Federal inspectors, whose negligence caused injury to some of the animals, the refusal of the shipper to consent to the further confinement of the stock was contributory negligence which will prevent a recovery from the carrier for such injuries. *Kansas City, M. & O. R. Co. v. McCuningham*, — Tex. Civ. App. —, 149 S. W. 420.

### Pens of Inadequate Size.

A carrier is answerable for confining an interstate shipment of live stock, when unloaded in compliance with the 28 Hour Act, in pens which were too small and which had insufficient feeding and watering facilities. *St. Louis, S. F. & T. R. Co. v. Drahn*, — Tex. Civ. App. —, 143 S. W. 357.

A finding that a carrier did not perform the duty imposed on it by the 28 Hour Act is justified in a shipper's action for damages, where, within such period, live stock was unloaded into pens which were not supplied with water, nor equipped with troughs or other facilities for feeding and watering them, and which were so small that the animals were crowded so closely together that they did not have space to lie down or to move about. *St. Louis & S. F. R. Co. v. Piburn*, 30 Okla. 262, 120 Pac. 923.

### 5 When Facilities for Feeding, Watering and Resting in Cars.

#### Feeding and Watering.

The 28 Hour Act does not require the unloading of horses when shipped in a

special express car which permits them to be fed and watered therein. *Regan v. Adams Express Co.*, 19 La. 1579, 22 So. 835.

Live stock is not transported in cars which have proper facilities for feeding and watering within the meaning of the 28 Hour Act, when 43 horses and mules are confined in two cars which are but 2 feet longer than ordinary stock cars. *Chesapeake & O. R. Co. v. American Exchange Bank*, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

#### Opportunity for Rest.

The phrase "opportunity to rest," as used in the 28 Hour Act, means an opportunity for live stock to lie down. *Northern P. R. Co. v. Finch*, 225 Fed. 676.

The fact that horses may take their rest while standing up in a car does not relieve a carrier from the duty of unloading them for rest, since the 28 Hour Act requires that live stock shall have an opportunity to lie down while resting. *Northern P. R. Co. v. Finch*, 225 Fed. 676.

The 28 Hour Law does not require the unloading of horses shipped in a special express car which provides sufficient space for them to rest. *Regan v. Adams Express Co.*, 49 La. Ann. 1579, 22 So. 835.

Cattle do not have an opportunity to rest, within the meaning of the 28 Hour Act, when 93 fat beef cattle weighing 1,500 pounds each were transported in five ordinary cattle cars. *Ecton v. Chicago, B. & Q. R. Co.*, 125 Mo. App. 223, 102 S. W. 575.

Live stock is not transported in cars in which they have space and opportunity for rest within the meaning of the 28 Hour Law, when 43 horses and mules are confined in 2 cars but 2 feet longer than ordinary stock cars. *Chesapeake & O. R. Co. v. American Exchange Bank*, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

Evidence that horses will not lie down during a railway journey, but will rest while standing, is not admissible in an action by a carrier to recover from a shipper for expenses incurred in unloading live stock for feed and rest, where the defendant claimed that such service was unnecessary because the car in which the animals were shipped afforded ample "space and opportunity to rest" within the meaning of the 28 Hour Act, although the horses were not able to lie down. *Northern P. R. Co. v. Finch*, 225 Fed. 676.

### 6. Consent to Confinement Beyond Twenty-Eight Hours.

#### For Confinement Exceeding 36 Hours.

An agreement between a carrier and shipper for the confinement of live stock on cars for more than 36 hours during

interstate transportation, is void under the 28 Hour law. *Webster v. Union P. R. Co.*, 200 Fed. 597.

#### Form of Consent.

An indorsement by a shipper over his initials, in the blank margin of a uniform live stock contract or bill of lading, of a request for a carrier to run an interstate shipment of live stock for 36 hours without unloading for feed, water and rest, satisfies the requirements of the Federal law. *Norfolk & W. R. Co. v. Steele*, 117 Va. 788, 86 S. E. 124.

#### Consent Obtained by Threats.

A carrier is not answerable for a failure to unload live stock in compliance with the requirements of the 28 Hour Act, where the shipper signed a 36 hour release, although in consequence of a threat by a conductor to unload the stock at a point where there were no pens unless the release was given. *Kansas City, M. & O. R. Co. v. Graham*, —, Tex. Civ. App. —, 145 S. W. 632.

#### Revocation of Consent.

A shipper may revoke his written request for the continuous confinement of live stock in cars for more than 28 hours when executed without consideration to the shipper or detriment to the carrier. *Durrett v. Chicago, R. I. & P. R. Co.*, 20 N. Mex. 114, 146 Pac. 962.

#### Unloading in Violation of Consent to Confinement Beyond Twenty-Eight Hours.

Where a shipper requested in writing that a carrier keep an interstate shipment of live stock in the cars for 36 hours, in which time their transportation could be completed, and in violation of such request the carrier unloaded the cattle for feed, water and rest, and in consequence the cattle would not take the proper amount of "fill" at destination which caused a shrinkage in weight, the shipper cannot recover damages therefor. *St. Louis, I. M. & S. R. Co. v. Washum*, 96 Ark. 384, 131 S. W. 959.

#### 7. Delays Due to Unloading.

##### In General.

A carrier is not answerable for a delay resulting solely from unloading an interstate shipment of live stock for feed, water and rest in compliance with the 28 Hour Act, when transportation could not, under ordinary circumstances, have been completed within that time. *St. Louis, I. M. & S. R. Co. v. Davenport*, 97 Ark. 82, 133 S. W. 186, S. C. 98 Ark. 609, 146 S. W. 1199; *Hickey v. Chicago, B. & Q. R. Co.*, 174 Mo. App. 408, 160 S. W. 24; *Ecton v. Chicago, B. & Q. Co.*, 125 Mo. App. 223, 102

S. W. 575; *Kansas City, M. & O. R. Co. v. Moore*, —, Tex. Civ. App. —, 149 S. W. 302; *St. Louis, I. M. & S. R. Co. v. Smith*, —, Tex. Civ. App. —, 135 S. W. 597; *St. Louis, I. M. & S. R. Co. v. Gunter*, 44 Tex. Civ. App. 480, 99 S. W. 152.

A carrier is not answerable for a delay in transporting an interstate shipment of live stock resulting from a compliance with the 28 Hour Act and a State Sunday law. *Louisville & N. R. Co. v. Cecil*, 145 Ky. 271, 140 S. W. 186.

When an interstate shipment of live stock cannot be transported within 28 hours, and the shipper does not request the carrier to confine the cattle for 36 hours, he cannot recover for a delay occasioned by compliance with the 28 Hour Act, although there was an additional delay caused by waiting for a train by which to resume the journey. *Hickey v. Chicago, B. & Q. R. Co.*, 174 Mo. App. 408, 160 S. W. 24.

Where an interstate shipment of live stock was made in a car in which they could be fed and watered, but it was not shown whether the car afforded sufficient space and opportunity for the animals to rest, the carrier is not answerable for a delay caused by the unloading of the cattle in compliance with the 28 Hour Act, although there was a further delay beyond the five hours rest period before the arrival of the first train by which the shipment could be forwarded. *Galveston, H. & S. A. R. Co. v. Warnken*, 12 Tex. Civ. App. 645, 35 S. W. 72.

A terminal carrier that, in consequence of a delay on the line of a preceding carrier, is compelled to unload live stock in order to comply with the 28 Hour Act, is not answerable for the further resulting delay. *St. Louis, I. M. & S. R. Co. v. Landa*, —, Tex. Civ. App. —, 149 S. W. 292.

#### When Delay Due to Negligence.

Where by custom it was the duty of an initial carrier to feed live stock during interstate transportation before the expiration of the 28 hour limit and before delivering them to a connecting carrier, a shipper may recover from the first carrier when its failure to perform such customary duty caused a delay in the delivery of live stock at the market. *Wisecarver v. Chicago, R. I. & P. R. Co.*, 141 Ia. 121, 119 N. W. 532.

A delay of 10 hours in moving an interstate shipment of live stock when 19 or 20 hours was a reasonable time for transportation, is not excused by the fact that the carrier was compelled to unload the stock for feed, water and rest as required by the 28 Hour Act. *Lay v. Chicago, B. & Q. R. Co.*, 157 Mo. App. 467, 138 S. W. 884.

A carrier is not answerable for delay in the interstate transportation of live stock as the result of unloading them for food, rest and water, unless the carrier was negligent in believing that the stock could not be delivered at destination within the 28 hours prescribed by the Federal law. *Wood v. Boston & M. R. Co.*, — N. H. —, 98 Atl. 480.

Negligence cannot be inferred from the fact of a delay in the transportation of live stock after the expiration of the 5 hours required for their rest, where they went forward on the first train leaving after the expiration of the rest period. *Lewis v. Pennsylvania R. Co.*, 70 N. J. L. 132, 56 Atl. 128, 1 Ann. Cas. 156.

#### **Unloading in Violation of Request for Confinement Beyond Twenty-eight Hours.**

Where, in violation of a shipper's written request to confine an interstate shipment of live stock on cars for 36 hours, a carrier caused a delay by unloading them for feed, water and rest, it is answerable to the shipper for resulting loss unless the condition of the stock was such that it would have been inhuman to confine them in cars for such period. *St. Louis, S. F. & T. R. Co. v. Drahm*, — Tex. Civ. App. —, 143 S. W. 357.

#### **8. Failure to Unload.**

Damages for noncompliance with 28 Hour Act as affected by limitation of carrier's liability, see *supra* VI, 1, 2, (m).

Measure of damages for failure of carrier to comply with 28 Hour Law, see *infra* XIII, F, 5.

##### **(a) In General**

#### **When Federal Law Applicable.**

Where a shipper consented to the confinement of horses in cars for 36 hours, the Federal law will be considered on the question of a carrier's negligence in confining them for a longer period, and in failing to provide suitable conveniences for feeding and watering them when unloaded. *Illinois C. R. Co. v. Eblin*, 114 Ky. 817, 71 S. W. 919.

#### **(b) When Shipper Under Contract to Unload.**

#### **Failure of Shipper to Perform Duty.**

A carrier is not answerable for injuries suffered by live stock during interstate transportation from its failure to properly care for, feed and water them in transit, where the shipper in consideration of a reduced rate agreed to unload, feed, water, tend and care for sheep in transit, and the carrier provided proper facilities

therefor, as such agreement was not in violation of the 28 Hour Law. *Webster v. Union P. R. Co.*, 200 Fed. 597.

When live stock is shipped under a contract requiring the owner to feed and care for them at his own expense during interstate transportation, and providing upon his failure to do so that the carrier might provide feed and water at the owner's expense, and the owner was guilty of a default, he cannot recover damages arising from the failure of the carrier to comply with the 28 Hour Act. *Southern R. Co. v. Tollerson*, 135 Ga. 74, 68 S. E. 798.

Where a shipper agreed to feed and water live stock during interstate transportation he cannot hold the carrier for its failure to comply with the 28 Hour Act. *Lewis v. Pennsylvania R. Co.*, 70 N. J. L. 132, 56 Atl. 128, 1 Ann. Cas. 156.

A shipper cannot recover for damages sustained by a carrier's violation of the 28 Hour law, where he accompanied a shipment of live stock under a contract requiring him to unload it for feed, water and rest when necessary, and he participated with the carrier in the violation of such law by permitting the cattle to be confined on cars continuously for 54 hours. *Fluckiger v. Chicago & N. W. R. Co.*, 99 Neb. 6, 154 N. W. 865.

A shipper who contracts to care for and feed and water live stock during interstate transportation, cannot recover damages for their confinement in cars for more than 28 hours in violation of the Federal law, where the evidence is not sufficiently specific to enable the court to assess damages. *Missouri P. R. Co. v. Texas & P. R. Co.*, 41 Fed. 913.

A provision of a contract for the interstate shipment of live stock requiring the owner to load and unload them at his own expense and risk at any place, for any purpose, does not relieve the carrier from liability for injuries resulting from its breach of the duty imposed on it by the 28 Hour Act. *Reynolds v. Great N. R. Co.*, 40 Wash. 163, 82 Pac. 161, 111 Am. St. Rep. 883.

A carrier is not released from liability to a shipper for its failure to unload live stock for feed, water and rest as required by the 28 Hour law, by reason of the shipper's express agreement to do so, where the carrier was aware of the former's omission to do so, since under the circumstances it was the duty of the carrier to obey the mandate of the Federal law. *Chicago, B. & Q. R. Co. v. Slattry*, 76 Neb. 721, 107 N. W. 1045, 124 Am. St. Rep. 825.

#### **Failure to Request Unloading.**

The failure of a shipper of live stock to notify a carrier to stop or to demand that it stop a train in order to permit

him to water, feed and rest his cattle before they have been confined on the cars for more than 28 hours, does not prevent a recovery of damages caused by the negligent confinement of the cattle and delay in transportation, where the shipper did not request or consent to the delay or the confinement of the stock for a longer period. *Southern P. Co. v. Arnett*, 61 C. C. A. 131, 126 Fed. 75.

There cannot be a recovery for a violation of the 28 Hour Act where live stock is shipped under a contract requiring the owner to feed and water the stock and he failed to request the privilege of unloading the stock for such purpose. *Fluckiger v. Chicago & N. W. R. Co.*, 99 Neb. 6, 154 N. W. 865.

Where a shipper, who accompanied an interstate shipment of horses under a contract requiring him to load, unload and care for the animals, as destination could be reasonably reached within 36 hours, signed a request for their confinement in cars for that period, and they were delayed for several hours longer, he cannot recover from the carrier for resulting injuries on the ground of a violation of the 28 Hour Act when he did not request that the horses should be unloaded for feed and water. *Haner v. Fargo*, 166 App. Div. 466, 151 N. Y. Supp. 913.

#### (c) Liability of Carrier.

##### Confinement for Statutory Period as Negligence.

###### — In General.

The Federal law precluding the continuous confinement of live stock in cars for more than 28 hours is not a grant or privilege to carriers to confine stock for such period irrespective of the question of negligence in doing so, since the statute leaves that question the same as at common law. *Durrett v. Chicago, R. I. & P. R. Co.*, 20 N. Mex. 114, 146 Pac. 962; *Missouri P. R. Co. v. Ivy*, 79 Tex. 444, 15 S. W. 692; *Texas & P. R. Co. v. McMillen*, — Tex. Civ. App. —, 183 S. W. 773.

###### — Negligence Per Se.

The failure of a carrier to unload live stock for feed, water and rest as required by the 28 Hour Act is negligence per se. *Southern R. Co. v. Proctor*, 3 Ala. App. 413, 57 So. 513; *Nashville, C. & St. L. R. Co. v. Heggie*, 86 Ga. 210, 12 S. E. 363, 22 Am. St. Rep. 453; *Atchison, T. & S. F. R. Co. v. Hill*, — Tex. Civ. App. —, 171 S. W. 1028.

##### Liability for Failure to Unload.

A carrier is answerable for injuries sustained by an interstate shipment of live stock in consequence of a failure to unload

them for feed, water and rest, as required by the Federal 28 Hour Act. *Southern R. Co. v. Proctor*, 3 Ala. App. 413, 57 So. 513; *Nashville, C. & St. L. R. Co. v. Heggie*, 86 Ga. 210, 12 S. E. 363, 22 Am. St. Rep. 453; *Baltimore & O. S. W. R. Co. v. Wood*, 130 Ky. 839, 114 S. W. 734; *Cincinnati, N. O. & T. P. R. Co. v. Greening*, — Ky. —, 100 S. W. 825; *Cincinnati, N. O. & T. P. R. Co. v. Gregg*, — Ky. —, 80 S. W. 512; *Brockway v. American Express Co.*, 168 Mass. 257, 47 N. E. 87; *Hale v. Missouri P. R. Co.*, 36 Neb. 266, 54 N. W. 517; *St. Louis & S. F. R. Co. v. Piburn*, 30 Okla. 262, 120 Pac. 923; *Texas & P. R. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 897; *Chesapeake & O. R. Co. v. American Exchange Bank*, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

Since the 28 Hour Act imposed on carriers the duty of unloading live stock for rest, feed and water, the failure to perform such duty, when resulting in damage to a shipper, is actionable negligence, notwithstanding the fact that the law also renders the carrier liable to a penalty. *Burns v. Chicago, M. & St. P. R. Co.*, 104 Wis. 646, 80 N. W. 927.

Where neither a railway company nor its employees provided a person in charge of an interstate shipment of live stock with facilities for unloading them for rest, feed and water before they had been confined in cars for more than 28 hours, although the attendant requested them to do so, the carrier is answerable for resulting damages, when they were confined in cars for 40 hours. *Nashville, C. & St. L. R. Co. v. Heggie*, 86 Ga. 210, 12 S. E. 363, 22 Am. St. Rep. 453.

An express company is answerable to a shipper where, as the result of the negligence of a railway company, a carload of horses was delayed at a junction point and kept in the car without food and water for 49 hours in violation of the Federal law. *Brockway v. American Express Co.*, 168 Mass. 257, 47 N. E. 87.

The negligence of a carrier is shown when there was an unexplained delay of 7 hours in the transportation of an interstate shipment of swine during very warm weather, and it appeared that the animals were left on a side track exposed to the heat of the sun, that one-third of them were dead on arrival at destination, and that they were confined without food or water in violation of the 28 Hour Act. *Nashville, C. & St. L. R. Co. v. Stone*, 112 Tenn. 348, 79 S. W. 1031.

A carrier that refuses a shipper an opportunity to unload live stock for rest, food and water during interstate transportation and who keeps them confined continuously in cars for 60 hours, in violation of the Federal law, is liable to the owner for resulting damages. *Chesapeake*

& O. R. Co. v. American Exchange Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

Where, on receiving horses that had been confined in cars for 10 hours, a connecting carrier kept them there for 35 hours longer without unloading them for rest, feed and water as required by the 28 Hour Act, although repeatedly requested by the owner to do so, the carrier is answerable for resulting injuries. *Pierson v. Northern P. R. Co.*, 52 Wash. 595, 100 Pac. 999, S. C. 61 Wash. 450, 112 Pac. 509.

Where, by reason of the continuous confinement of horses in cars for 45 hours in violation of the 28 Hour Act, their vitality was lowered so as to render them susceptible to disease, and while in that condition they were unwittingly exposed by the owner in endeavoring to bring them back to normal condition, and because of their exposure and weakened condition a number of them sickened and died, the negligence of the carrier was the proximate cause of the injury for which it was answerable to the owner. *Pierson v. Northern P. R. Co.*, 52 Wash. 595, 100 Pac. 999, S. C. 61 Wash. 450, 112 Pac. 509.

The confinement of live stock in cars for 43 hours without unloading it for food, water and rest, as required by the 28 Hour Law, when contributing to the injury of the stock, is evidence of negligence sufficient to go to the jury in a shipper's action. *Chicago, B. & Q. R. Co. v. Simpson*, 23 Wyo. 342, 151 Pac. 902.

Where a railway company refused a shipper's request for an opportunity to unload an interstate shipment of live stock for feed, water and rest before they were confined in cars for more than 28 hours, and in consequence thereof the stock was injured, the carrier is answerable therefor, notwithstanding that at the place where the request was made, and where the cattle should have been unloaded, the carrier's stock pens were on fire. *Nashville, C. & St. L. R. Co. v. Heggie*, 86 Ga. 210, 12 S. E. 363, 22 Am. St. Rep. 453.

Evidence that live stock arrived at destination in bad condition after confinement in cars for 50 hours in violation of the 28 Hour Act, during a journey that should have consumed but 24 hours, is not overcome by testimony that there was no delay and that the stock was not negligently handled. *Cincinnati, N. O. & T. P. R. Co. v. Greening*, — Ky. —, 100 S. W. 825.

In an action in a state court for injuries caused an interstate shipment of live stock by the failure of a carrier to stop it for feed and water, the rights of the parties are not measured or affected by the 28 Hour Act, which provides a penalty for its violation collectable in a Federal court.

*Illinois C. R. Co. v. Peterson*, 68 Miss. 454, 10 So. 43, 14 L. R. A. 550.

While it may be true that state courts are not concerned with the enforcement of the 28 Hour Act, yet the fact that live stock was confined in cars for 40 hours without food or water may be considered as a circumstance showing probable cause for the plaintiff's complaint in an action for resulting damages for keeping the stock during such time in a car with an open trap door in the roof through which air and sleet entered. *Covington v. Yazoo & M. V. R. Co.*, — Miss. —, 71 So. 821.

#### **Failure of Shipper to Request Unloading.**

The fact that the agent of a shipper of live stock did not sufficiently urge upon the carrier the necessity for stopping a car of live stock before their confinement for more than 28 hours, will not relieve the carrier from liability to the shipper for resulting damages where the cattle were confined on cars for 40 hours without feed or water, since it was the duty of the carrier to select a stopping place and to comply with the Federal law. *Nashville, C. & St. L. R. Co. v. Heggie*, 86 Ga. 210, 12 S. E. 363, 22 Am. St. Rep. 453.

#### **Revocation of Consent for Confinement Beyond Statutory Period.**

Where, after executing a written request for the confinement of live stock for 36 hours, a shipper notified a carrier, on the arrival of the stock at a point where they could be unloaded, that they could not be safely transported further without food, water and rest and the carrier refused to stop the shipment for unloading, it is answerable to the shipper for resulting damages. *Durrett v. Chicago, R. I. & P. R. Co.*, 20 N. Mex. 114, 146 Pac. 962.

#### **(d) Justification.**

##### **Infected Stock Pens.**

Where an interstate shipment of hogs coming from private pens were not shown to have been infected in any manner nor to have been exposed to disease, a carrier cannot escape liability to the shipper for a violation of the 28 Hour Act by showing that the requirements of the Bureau of Animal Industry prohibited the unloading of swine which came from public stockyards. *Atchison, T. & S. F. R. Co. v. Hill*, — Tex. Civ. App. —, 171 S. W. 1028.

##### **Refusal of Connecting Carrier to Receive Shipment.**

The fact that a connecting carrier refused to accept an interstate shipment of live stock does not relieve the initial carrier from liability for damages resulting from its refusal thereafter to unload the cattle as required by the 28 Hour law,

although the contract of shipment limited the initial carrier's liability to injuries occurring on its own line. *Texas & P. R. Co. v. Berchfield*, 19 Tex. Civ. App. 228, 46 S. W. 900.

#### **Washouts and High Water.**

A carrier is not relieved of liability to a shipper for damages resulting from a violation of the 28 Hour Act, on the ground that it was prevented from unloading live stock by reason of a flood, where it does not appear that the flood interfered in any manner with the unloading of the stock for feed, water and rest. *Chicago, B. & Q. R. Co. v. Slatterly*, 78 Neb. 721, 107 N. W. 1045, 124 Am. St. Rep. 825.

The delay of a train for some hours on account of high water and a washout is not due to "a storm or other accidental causes" within the meaning of the 28 Hour law, so as to relieve a carrier from liability to a shipper for injuries caused an interstate shipment of live stock in consequence of their confinement in cars continuously for more than 28 hours, where it does not appear that the high water or a storm prevented the carrier from unloading the stock before the expiration of such period. *Chesapeake & O. R. Co. v. American Exchange Bank*, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

### **9. Who Liable.**

#### **In General.**

When both an initial and a connecting carrier are guilty of a continued violation of the 28 Hour Act, either or both are answerable to a shipper for resulting injuries to live stock. *Baltimore & O. S. W. R. Co. v. Wood*, 130 Ky. 839, 114 S. W. 734.

#### **Connecting Carrier.**

It is the duty of a connecting carrier on receiving an interstate shipment of live stock to make inquiry as to the length of time they have been confined in cars, if such fact is not shown by the waybills. *Pierson v. Northern P. R. Co.*, 52 Wash. 595, 100 Pac. 999, S. C. 61 Wash. 450, 112 Pac. 509.

A connecting carrier cannot rely on notations on the waybill of an initial carrier showing the unloading of live stock for food, water and rest as required by the 28 Hour Act, so as to be relieved from liability to the shipper, where the connecting carrier had actual notice that such law had not been observed. *St. Louis & S. F. R. Co. v. Piburn*, 30 Okla. 262, 120 Pac. 923.

Even though in receiving a shipment of live stock from an initial carrier a connecting carrier believed that they had been unloaded for feed, water and rest, as re-

quired by the 28 Hour law, and the latter carrier handled the shipment in the usual and customary manner and gave it the usual and customary attention, the connecting carrier is not relieved from liability where the Federal law was not complied with by either carrier. *St. Louis & S. F. R. Co. v. Piburn*, 30 Okla. 262, 120 Pac. 923.

#### **Terminal Carrier.**

A delivering carrier is answerable to a shipper for injuries sustained by an interstate shipment of live stock which was confined in cars for 96 hours, although such carrier had the stock in its possession only 18 hours, since the 28 Hour Act requires that the time the stock was confined by connecting roads shall be included in estimating the total confinement. *Cincinnati, N. O. & T. P. R. Co. v. Gregg*, — Ky. —, 80 S. W. 512.

A delivering carrier cannot escape liability to a shipper resulting from a violation of the Federal law by showing that it had an interstate shipment of live stock in its possession and transportation for less than 28 hours, or that it did not know that the preceding connecting carriers had not complied with such law, which requires that the time the stock was confined by connecting carriers shall be included in estimating the total length of confinement. *Cincinnati, N. O. & T. P. R. Co. v. Gregg*, — Ky. —, 80 S. W. 512.

### **10. Liability for Cost of Feed and Water.**

#### **When Stock Unloaded Contrary to Request for Further Confinement.**

Where a carrier unloads live stock for feed, water and rest, in violation of a shipper's written request for confinement in cars for 36 hours, the latter is not answerable to the carrier for the cost of feeding. *St. Louis, I. M. & S. R. Co. v. Washum*, 96 Ark. 384, 131 S. W. 959.

### **G. Transportation of Infected Animals.**

#### **1. In General.**

#### **What Law Controls.**

The Federal statutes and regulations for the interstate shipment of infected live stock supersede state laws and regulations. *Pecos & N. T. R. Co. v. Hall*, — Tex. Civ. App. —, 189 S. W. 535.

#### **Delay Incident to Loss of Certificate of Inspection.**

Where sheep from a quarantined district were shipped under a certificate of a government inspector, which was lost by some one of the several carriers, a subsequent connecting carrier who, in the ab-

sence of such certificate, was compelled under the Federal law to hold and treat the sheep, is not answerable to the owner for damages resulting from their detention. *Wakefield v. Chicago, I. & L. R. Co.*, — Ky. —, 104 S. W. 778.

## 2. Animals Intended for Immediate Slaughter.

### Refusal to Accept for Transportation.

Where, in violation of the Act of Congress of March 3, 1905, ch. 1496, secs. 1, 3, 4, 33 St. L. 1264, U. S. Comp. St. 1913, secs. 8701, 8703, 8704, and the requirements of the Secretary of Agriculture, a carrier refused to accept from a quarantined district an interstate shipment of live stock intended for immediate slaughter at destination, the carrier is answerable to the shipper for injuries to and the shrinkage of the cattle as the result of "dipping" them as a condition precedent to their acceptance for transportation. *Pecos & N. T. R. Co. v. Hall*, — Tex. Civ. App. —, 189 S. W. 535.

## 3. Infecting Other Animals.

### Moving Stock on Highway Because of Wreck.

Where, because of a wreck, a carrier, in violation of the Act of Congress of March 3, 1905, ct. 1496, 33 St. L. 1264, as well as of a state law, unloaded cattle which came from a quarantined district, at a point below the quarantine line, and drove some of them along a highway, the carrier is liable for infecting cattle at the place of unloading, although its knowledge of the infected condition of the cattle transported is not alleged. *St. Louis, I. M. & S. R. Co. v. Campbell*, 116 Ark. 119, 172 S. W. 823.

### I. Criminal Liability.

(Will be covered in No. 4, Vol. I.)

## VIII. LIABILITY OF CARRIER FOR LOSS OF OR INJURY TO SHIPMENTS.

Liability for losses of or injuries to live stock, see *supra* VII.

Liability of carriers under the Carmack Amendment, see *infra* XI.

Liability of carriers under the Cummins Amendment, see *infra* XII.

### A. In General.

#### Assuming Common-Law Liability.

The Interstate Commerce Act does not prevent a carrier from assuming its common-law liability in the transportation of goods from one state to another. *Grice v.*

*Oregon, W. R. & N. Co.*, — Wash. —, 150 Pac. 862.

### C. Diversion of Shipment.

#### Failure of Shipper to Designate Route.

Where there was but one through route over which there was an established interstate tariff a shipper need not, under section 15 of the Act Regulating Commerce, designate the route by which the shipment is to be made, in order to render the carrier answerable for a diversion thereof. *Lamb v. Moor*, 17 Ga. App. 549, 87 S. E. 837.

### D. Effect of Illegality of Contract of Carriage.

Effect of undervaluation on liability of carrier for loss, see *supra* VI, I, 2, (n).

Effect of undervaluation on liability under Carmack Amendment, see *infra* XI, I, 4, (b).

Instructions as to liability of carrier for loss of shipment when false classification, see *infra* XIII, H, 1.

### In General.

The fact that a shipper of goods entered into an agreement with a carrier in violation of the Act Regulating Commerce and the Elkins Act, to limit its liability to an agreed valuation, does not prevent a recovery of the full value of an interstate shipment where the shipper was not guilty of any fraud or misrepresentation in connection with the shipment. *Nonotuck Silk Co. v. Adams Express Co.*, 256 Ill. 66, 76, 99 N. E. 893, 897.

### Unlawful Rating.

The fact that the rate charged for an interstate shipment is, in violation of the Act Regulating Commerce, lower than the established tariff rate, does not relieve the carrier from liability for the loss of the shipment. *Central of Ga. R. Co. v. Butler M. & G. Co.*, 8 Ga. App. 1, 68 S. E. 775; *Oregon R. & N. Co. v. Thisler*, 90 Kan. 5, 133 Pac. 539; *Insurance Co. of N. A. v. Delaware M. Ins. Co.*, 91 Tenn. 537, 19 S. W. 755.

The fact that, with the knowledge of a carrier, and in good faith, eggs were shipped in the same car with live poultry for the lower rate applicable to the latter class of freight, does not relieve the carrier from liability for an injury to the eggs. *Houston & T. C. R. Co. v. Commons*, — Tex. Civ. App. —, 160 S. W. 1107.

A carrier is answerable for the full value of a lost interstate shipment, although transported under a limited liability contract in consideration of a lower rate than that fixed by the established tariffs. *Ward*



v. Missouri P. R. Co., 158 Mo. 226, 58 S. W. 28.

**Misclassification.**

The right of a shipper to recover on the common-law liability of an express company for the loss of an interstate shipment as the result of the latter's violation of its duties as a carrier, is not affected by the fact that, by false billing or classification, the shipper violated the provisions of the Act Regulating Commerce by obtaining transportation at less than the regular rates. *Adams Express Co. v. Chamberlin-Johnson-DuBose Co.*, 138 Ga. 455, 75 S. E. 601, writ of error dismissed 229 U. S. 631, 632, 57 L. ed. 1359, 33 Sup. Ct. Rep. 779.

A carrier is answerable for the full value of an interstate shipment that is lost through its negligence, notwithstanding there was a fraudulent classification by which a lower rate was obtained. *Harrington v. Wabash R. Co.*, 108 Minn. 257, 122 N. W. 14, 23 L. R. A. (N. S.) 745.

**Allowance of Rebates.**

The allowance of illegal rebates to an interstate shipper does not relieve a carrier from liability for injuries to an interstate shipment. *Merchants' Cotton P. & S. Co. v. Ins. Co. of N. A.*, 151 U. S. 368, 38 L. ed. 195, 14 Sup. Ct. Rep. 367; *Insurance Co. of N. A. v. Delaware Mut. S. Ins. Co.*, 91 Tenn. 537, 19 S. W. 755.

**XI. CARMACK AMENDMENT.\***

(See also Federal Railway Digest, Vol. I, No. 2.)

**C. Construction.**

**Federal Decisions Binding on State Courts.**

The construction placed on the Carmack Amendment by the Supreme Court of the United States is binding on state courts. *Cincinnati, H. & D. R. Co. v. Quincey*, — Ga. App. —, 91 S. E. 220.

**D. Effect.**

**1. In General.**

**Exclusiveness of Remedy.**

The Carmack Amendment is paramount as to all interstate shipments. *Cincinnati, H. & D. R. Co. v. Quincey*, — Ga. App. —, 91 S. E. 220.

The liability of an initial carrier for the loss of or injury to an interstate shipment must be determined by the Federal laws

and decisions. *Dodge v. Pennsylvania R. Co.*, — App. Div. —, 162 N. Y. Supp. 549.

**On Federal Laws Permitting Limitation of Liability of Carriers by Water.**

Federal laws permitting carriers by water to limit their liability were not repealed by the Elkins Act nor the Carmack Amendment, and they may be invoked by a railway company in an action for the loss of goods in transit on a barge owned by it. *The Hoffmans*, 171 Fed. 455.

**2. On State Laws.**

**(a) In General.**

**Action Against Negligent Connecting Carrier Under State Law.**

An action cannot be maintained under a state law against a negligent terminal carrier for injuries to an interstate shipment, since under the Carmack Amendment the initial carrier alone is answerable. *Southern R. Co. v. Savage*, — Ga. App. —, 89 S. E. 634, overruled *Central of Ga. v. Waxelbaum Produce Co.*, — Ga. App. —, 89 S. E. 635.

**(b) Laws Relating to Particular Subjects.**

**Laws Against Limitation of Liability.**

The Carmack Amendment with respect to interstate shipments, superseded a state constitutional prohibition against contracts limiting a carrier's liability. *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 153 Ky. 730, 156 S. W. 400, 45 L. R. A. (N. S.) 529.

If the Carmack Amendment was intended to supersede state laws invalidating contracts limiting the liability of carriers for the injury or loss of shipments, it cannot be applied to an action in a state court where the pleadings and evidence do not show that the carrier has complied with the requirements of the Act Regulating Commerce. *Elliott v. Atlantic C. L. R. Co.*, 94 S. C. 129, 75 S. E. 886, reversed on rehearing 94 S. C. 129, 77 S. E. 718.

**Binding Effect of Recitals of Bills of Lading.**

The Carmack Amendment precludes the application of a state statute making a bill of lading in the hands of a bona fide holder for value conclusive evidence of the receipt by a carrier of the property described therein. *Southern R. Co. v. North State Cotton Co.*, 107 Miss. 71, 64 So. 965.

**Burden of Proof.**

A state statute placing on carriers the burden of showing that a loss of or damage to a shipment was occasioned by accidental or uncontrollable events, was

\*For text of Carmack Amendment see Appendix No. 2, Vol. I, page 394.

not, with respect to interstate shipments, affected by the Carmack Amendment. *National Rice M. Co. v. New Orleans & N. E. R. Co.*, 132 La. 615, 61 So. 708, Ann. Cas. 1914 D. 1100, writ of error dismissed 234 U. S. 80, 58 L. ed. 1223, 34 Sup. Ct. Rep. 726.

#### Attorney Fees.

The Carmack Amendment does not prevent the plaintiff recovering an attorney fee, in an action for the loss of an interstate shipment, under a state statute providing that when an attorney is employed the plaintiff may be allowed an attorney fee not exceeding \$20 on claims not exceeding \$200, in actions including those against carriers for the loss of or injury to freight, where such claim was not paid within 30 days and the plaintiff recovers the full amount of his demand. *Missouri, K. & T. R. Co. v. Harris*, 234 U. S. 412, 58 L. ed. 1377, 34 Sup. Ct. Rep. 790.

#### 4. Effect of Saving Clause.

##### In General.

Such remedies only as existed under Federal laws, either statutory or common, at the time of the enactment of the Carmack Amendment, and not remedies under state laws, were preserved by the declaration of such act that nothing therein contained "shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing laws." *Southern R. Co. v. Avey*, — Ky. —, 191 S. W. 460.

##### Effect on State Laws.

The provisions of the Carmack Amendment preserving to the holder of a receipt or bill of lading for an interstate shipment, any rights or remedies he has under existing laws, leaves him free to resort to the laws of a state applicable to his contract. *St. Louis & S. F. R. Co. v. Akard*, — Okla. —, 159 Pac. 344.

#### F. What Shipments Within Act.

##### 1. In General.

##### Shipments Reconsigned to Foreign State.

Where a car of freight in intrastate commerce was shipped by rail to a lake port and delivered to the consignee, the carrier not undertaking to ship the cargo further and not knowing that this was to be done, and the consignee delivered it to a water carrier, who issued a through bill of lading for interstate transportation, the latter company, rather than the first rail carrier, was the initial carrier within the meaning of the Carmack Amendment and answerable as such for the negligence of a subsequent carrier. *Victor Produce Co. v.*

*Western Transit Co.*, — Minn. —, 160 N. W. 248.

#### 3. Shipments to Foreign Countries.

##### In General.

An initial carrier is not answerable under the Carmack Amendment for the loss of a through shipment to the Dominion of Canada by a connecting carrier in that country. *Darlington v. Cleveland, C. C. & St. L. R. Co.*, 14 Ohio N. P. 427.

#### H. Contracts of Affreightment.

##### 1. In General.

##### What Constitutes.

The contract between an interstate shipper of freight and a carrier is the bill of lading which the latter is required by the Carmack Amendment to issue for such shipments. *Aradalou v. New York, N. H. & H. R. R. Co.*, — Mass. —, 114 N. E. 297.

##### Contracts for Through Transportation.

Under the Carmack Amendment a carrier that voluntarily accepts goods for shipment to a point in another state on the line of a connecting carrier, will be conclusively treated as having made a through contract, and as thereby electing to treat the connecting carriers as its agents for all purposes of transportation and delivery. *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205, affirming — *Tex. Civ. App.* —, 117 S. W. 169, 170.

##### Separate Contracts of Each Connecting Carrier.

When property is delivered to a carrier for transportation on a continuous trip to a point beyond the limits of a state, it is an interstate shipment, although it is made on special contracts with each connecting carrier. *Collier v. Wabash R. Co.*, — Mo. App. —, 190 S. W. 969.

When property is accepted for through interstate transportation the fact that each of three connecting carriers whose lines were employed, moved the shipment under separate contracts, did not constitute a separate undertaking by each carrier to haul the shipment to the end of its own line only. *Collier v. Wabash R. Co.*, — Mo. App. —, 190 S. W. 969.

##### 2. Written Contracts.

##### Controlling Effect.

The liability of a carrier for the conversion of an interstate shipment of freight is, under the Carmack Amendment, controlled by the terms of the written bill of

lading. *Brockman Comm. Co. v. Missouri P. R. Co.*, — Mo. App. —, 188 S. W. 920.

A written contract for an interstate shipment signed by a carrier's agent and the consignor is, under the Carmack Amendment, when executed without fraud or overreaching, controlling of the liability of the initial carrier for damages occurring on the lines of a connecting carrier. *Panhandle & S. F. R. Co. v. Bell*, — Tex. Civ. App. —, 189 S. W. 1097.

### 3. Parol Contracts.

#### Validity.

An interstate shipment may be made under a parol contract. *Kansas City, M. & O. R. Co. v. Hansard*, — Tex. Civ. App. —, 184 S. W. 329.

#### Effect of Subsequent Execution of Written Contract.

An interstate shipment which is made without the issuance of a receipt or bill of lading by the carrier is not controlled by a contract made several months thereafter. *Chesapeake & O. R. Co. v. Jordan*, — Ind. App. —, 114 N. E. 461.

### 5. Effect of Failure to Issue Bill of Lading.

See *infra* XII, L, 3.

#### In General.

An action under the common law will lie against a carrier for an injury to an interstate shipment, although no receipt or bill of lading was issued therefor as required by the Carmack Amendment. *Chesapeake & O. R. Co. v. Jordan*, — Ind. App. —, 114 N. E. 461.

Since the Carmack Amendment imposes on carriers the duty of issuing a receipt or bill of lading for interstate shipments they cannot shield themselves from liability for an injury to such a shipment by failing to discharge such duty, even though the shipper does not demand a receipt or bill of lading. *Chesapeake & O. R. Co. v. Jordan*, — Ind. App. —, 114 N. E. 461.

### 6. Bill of Lading for Intrastate Portion of Interstate Shipment.

#### In General.

A carrier that accepts an interstate shipment for a through rate to a point beyond its own line cannot escape liability as an initial carrier under the Carmack Amendment by billing the shipment to a junction point and there reconsigning it to a connecting carrier under a provision of the tariff of the first carrier giving such reconsignment privilege to all shippers. *Keithley v. Lusk*, — Mo. App. —, 189 S. W. 621, S. C. 190 Mo. App. 458, 177 S. W. 756.

### 7. Construction of Contracts of Affreightment.

#### What Law Controls.

In determining the rights and liabilities of the parties to an interstate shipping contract the Acts of Congress and the decisions of the Federal courts thereunder control state courts. *Cranor v. Southern R. Co.*, 13 Ga. App. 86, 78 S. E. 1014; *St. Louis, I. M. & S. R. Co. v. Faulkner*, 111 Ark. 430, 164 S. W. 763; *Aradalou v. New York, N. H. & H. R. Co.*, — Mass. —, 114 N. E. 297; *Smith v. St. Louis S. W. R. Co.*, 186 Mo. App. 401, 171 S. W. 635; *Atchison, T. & S. F. R. Co. v. Smyth*, — Tex. Civ. App. —, 189 S. W. 70.

The construction of a bill of lading for an interstate shipment must be in accordance with the Federal statutes and decisions. *Dodge v. Pennsylvania R. Co.*, — App. Div. —, 162 N. Y. Supp. 549.

#### I. Contracts Limiting Liability of Carriers.

See generally, *supra* VI, I.

##### 1. In General.

#### What Law Determines.

The validity of any stipulation limiting a carrier's liability for an interstate shipment is to be determined by both state and Federal courts under the common law as finally settled by the Supreme Court of the United States. *Adams Express Co. v. Cook*, 162 Ky. 592, 172 S. W. 1096.

#### Limitation of Common-Law Liability.

Under the Carmack Amendment a carrier may limit its common-law liability by special contract, when supported by a reasonable consideration, if such contract is fairly entered into, and does not attempt to relieve the carrier from liability for its own negligence or misconduct. *St. Louis & S. F. R. Co. v. Akard*, — Okla. —, 159 Pac. 344; *Haskell v. St. Louis & S. F. R. Co.*, — Okla. —, 162 Pac. 459.

#### When Initial Carrier Does Not Have Agent at Destination.

Under the Carmack Amendment an initial carrier is answerable for the loss of an interstate shipment while in the possession of a connecting carrier, notwithstanding a provision of the contract of shipment to the effect that if the initial carrier did not have an agency at destination it should not be liable for loss or damage occurring after delivery of the shipment to a connecting carrier. *Fern v. Adams Express Co.*, 51 Pa. Super. Ct. 204, modifying 20 Pa. Dist. Ct. 725, 39 Pa. Co. Ct. 129.

**Failure of Shipper to Accompany Live Stock.**

Neither the Hepburn Act nor the Carmack Amendment prohibit interstate carriers of live stock from stipulating against liability resulting from the failure of a shipper to accompany and care for his stock, or from entering into any other reasonable stipulation which does not exempt the carrier from liability for negligence. *Cranor v. Southern R. Co.*, 13 Ga. App. 86, 78 S. E. 1014.

**Waiver of Limitation of Liability.**

A provision of a contract for the interstate shipment of live stock relieving a carrier from liability for delays caused by stress of weather may be waived, since not regulated by the Carmack Amendment. *Cincinnati, N. O. & T. P. R. Co. v. Smith*, 165 Ky. 235, 176 S. W. 1013.

**2. For Negligence.****In General.**

A carrier cannot by a stipulation in a bill of lading limit its liability for the negligence of itself or its servants in and about the transportation and delivery of an interstate shipment. *Central of Ga. R. Co. v. Broda*, 190 Ala. 266, 67 So. 437.

A contract between a carrier and a shipper, in consideration of a lower interstate freight rate, limiting the liability of the carrier to \$10 per cwt., is not a contract attempting to exempt the carrier from liability for its own negligence. *Haskell v. St. Louis & S. F. R. Co.*, — Okla. —, 162 Pac. 459.

**Injury to Persons.**

Since the Carmack Amendment does not apply to injuries received by persons traveling in interstate commerce, a provision of a contract between a railway and a shipper of a circus exempting the carrier from liability for injuries to the property or employees of the shipper does not fall within the prohibition of such act against contracts exempting carriers from the liability thereby created. *Maucher v. Chicago, R. I. & P. R. Co.*, — Neb. —, 159 N. W. 422.

**3. To Lines of Particular Carrier.****Initial Carrier.**

An initial carrier cannot limit its liability for an interstate shipment to injury or loss occurring while in its possession. *Southern Express Co. v. Meyer*, 94 Ark. 103, 125 S. W. 642.

**4. Agreed Valuation.**

Agreed valuation in general, see also *supra* VI, I, 2.

Effect of fraudulent undervaluation on liability of carrier, see also *supra* VIII, D.

**(b) Validity.****In General.**

A limitation of a carrier's liability for property transported in interstate commerce to an agreed valuation is valid under the Carmack Amendment, when made in consideration of the rate charged. *Shay v. Union P. R. Co.*, — Utah, —, 153 Pac. 31; *Aradalou v. New York, N. H. & H. R. Co.*, — Mass. —, 114 N. E. 297.

**Fraudulent Undervaluation.****— In General.**

A stipulation limiting a carrier's liability for an interstate shipment is void under the Carmack Amendment, where the carrier accepts property with actual knowledge of its undervaluation by the shipper in consideration of a reduced freight rate. *St. Louis & S. F. R. Co. v. Mounts*, — Okla. —, 144 Pac. 1036, reversed 241 U. S. 654, 60 L. ed. 1223, 36 Sup. Ct. Rep. 725.

**— Liability of Carrier for Actual Value.**

When a carrier connives or agrees to an undervaluation of an interstate shipment, and takes from the shipper a release from liability based on such undervaluation, the release is void and cannot be used by the initial or any succeeding carrier as an estoppel to a recovery by the owner of the full value or the shipment in an action sounding in tort for its negligent loss or injury. *St. Louis & S. F. R. Co. v. Mounts*, — Okla. —, 144 Pac. 1036, reversed 241 U. S. 654, 60 L. ed. 1223, 36 Sup. Ct. Rep. 725.

Where a carrier accepts for interstate transportation a stallion which it has actual knowledge is worth \$500, at a released valuation of \$100 made by the shipper, in order to obtain a reduced freight rate, in the event of loss the carrier is answerable for the full value of the animal, since the release is void. *St. Louis & S. F. R. Co. v. Mounts*, — Okla. —, 144 Pac. 1036, reversed 241 U. S. 654, 60 L. ed. 1223, 36 Sup. Ct. Rep. 725.

**Stipulated Amount.**

The Carmack Amendment permits a carrier and shipper, in consideration of a reduced interstate freight rate, to stipulate as to the value of the property in the event of loss or damage. *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 153 Ky. 730, 156 S. W. 400, 45 L. R. A. (N. S.) 529.

A stipulation limiting the value of an interstate shipment is valid under the Carmack Amendment, when the transportation charges are based on such valuation. *Ridge v. Erie R. Co.*, 54 Pa. Super. Ct. 602.

The Carmack Amendment does not prevent a carrier from limiting its liability for an interstate shipment to a designated sum, except as against its own negligence. *Fern v. Adams Express Co.*, 51 Pa. Super. Ct. 204, modifying 20 Pa. Dist. Ct. 725, 39 Pa. Co. Ct. 129.

**(e) Effect of Absence of Knowledge of Limitation.**

See also supra VI, I, 2, (c).

**In General.**

Under the Carmack Amendment and the rules of the Interstate Commerce Commission, a limitation in a bill of lading of a carrier's liability for an interstate shipment, in consideration of a reduced freight rate as prescribed by the established tariffs, is binding on the shipper, although he was not aware of the limitation nor was it called to his attention. *Cincinnati, N. O. & T. P. R. Co. v. Dodd*, 153 Ky. 845, 156 S. W. 894.

**(h) Effect of Refusal to Permit Shipment Without Limitation.**

See also supra VI, I, 2, (f).

**In General.**

A limitation of a carrier's liability is void under the Carmack Amendment, when without consideration, where a shipper was not offered a choice of rates nor given a bona fide opportunity to ship at a fair and reasonable rate without limitation of the carrier's common-law liability. *Pittsburgh, C. C. & St. L. R. Co. v. Mitchell*, 175 Ind. 196, 91 N. E. 735, rehearing denied 175 Ind. 196, 93 N. E. 996.

**(j) Particular Valuations.**

See also supra VI, I, 2, (k).

**In General.**

Where, in consideration of the lower of two established interstate freight rates, a shipper placed a valuation of \$100 on property worth \$2,000, such limitation is valid under the Carmack Amendment, and fixes the liability of the carrier for injuries caused by its negligence. *Metz v. Chicago, R. I. & P. R. Co.*, 90 Kan. 460, 135 Pac. 667.

A contract between a carrier and a shipper, in consideration of a reduced interstate freight rate, limiting the former's liability for loss to \$10 per cwt., when the contract is reasonable and just and fairly entered into, will be upheld as a proper and lawful means of determining the amount of the carrier's liability in the event of loss. *Haskell v. St. Louis & S. F. R. Co.*, — Okla. —, 162 Pac. 459.

A limitation of a carrier's liability for chattels in an interstate contract of freightment to \$10 per cwt. is valid under the Carmack Amendment. *Shay v. Union P. R. Co.*, — Utah, —, 153 Pac. 31.

**(k) In Express Receipts.**

**In General.**

When a shipper does not state and is not asked the value of an interstate shipment, the liability of the carrier under the Carmack Amendment is limited by a provision of an express receipt to the effect that in such cases it shall not exceed \$50. *Cohn-Goodman Co. v. Wells Fargo Express Co.*, 13 Ohio C. C. (N. S.) 467.

**(m) Live Stock.**

See also supra VI, I.

**In General.**

A limitation of a carrier's liability for an interstate shipment of live stock to \$100 per head is valid under the Carmack Amendment. *Shay v. Union P. R. Co.*, — Utah, —, 153 Pac. 31.

**(o) Value at Particular Time or Place.**

See also supra VI, I, 2, (l).

**Time and Place of Shipment.**

A carrier's liability for the conversion of an interstate shipment is governed by a provision of the bill of lading to the effect that the loss or damage should be computed on the basis of the value of the property at the time and place of shipment. *Brockman Comm. Co. v. Missouri P. R. Co.*, — Mo. App. —, 188 S. W. 920.

In an action against a carrier for the conversion of an interstate shipment, it is error to permit the plaintiff to recover the reasonable value of the property at destination, where the bill of lading provided that loss or damage should be computed on the value of the property at the time and place of shipment. *Brockman Comm. Co. v. Missouri P. R. Co.*, — Mo. App. —, 188 S. W. 920.

**5. Limiting Liability for Baggage.**

Limiting liability for baggage, see generally supra VI, I, 2, (b).

**6. What Losses Within Terms of Limitations.**

See also supra VI, I, 2, (m).

**(b) Losses Due to Negligence.**

**In General.**

A contract for the interstate shipment of a stallion worth \$2,000, by which, in

consideration of the lower of two established rates, the shipper agreed to a valuation of \$100, is not in violation of the Carmack Amendment, since the contract is not against the negligence of the carrier, but merely establishes a basis for determining the amount of damages in the event of loss through the carrier's negligence. *Metz v. Chicago, R. I. & P. R. Co.*, 90 Kan. 460, 135 Pac. 667.

Since the Carmack Amendment does not purport to relieve a carrier from liability for its own negligence, it cannot rely on a valuation clause in an interstate shipping contract where property was lost by its wrongful act. *Hering v. Atlantic C. L. R. Co.*, 160 N. C. 252, 76 S. E. 527; *Pace Mule Co. v. Seaboard A. L. R. Co.*, 160 N. C. 215; 76 S. E. 513, reversed 234 U. S. 751, 58 L. ed. 1576, 34 Sup. Ct. Rep. 775; *Stehli v. Southern Express Co.*, 190 N. C. 493, 76 S. E. 542, reversed 238 U. S. 605, 59 L. ed. 1485, 35 Sup. Ct. Rep. 418.

#### Theft of Employee.

Since the Carmack Amendment does not preclude a limitation of a carrier's liability for an interstate shipment to an agreed valuation when based on a reduced rate, the carrier's liability is controlled by such limitation where a shipment is stolen by one of its employees. *D'Utassay v. Barrett*, 171 App. Div. 772, 157 N. Y. Supp. 916, affirmed — N. Y. —, 114 N. E. 786.

#### (d) Conversion of Property by Carrier

##### In General.

The liability of a carrier under the Carmack Amendment for the conversion of an interstate shipment made under a written bill of lading, is controlled by a limitation of value contained therein. *Brockman Comm. Co. v. Missouri P. R. Co.*, — Mo. App. —, 188 S. W. 920.

#### J. Notice of Claim for Loss or Damage.

See also *supra* VI, I, 6.

#### 2. Validity of Requirement for.

##### (a) In General.

##### Validity and Effect.

A written contract for an interstate shipment excludes the idea of a lack of consideration because of a previous oral contract, and a provision of the written agreement with reference to the giving of notice of claims for damages, when reasonable, will control the liability of the initial carrier under the Carmack Amendment. *Panhandle & S. F. R. Co. v. Bell*, — Tex. Civ. App. —, 189 S. W. 1097.

#### Stipulations Made After Shipment Under Parol Agreement.

When a shipment is made under a parol

contract a provision of a subsequently executed written agreement requiring the shipper to give the carrier notice of loss to or injury of an interstate shipment of live stock within one day, and before the removal of the animals at destination, is not binding on the shipper. *Kansas City, M. & O. R. Co. v. Hansard*, — Tex. Civ. App. —, 183 S. W. 329.

#### Effect of Failure to Give.

The failure of an interstate shipper to give a verified written notice of his claim for an injury to a horse within 5 days from its removal from the car, as required by the terms of a uniform live stock contract, defeats a recovery where such stipulation is fair on its face and unobjectionable, and its invalidity is not shown nor the noncompliance therewith excused. *Chesapeake & O. R. Co. v. McLaughlin*, 242 U. S. 142, 61 L. ed. —, 37 Sup. Ct. Rep. 40.

Noncompliance with the requirement of a contract of carriage for the giving of written notice of a claim for damages as a condition precedent to a carrier's liability for injuries to or the loss of an interstate shipment, is a bar to an action against an initial carrier under the Federal laws for a loss arising from the negligence of a terminal carrier, or from its unauthorized delivery or conversion of a shipment. *Dodge v. Pennsylvania R. Co.*, — App. Div. —, 162 N. Y. Supp. 549.

#### (b) Particular Periods.

See also *supra* VI, I, 6, (d).

#### Reasonableness.

In determining the reasonableness of the time limited for giving notice of a claim for damage to an interstate shipment there is no difference between perishable produce and other property. *Phillips v. Seaboard A. L. R. Co.*, — N. C. —, 89 S. E. 1057.

#### One Day.

A requirement of a bill of lading for giving a carrier written notice of injury to a shipment of live stock within one day from arrival at destination and before their removal and mingling with others, is, with respect to an interstate shipment passing over the lines of several carriers, reasonable and valid, since the notice may be given to the delivering carrier, who is, under the Carmack Amendment, the agent for the initial carrier. *Chicago, R. I. & P. R. Co. v. Whaley*, — Tex. Civ. App. —, 190 S. W. 833.

#### Five Days.

A requirement of an interstate shipping contract for giving the carrier written no-

tice of loss or injury within 5 days is valid under the Carmack Amendment. *Sweitzer v. Chicago & A. R. Co.*, 196 Ill. App. 623.

#### Ten Days.

Ten days' limitation for giving a carrier notice of a claim for damage to an interstate shipment is unreasonable. *Phillips v. Seaboard A. L. R. Co.*, — N. C. —, 89 S. E. 1057.

### 3. What Losses Within Requirement for Notice.

See generally, *supra* VI, I, 6, (g).

#### (d) Loss of Particular Market.

##### In General.

A decline in the market price of live stock in consequence of a delay on the line of a connecting carrier is not within a requirement of a contract of carriage for giving written notice to an initial carrier before the delivery of the shipment to any connecting carrier. *Baird v. Denver & R. G. R. Co.*, — Utah, —, 162 Pac. 79.

#### (e) Shrinkage.

##### In General.

A requirement for giving written notice to a carrier before injured cattle are delivered to a connecting carrier is unreasonable and void with respect to a claim for shrinkage due to delay on the line of a connecting carrier. *Baird v. Denver & R. G. R. Co.*, — Utah, —, 162 Pac. 79.

#### 4. Form of Notice.

See also *supra* VI, I, 6, (h).

#### (a) In General.

##### No Particular Form Required.

A written claim for damages to an interstate shipment need not be expressed in any particular manner, but it is sufficient if a plain and intelligible statement of the demand is given. *Phillips v. Seaboard A. L. R. Co.*, — N. C. —, 89 S. E. 1057.

#### (b) Verbal Notice.

See also *supra* VI, I, 6, (h).

##### In General.

Oral notice to a carrier's agent that a claim for damages to an interstate shipment would be made is not a sufficient compliance with a requirement for written notice. *Phillips v. Seaboard A. L. R. Co.*, — N. C. —, 89 S. E. 1057.

#### 5. To Whom Given.

See also *supra* VI, I, 6, (i).

### Connecting or Terminal Carrier.

The giving of notice of damage to the depot master of the delivering carrier is a sufficient compliance with a requirement for notice within 30 hours to bind the initial carrier under the Carmack Amendment. *St. Louis & S. F. R. Co. v. Heyser*, 95 Ark. 412, 130 S. W. 562.

Notice given an agent of the delivering carrier of an injury to an interstate shipment of live stock is, under the Carmack Amendment, binding on the initial carrier. *Chicago, R. I. & P. R. Co. v. Whaley*, — Tex. Civ. App. —, 190 S. W. 833.

#### 7. Waiver.

See also *supra* VI, I, 6, (j).

#### (a) In General.

##### When Requirement for Notice May be Waived.

A requirement of a contract of affreightment for the giving of 5 days' notice of the loss of or damage to an interstate shipment of cattle as a condition precedent to the carrier's liability, may be waived by the latter, since the giving of such notice is not controlled by the Carmack Amendment. *Cincinnati, N. O. & T. P. R. Co. v. Smith*, 165 Ky. 235, 176 S. W. 1013.

A carrier may waive a provision of an interstate contract of affreightment requiring a shipper to give a written claim for damage to the agent of a connecting carrier before the removal of live stock from destination, and to file a written claim within a specified time with a designated officer as a condition precedent to the carrier's liability, since such requirement is solely for the benefit of the carrier. *Baltimore & O. R. Co. v. Leach*, — Ky. —, 191 S. W. 310.

##### Waiver as Unlawful Preference.

A provision of an interstate shipping contract requiring the presentation of a written claim for loss or damages to an interstate shipment of live stock within 5 days after their removal from the cars, may be waived by a carrier without violating the Carmack Amendment, since such limitation is not determinative of the rate established, and a waiver thereof does not amount to a preference or discrimination in violation of the Act Regulating Commerce. *Doster v. Michigan C. R. Co.*, 196 Ill. App. 49.

##### Who May Bind Carrier by Waiver.

An agent of a connecting carrier may, with respect to the liability of an initial carrier under the Carmack Amendment, waive a requirement of a contract of interstate affreightment for the giving of a verified affidavit of a claim for loss or

damage to live stock within a designated time as a condition precedent to the carrier's liability. *Baltimore & O. R. Co. v. Leach*, — Ky., —, 191 S. W. 310.

#### **What Constitutes.**

##### **— Failure to Plead.**

In an action under the Carmack Amendment a carrier cannot claim the benefit of a stipulation requiring the giving of notice of loss or damage within 30 days, where the carrier did not plead non-compliance with such requirement. *Gibson v. Atlantic C. L. R. Co.*, 88 S. C. 360, 70 S. E. 1030.

##### **— Negotiations With Claimant.**

The acceptance by a carrier of a claim for damages to an interstate shipment after the expiration of the 5 days limited by the contract of shipment for its presentation, together with negotiations with the shipper for a settlement, is a waiver of such requirement. *Doster v. Michigan C. R. Co.*, 196 Ill. App. 49.

#### **K. Limitation of Time for Action.**

See also *supra* VI, I, 7.

##### **3. Validity of Particular Periods.**

Validity of limitations generally, see *supra* VI, I, 7, (b).

#### **Six Months.**

A stipulation in a contract of affreightment requiring an action for the loss of or injury to an interstate shipment to be begun within six months next after the cause of action accrues, is valid under the Carmack Amendment, and failure to comply therewith will bar a recovery. *Chicago, R. I. & P. R. Co. v. Paden*, — Okla., —, 162 Pac. 727; *St. Louis & S. F. R. Co. v. Mounts*, — Okla., —, 144 Pac. 1036, reversed without opinion 241 U. S. 654, 60 L. ed. 1223, 36 Sup. Ct. Rep. 725; *Atchison, T. & S. F. R. Co. v. White*, — Tex. Civ. App., —, 188 S. W. 714.

#### **L. Liability of Initial Carrier.**

##### **1. In General.**

##### **Refusal of Consignee to Accept Injured Goods.**

The fact that a consignee was not justified in refusing to accept a damaged interstate shipment is of no importance in an action based on the Carmack Amendment, where the rule of damages applied was that applicable when a shipment is accepted by the consignee and a recovery sought for damage to the property. *Victor Produce Co. v. Western Transit Co.*, — Minn., —, 160 N. W. 248.

##### **3. Effect of Failure to Issue Bill of Lading.**

##### **On Liability of Initial Carrier.**

A carrier is not relieved from liability under the Carmack Amendment for the destruction of an interstate shipment, because no receipt or bill of lading was issued therefor. *Davis v. Norfolk & S. R. Co.*, — N. C., —, 90 S. E. 123; *Ricks Sheep Co. v. Oregon S. L. R. Co.*, 180 Ill. App. 220.

##### **4. Liability for Acts of Succeeding Carriers.**

###### **(a) In General.**

##### **Negligence of Connecting Carriers.**

##### **— In General.**

An initial carrier who issues a bill of lading for an interstate shipment of freight, is answerable to the lawful holder of the bill for any damages caused by it or any connecting carrier over whose lines the property passes before arrival at its destination. *St. Louis, I. M. & S. R. Co. v. Cunningham Comm. Co.*, — Ark., —, 188 S. W. 1177.

The Carmack Amendment gives a shipper the right of recovery from an initial carrier for the whole loss or damage sustained by an interstate shipment on the line of such carrier or any subsequent carrier. *Southern R. Co. v. Avey*, — Ky., —, 191 S. W. 460.

In an action against an initial carrier for injuries to an interstate shipment a motion to set aside a verdict against such carrier because the findings of the jury showed that damages in a designated amount were caused by a connecting carrier, was properly overruled. *Texas-Mexican R. Co. v. Sutherland*, — Tex. Civ. App., —, 189 S. W. 983.

##### **— Failure to Make Delivery.**

Under the Carmack Amendment an initial carrier is liable for the failure of a connecting carrier to make delivery of an interstate shipment. *Howatt v. Barrett*, 78 Misc. 156, 137 N. Y. Supp. 915, but see *S. C. 156 App. Div. 849*, 142 N. Y. Supp. 135.

##### **— Failure to Notify Consignee of Non-delivery.**

An initial carrier is not answerable under the Carmack Amendment for the failure of a terminal carrier to notify a shipper of a consignee's refusal to accept an interstate shipment. *Wien v. New York C. & H. R. R. Co.*, 166 App. Div. 766, 152 N. Y. Supp. 154, reversing 85 Misc. 42, 146 N. Y. Supp. 1010.

##### **— Salt and Unfit Feed in Stock Pens.**

An initial carrier is answerable under



the Carmack Amendment where an interstate shipment of live stock was en route placed in pens in which a large quantity of salt had been negligently left by a connecting carrier, and which, together with rotten hay and impure water that the latter gave the stock, injured them. *Pecos & N. T. R. Co. v. Meyer*, — Tex. Civ. App. —, 155 S. W. 309, 6 N. C. C. A. 146.

#### **Necessity for Showing Negligence of Subsequent Carrier.**

In an action against an initial carrier under the Carmack Amendment for the loss of an interstate shipment while in the possession of a connecting carrier, the plaintiff need not show that the loss was in fact caused by the carrier, since such law imposes liability on the initial carrier for loss or damage occurring on the line of any carrier without altering or restricting its common-law liability. *Chicago & E. I. R. Co. v. Collins Produce Co.*, — C. C. A. —, 235 Fed. 857.

#### **Derailment of Train by Cattle Running on Track.**

Under the Carmack Amendment an initial carrier is answerable for an injury to an interstate shipment caused by the derailment of a train as the result of an animal running in front of the locomotive, the presence of which could not have been reasonably anticipated by the carrier. *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 153 Ky. 730, 156 S. W. 400, 45 L. R. A. (N. S.) 529.

#### **Shipment Seized by Military Authorities.**

Where a car of poultry, during interstate transportation, was, at the request of a connecting carrier, seized by military authorities in a territory under martial law, the initial carrier is answerable under the Carmack Amendment, as the taking was not within an exemption of the bill of lading from liability for loss or damage caused by authority of law. *Chicago & E. I. R. Co. v. Collins Produce Co.*, — C. C. A. —, 235 Fed. 857.

#### **Act of God.**

##### **— Floods.**

An initial carrier is not liable under the Carmack Amendment where an interstate shipment was negligently delayed by a connecting carrier so that it arrived at destination during a heavy storm which precluded unloading it, and on the following day the shipment was destroyed by an unprecedented flood, since the injury was within a provision of the contract of carriage relieving the carrier from liability for loss or damage caused by the act of God. *Continental Paper B. Co. v. Maine C. R. Co.*, — Me., —, 99 Atl. 259.

An initial carrier is not answerable under

the Carmack Amendment for the destruction of an interstate shipment as the result of an unprecedented flood which could not have been foreseen in time to guard against it, although the shipment would not have been in range of the destructive force except for a negligent delay on the line of a connecting carrier. *Northwestern Cons. Milling Co. v. Chicago, B. & Q. R. Co.*, — Minn. —, 160 S. W. 1028.

Injuries to an interstate shipment due to a carrier leaving a car in close proximity to a car containing unslacked lime at a time when the carrier was aware that high water was liable to reach the lime and set it afire, were not caused by an act of God from which the carrier can, under the Carmack Amendment, relieve itself by contract, since such injuries were due to the negligence of the carrier. *Barnet v. New York C. & H. R. R. Co.*, 167 App. Div. 738, 153 N. Y. Supp. 374.

#### **— Concurrent Negligence.**

Notwithstanding that a carrier is not answerable under the Carmack Amendment for the destruction of an interstate shipment on the line of a connecting carrier in consequence on an unprecedented flood, although the loss would not have occurred but for a negligent delay of the shipment, yet the initial carrier will be answerable if there was some attendant negligence other than the mere delay. *Northwestern Cons. Milling Co. v. Chicago, B. & Q. R. Co.*, — Minn. —, 160 N. W. 1028.

In order to hold an initial carrier under the Carmack Amendment for the loss of an interstate shipment by an act of God where the injury would not have occurred but for the negligence of a connecting carrier in delaying the shipment, the plaintiff must show some other concurrent negligence. *Northwestern Cons. Milling Co. v. Chicago, B. & Q. R. Co.*, — Minn. —, 160 N. W. 1028.

The fact that a connecting carrier became apprehensive of danger two hours before an unprecedented flood swept its yards and destroyed an interstate shipment which would not have been in danger but for a negligent delay in its movement, does not show negligence sufficient to charge the initial carrier under the Carmack Amendment, where it does not appear that it was feasible or possible to protect or move the shipment to a place of safety after the danger was anticipated. *Northwestern Cons. Milling Co. v. Chicago, B. & Q. R. Co.*, — Minn. —, 160 N. W. 1028.

#### **(c) Delay in Transit.**

#### **Absence of Physical Injury to Shipment.**

An initial carrier is answerable under the Carmack Amendment for the negli-

gence of a connecting carrier in failing to transport an interstate shipment of vegetables with reasonable dispatch, notwithstanding that they did not sustain physical injury. *Van Epps v. Atlantic C. L. R. Co.*, — S. C. —, 89 S. E. 1035.

#### **Loss of Particular Market.**

Under the Carmack Amendment an initial carrier is answerable for damages attributable to a delay on the line of a connecting carrier in transporting an interstate shipment of vegetables with reasonable dispatch which prevented their arrival at the market for which they were intended. *Van Epps v. Atlantic C. L. R. Co.*, — S. C. —, 89 S. E. 1035.

#### **(d) Diversion or Misrouting of Shipment.**

##### **Wrongful Diversion.**

When goods are shipped in interstate commerce in the seller's name under an order bill of lading with draft attached under instructions to notify the purchaser at destination, it was held in an action against the initial carrier under the Carmack Amendment that the delivering carrier could not divert the shipment short of destination without the production of the bill of lading. *Perkett v. Manistee & N. E. R. Co.*, 175 Mich. 253, 141 N. W. 607.

##### **Diversion by Terminal Carrier at Shipper's Request.**

Where an interstate shipment passing over the lines of several carriers was, at its destination, reshipped on the original bill of lading to a point in another state upon the line of another carrier, and moved under a through rate from point of origin to final destination, the initial carrier is answerable under the Carmack Amendment for the negligence of such final carrier. *Baltimore & O. R. Co. v. Montgomery*, — Ga. App. —, 90 S. E. 740.

##### **Misrouting.**

An initial carrier is answerable for the misrouting by a connecting carrier of an interstate shipment of grain which deprived the shipper of the privilege of milling it in transit. *McCullough v. Missouri P. R. Co.*, — Kan. —, 160 Pac. 214.

Where a shipper of grain is required to submit to a reduction in the selling price because of the loss of the privilege of milling the grain in transit as the result of the misrouting of an interstate shipment by a connecting carrier, he may recover the amount of his loss from the initial carrier. *McCullough v. Missouri P. R. Co.*, — Kan. —, 160 Pac. 214.

A shipper cannot recover from an initial carrier for the loss of the privilege of milling an interstate shipment of grain in transit as the result of a misrouting by a connecting carrier, in the absence of a

notation of the privilege on the bill of lading as required by the published tariff, since to permit a recovery in the absence of compliance with such requirement would give the plaintiff an undue advantage contrary to the published tariffs. *McCullough v. Missouri P. R. Co.*, — Kan. —, 160 Pac. 214.

An interstate carrier is answerable under the Carmack Amendment for additional freight charges a shipper was compelled to pay in consequence of a misrouting of an interstate shipment by a connecting carrier. *Chesapeake & O. R. Co. v. Ward Lumber Co.*, 1 Ohio App. 164.

#### **8. Acts of Warehousemen or Bailee.**

##### **Warehousemen.**

An initial carrier is not answerable under the Federal law to a shipper for damages to an interstate shipment while held by a delivering carrier as a warehouseman. *Model Mill Co. v. Carolina, C. & O. R. Co.*, — Tenn. —, 188 S. W. 936; *Dodge v. Pennsylvania R. Co.*, — App. Div. —, 162 N. Y. Supp. 549.

An initial carrier is not answerable under the Federal law for the conduct of a delivering carrier with respect to an interstate shipment after 48 hours from notice to the consignee of its arrival, since its duty as a carrier had ceased. *Dodge v. Pennsylvania R. Co.*, — App. Div. —, 162 N. Y. Supp. 549.

Where an interstate shipment made on an order bill of lading was, more than 48 hours after arrival at destination, ordered by the consignor, on the refusal of the consignee to accept the shipment, to be delivered to a third person who subsequently secured a default judgment against the consignor under which the shipment was sold, the shipper cannot recover the value of the property from the initial carrier under the Carmack Amendment, since the liability of the delivering carrier had become that of a warehouseman. *Hamilton Mill & E. Co. v. Stephenville, N. & S. T. R. Co.*, — Tex. Civ. App. —, 189 S. W. 774.

##### **Bailee.**

The Carmack Amendment does not apply where the interstate transportation of a shipment has terminated and the delivering carrier holds the property as bailee. *Coate v. New Orleans Term. Co.*, 139 La. 958, 72 So. 678.

#### **M. Liability of Connecting and Terminal Carriers.**

##### **1. In General.**

##### **Liability for Negligence of Initial Carrier.**

A connecting carrier that issues a bill of lading for an interstate shipment is not

liable under the Carmack Amendment for injuries caused by a preceding carrier. *Knapp v. Minneapolis, St. P. & S. S. M. R. Co.*, — N. Dak. —, 159 N. W. 81.

## 2. For Own Negligence.

### In General.

The Carmack Amendment does not preclude an action against a negligent connecting or delivering carrier for injuries to an interstate shipment. *Gibson v. Little Rock & H. S. R. Co.*, 93 Ark. 429, 124 S. W. 1033; *Southern R. Co. v. Waxelbaum Produce Co.*, — Ga. App. —, 90 S. E. 987; *Central of Ga. R. Co. v. Waxelbaum Produce Co.*, — Ga. App. —, 89 S. E. 635, overruling *Southern R. Co. v. Savage*, — Ga. App. —, 89 S. E. 634, and *Bennett v. Southern R. Co.*, 17 Ga. App. 162, 86 S. E. 418; *Cincinnati, H. & D. R. Co. v. Quincy*, — Ga. App. —, 91 S. E. 220; *Southern R. Co. v. Avey*, — Ky. —, 191 S. W. 460; *Coate v. New Orleans Term. Co.*, 139 La. 958, 72 So. 678; *Aydlett v. Norfolk-So. R. Co.*, — N. C. —, 89 S. E. 1000.

The Carmack Amendment does not abrogate or impair the right of a shipper under existing Federal laws to pursue a connecting carrier whose own wrong caused an injury to an interstate shipment. *Collier v. Wabash R. Co.*, — Mo. App. —, 190 Pac. 969.

A person is not bound to sue an initial carrier for injuries to an interstate shipment, although under the Carmack Amendment he may do so, but he may sue the negligent connecting or delivering carrier. *St. Louis & S. F. R. Co. v. Akard*, — Okla. —, 159 Pac. 344.

The Carmack Amendment does not preclude an action against a connecting carrier for its negligence in failing to properly prepare a car for the interstate movement of produce which it received in bulk from the initial carrier. *Aydlett v. Norfolk-So. R. Co.*, — N. C. —, 89 S. E. 1000.

The recovery in an action against a connecting carrier for the loss of or injury to an interstate shipment on its line is limited to such damages only as were sustained thereon. *Southern R. Co. v. Avey*, — Ky. —, 191 S. W. 460.

## 3. Liability on Own Contracts With Shipper.

### (c) As Initial Carrier.

#### On Reconsigned Shipment.

Where an interstate shipment made under an open bill of lading was reconsigned by a carrier at the request of the consignor after he had learned that the original consignee would not pay for the shipment, such carrier is answerable to the

new consignee, under the Carmack Amendment, for the nondelivery of the shipment by a connecting carrier. *Myers v. Norfolk S. R. Co.*, 171 N. C. 190, 88 S. E. 149.

## O. Liability Over of Negligent Carrier to Initial Carrier

### In General.

Where an intermediate carrier delivered an interstate shipment to a person who was not authorized by a delivering carrier to receive it, and the goods were thereby lost, the former carrier is liable to the initial carrier under the Carmack Amendment for the amount paid by it to the shipper for his loss. *Hill Steamboat Line v. Panama R. Co.*, — App. Div. —, 160 N. Y. Supp. 1103, modifying and affirming 94 Misc. 118, 158 N. Y. Supp. 1084.

Where an intermediate carrier delivered an interstate shipment to a person who was not authorized to receive it for a connecting carrier and the goods were thereby lost, both such carriers are answerable to the initial carrier under the Carmack Amendment for the amount paid by it to the shipper in settlement of his loss, when the connecting carrier negligently concurred in causing the misdelivery by permitting such person to obtain possession of the receipted freight bill issued by the intermediate carrier. *Hill Steamboat Line v. Panama R. Co.*, — App. Div. —, 160 N. Y. Supp. 1103, modifying and affirming 94 Misc. 118, 158 N. Y. Supp. 1084.

Where an intermediate carrier delivered an interstate shipment to a person who was not authorized to receive it for a connecting carrier and the goods were thereby lost, the intermediate carrier is answerable under the Carmack Amendment to the initial carrier for the amount paid by it to the shipper in settlement for the loss, notwithstanding a custom between the intermediate and connecting carriers to deliver freight to the bearer of the intermediate carrier's receipted freight bill. *Hill Steamboat Line v. Panama R. Co.*, — App. Div. —, 160 N. Y. Supp. 1103, modifying and affirming 94 Misc. 118, 158 N. Y. Supp. 1084.

## XII. CUMMINS AMENDMENT.\*

### Retroactive Effect.

The provisions of the Cummins Amendment invalidating stipulations that prescribe a shorter period of limitations than 2 years for bringing actions for injuries to or the loss of interstate shipments, do not

\*For text of Cummins Amendment see Federal Railway Digest, vol. I, No. 2, page 394.

apply to a cause of action accruing before but not tried until after the enactment of such law. *Betka v. Houston & T. C. R. Co.*, — Tex. Civ. App. —, 189 S. W. 532.

### XIII. ACTIONS.

Actions on reparation orders of Interstate Commerce Commission, see *supra* III, 5, (g).

#### A. In General.

##### 2. Survival.

##### In General.

Since a shipper's action in a Federal court against a carrier for discriminatory practices in violation of the Act to Regulate Commerce, is not for the recovery of a penalty, the cause of action survives the plaintiff's death and passes to his personal representative under a state statute pertaining to all actions except for slander, libel or wrongs to the person. *Langdon v. Pennsylvania R. Co.*, 194 Fed. 486, S. C. 186 Fed. 237, reversed on other grounds sub nom. *Pennsylvania R. Co. v. Carbon C. & C. Co.*, 125 C. C. A. 361, 208 Fed. 145.

##### Death of Partner.

The right of action given by the Act Regulating Commerce to a partnership for damages sustained through the discriminatory acts and unfair practices of a carrier, is not lost in whole or in part by the death of one of the partners. *Minds v. Pennsylvania R. Co.*, 237 Fed. 267.

##### 3. Limitations.

Limitation of actions on reparation orders of Interstate Commerce Commission, see *supra* III, 5, (g).

Retroactive operation of limitation prescribed by Cummins Amendment, see *supra* XIII.

Stipulations in contracts of carriage relating to time for bringing action, see *supra* VI, I, 7.

##### (a) In General.

(No decisions.)

##### (b) What Laws Apply.

##### Effect of Conformity Act.

The Conformity Act (U. S. Stats. 1913, § 1537) does not apply to a shipper's action for overcharges of interstate freight rates when not begun within the time prescribed by § 9 of the Act Regulating Commerce, and where the local rules of practice do not permit the statute of limitations to be raised by general demurrer, since non-compliance with the requirements of § 9

not only bars the shipper's right of action, but destroys his remedy as well. *Phillips Co. v. Grand Trunk W. R. Co.*, 236 U. S. 662, 59 L. ed. 774, 35 Sup. Ct. Rep. 444, affirming 115 C. C. A. 94, 195 Fed. 12.

##### Action For Refusing Switch Connections.

An action against a carrier for an unjust refusal to grant an interstate shipper a switch connection as required by the Act Regulating Commerce, is barred only by the elapse of the prescriptive period from the time of the refusal rather than from the time demand for such connection is made. *Langhill v. Pennsylvania R. Co.*, — Pa. —, 98 Atl. 873.

##### Recovery of Unreasonable Rates and Charges.

Notwithstanding that every person who pays an unreasonable freight rate may take advantage of a finding of the Interstate Commerce Commission of the unreasonableness of such rate, yet the claim must be asserted within the time prescribed by law. *Phillips Co. v. Grand Trunk W. R. Co.*, 236 U. S. 662, 59 L. ed. 774, 35 Sup. Ct. Rep. 444, affirming 115 C. C. A. 94, 195 Fed. 12.

##### Federal Laws.

Section 16 of the Act to Regulate Commerce precludes an action by a shipper for the recovery of overcharges on interstate freight shipments, where the action is not brought within one year after the rate is declared excessive by the Interstate Commerce Commission, and until five years after the last overcharge was made. *Phillips v. Grand Trunk W. R. Co.*, 115 C. C. A. 94, 195 Fed. 12, affirmed 236 U. S. 662, 59 L. ed. 774, 35 Sup. Ct. Rep. 444.

An action against a carrier in a Federal court for the recovery of damages caused by discriminations against a shipper in violation of the Act to Regulate Commerce, is governed by § 1047 U. S. Rev. Stat. 1901, p. 727, requiring actions for penalties and forfeitures accruing under Federal laws to be brought within five years, instead of a state statute of limitations relating to actions for penalties and forfeitures. *Carter v. New Orleans & N. E. R. Co.*, 74 C. C. A. 293, 143 Fed. 99.

The two years' limitation prescribed by the Act Regulating Commerce for presenting claims to the Interstate Commerce Commission does not apply to an action in a state court for the recovery of overcharges in excess of the interstate tariff rate. *Chicago, R. I. & P. R. Co. v. Lena Lumber Co.*, 99 Ark. 105, 137 S. W. 562.

##### State Laws.

##### — Actions in State Courts.

The statute of limitations of the forum applies to an action in a state court for

the recovery of overcharges in excess of interstate tariff rates. *Chicago, R. I. & P. R. Co. v. Lena Lumber Co.*, 99 Ark. 105, 137 S. W. 562.

An action in a state court for the recovery of undercharges on an interstate freight shipment is governed by the statute of limitations of the forum, since there is no applicable Federal statute. *Yazoo & M. V. R. Co. v. Willis*, — Miss. —, 71 So. 563; *Atlantic C. L. R. Co. v. Virginia Mfg. Co.*, — Va. —, 89 S. E. 103.

A shipper's action in a state court to recover the cost of putting cars in condition to hold interstate shipments of grain, for which reimbursement is permitted by the established tariffs of the carrier, is governed by the Kansas three years statute of limitation, which begins to run from the time of putting each car in condition, where the shipments in question extended over a period of years. *Rock Milling & E. Co. v. Atchison, T. & S. F. R. Co.*, 98 Kan. 478, 154 Pac. 254, S. C. — Kan. —, 158 Pac. 859.

#### — Actions in Federal Courts.

A shipper's action in a Federal court for damages resulting from unlawful discrimination against him by a carrier in violation of the Act to Regulate Commerce, is governed, when there is no applicable Federal law, by the statute of limitations of the state wherein the action is brought. *Ratican v. Terminal R. Assn.*, 114 Fed. 666.

Since there is no Federal statute of limitation applicable to a shipper's action in a Federal court against a carrier for damages resulting from discriminations in violation of the Act to Regulate Commerce, section 34 of the Judicature Act of 1789 makes a state statute of limitations the governing law. *Copp v. Louisville & N. R. Co.*, 50 Fed. 164.

Since a shipper's action in a Federal court for damages sustained by unjust discriminations practiced by a carrier in violation of the Act to Regulate Commerce is penal in its nature, there being no applicable Federal statute of limitation, it is within a statute of the state in which the action was brought prescribing the time in which actions for penalties and forfeitures may be maintained. *Ratican v. Terminal R. Assn.*, 114 Fed. 666.

Since there is no Federal statute of limitations that controls a shipper's action in a Federal court for discriminations against him in violation of the Act Regulating Commerce, under section 34 of the Judicature Act of 1789 the action is governed by a statute of the state wherein the action is pending requiring suits for quasi offenses to be brought within one year. *Copp v. Louisville & N. R. Co.*, 50 Fed. 164.

#### — Particular Statutes.

Since a bill of lading for an interstate shipment is a "contract in writing," within the meaning of a state statute of limitations requiring actions on simple contracts in writing to be brought within six years, an action for undercharges in interstate freight rates falls within such statute. *Seaboard A. L. R. Co. v. Luke*, — Ga. App. —, 90 S. E. 1041.

An action for an undercharge in interstate freight rates is not based on an open account within the meaning of a statute limiting the time for suits on such accounts. *Northern Ala. R. Co. v. Wilson Mercantile Co.*, 9 Ala. App. 269, 63 So. 34.

A suit by a carrier for the recovery of undercharges on interstate freight is not an action on an "account" within the meaning of Article 3538 of the Civil Code of Louisiana regulating the time for bringing actions on accounts. *Illinois C. R. Co. v. Segari*, 205 Fed. 998.

Article 3534 of the Louisiana Civil Code, fixing a prescription of one year for actions sounding in tort, does not apply to a carrier's action against a shipper for the recovery of undercharges in interstate freight rates. *Illinois C. R. Co. v. Segari*, 205 Fed. 998.

Article 3534 of the Louisiana Civil Code, fixing a prescription of one year for actions for the recovery of freight on shipments by water, does not apply to an action by a railway company against a shipper for the recovery of undercharges on interstate shipments. *Illinois C. R. Co. v. Segari*, 205 Fed. 998.

#### Concealment of Cause of Action.

A concealed breach by a carrier of its promise to give a shipper the same rates in the future as those given competitors, will not toll the statute of limitations so as to permit the shipper to recover damages for discriminations against him in violation of the Act to Regulate Commerce. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 181 Fed. 403, S. C. 183 Fed. 908, 112 C. C. A. 637, 192 Fed. 475, modified and affirmed 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916.

The concealment by a carrier from an interstate shipper of the fact that secret rebates were being given to other shippers similarly situated, is not within a provision of a statute of limitations preserving rights of action until fraud is discovered, especially where the shipper did not use diligence in discovering such concealment. *Murray v. Chicago & N. W. R. Co.*, 62 Fed. 24, affirmed 35 C. C. A. 62, 92 Fed. 868.

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#### — Actions in Federal Courts.

A shipper's action in a Federal court for damages resulting from unlawful discrimination against him by a carrier in violation of the Act to Regulate Commerce, is governed, when there is no applicable Federal law, by the statute of limitations of the state wherein the action is brought. *Ratican v. Terminal R. Assn.*, 114 Fed. 666.

Since there is no Federal statute of limitation applicable to a shipper's action in a Federal court against a carrier for damages resulting from discriminations in violation of the Act to Regulate Commerce, section 34 of the Judicature Act of 1789 makes a state statute of limitations the governing law. *Copp v. Louisville & N. R. Co.*, 50 Fed. 164.

Since a shipper's action in a Federal court for damages sustained by unjust discriminations practiced by a carrier in violation of the Act to Regulate Commerce is penal in its nature, there being no applicable Federal statute of limitation, it is within a statute of the state in which the action was brought prescribing the time in which actions for penalties and forfeitures may be maintained. *Ratican v. Terminal R. Assn.*, 114 Fed. 666.

Since there is no Federal statute of limitations that controls a shipper's action in a Federal court for discriminations against him in violation of the Act Regulating Commerce, under section 34 of the Judicature Act of 1789 the action is governed by a statute of the state wherein the action is pending requiring suits for quasi offenses to be brought within one year. *Copp v. Louisville & N. R. Co.*, 50 Fed. 164.

#### — Particular Statutes.

Since a bill of lading for an interstate shipment is a "contract in writing," within the meaning of a state statute of limitations requiring actions on simple contracts in writing to be brought within six years, an action for undercharges in interstate freight rates falls within such statute. *Seaboard A. L. R. Co. v. Luke*, — Ga. App. —, 90 S. E. 1041.

An action for an undercharge in interstate freight rates is not based on an open account within the meaning of a statute limiting the time for suits on such accounts. *Northern Ala. R. Co. v. Wilson Mercantile Co.*, 9 Ala. App. 269, 63 So. 34.

A suit by a carrier for the recovery of undercharges on interstate freight is not an action on an "account" within the meaning of Article 3538 of the Civil Code of Louisiana regulating the time for bringing actions on accounts. *Illinois C. R. Co. v. Segari*, 205 Fed. 998.

Article 3534 of the Louisiana Civil Code, fixing a prescription of one year for actions sounding in tort, does not apply to a carrier's action against a shipper for the recovery of undercharges in interstate freight rates. *Illinois C. R. Co. v. Segari*, 205 Fed. 998.

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#### Concealment of Cause of Action.

A concealed breach by a carrier of its promise to give a shipper the same rates in the future as those given competitors, will not toll the statute of limitations so as to permit the shipper to recover damages for discriminations against him in violation of the Act to Regulate Commerce. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 181 Fed. 403, S. C. 183 Fed. 908, 112 C. C. A. 637, 192 Fed. 475, modified and affirmed 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916.

The concealment by a carrier from an interstate shipper of the fact that secret rebates were being given to other shippers similarly situated, is not within a provision of a statute of limitations preserving rights of action until fraud is discovered, especially where the shipper did not use diligence in discovering such concealment. *Murray v. Chicago & N. W. R. Co.*, 62 Fed. 24, affirmed 35 C. C. A. 62, 92 Fed. 868.

— A saving clause of a state statute of limitations relating to actions in general when the plaintiff's cause of action has been concealed by the defendant or there

has been some other improper act on the latter's part, does not extend to and apply to another chapter of the statute relating to limitations of actions for penalties, forfeitures and crimes, so as to save a shipper's action in a Federal court for unjust discriminations by a carrier. *Ratican v. Terminal R. Ass'n*, 114 Fed. 666.

#### How Invoked.

The statute of limitations of the state in which an action is brought may be invoked in a Federal court in a shipper's action against a carrier for discriminations in violation of the Interstate Commerce Act, by a demurrer to the complaint, when such procedure is in accordance with the local law. *Ratican v. Terminal R. Ass'n*, 114 Fed. 666.

#### 4. Removal.

##### In General.

A shipper's action against a carrier for unjust discriminations and overcharges on an interstate shipment, although based on the common-law liability of the carrier, is an action under the Act Regulating Commerce which the defendant may remove from a state to a Federal court when the construction of such act is necessarily involved. *Lowry v. Chicago, B. & Q. R. Co.*, 46 Fed. 83.

An action by a shipper against a carrier for failure to stop an interstate shipment of live stock for feed and water, and for an overcharge in freight, and for attorney fees, is removable from a state to a Federal court. *Smith v. Atchison, T. & S. F. R. Co.*, 210 Fed. 988.

The fact that an assistant chief mail clerk was using his official pass in violation of the Hepburn Act at the time he was killed in consequence of the negligence of a carrier, does not permit the removal of an action for wrongful death from a state to a Federal court as one arising under the Constitution and laws of the United States. *Schuyler v. Southern P. Co.*, 37 Utah, 581, 595, 612, 109 Pac. 458, 464, 1025, affirmed on other grounds 227 U. S. 601, 57 L. ed. 662, 33 Sup. Ct. Rep. 277.

#### B. Jurisdiction.

##### 1. In General.

(No Decisions).

##### 2. Federal Courts.

###### (a) In General.

##### Amount.

A shipper's action against a carrier for damages caused by undue and unreasonable preferences and disadvantages

against him, in violation of the Act Regulating Commerce, will not lie in a Federal court under section 9 of such act, where the amount involved is less than \$2,000, since the state courts have exclusive jurisdiction under such circumstances. *Delaware, L. & W. R. Co. v. Lyne*, 113 C. C. A. 604, 193 Fed. 984, affirming and reversing in part 170 Fed. 847.

When the amount involved exceeds \$2,000 exclusive of costs, a federal circuit court has original jurisdiction of an action to compel specific performance of a carrier's agreement to give a free pass annually for the life of a person in consideration of the release of a claim for the personal injuries, where refusal to do so is based on the ground that the contract was avoided by the passage of the Hepburn Act. *Mottley v. Louisville & N. R. Co.*, 150 Fed. 406, reversed 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42. See also 219 U. S. 467, 55 L. ed. 297, 31 Sup. Ct. Rep. 265, 34 L. R. A. (N. S.) 671, reversing, 133 Ky. 652, 118 S. W. 982.

##### Contracts to Issue Pass.

An action for the specific performance of an agreement of a carrier to issue an annual free pass during life of the plaintiff is not brought within the Act of August 13, 1888, 25 Stat. at L. 434, ch. 866, U. S. Comp. St. 1901, p. 509, as one arising under the laws of the United States and of which a Federal circuit court has original jurisdiction, by an allegation of the plaintiff's petition of the unsoundness of the defendant's contention that the performance of the agreement would violate the terms of the Interstate Commerce Act. *Louisville & N. R. Co. v. Mottley*, 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42, reversing 150 Fed. 406. See also 219 U. S. 467, 55 L. ed. 297, 31 Sup. Ct. Rep. 265, 34 L. R. A. (N. S.) 671, reversing 133 Ky. 652, 118 S. W. 982.

##### (b) Jurisdiction of the Person.

##### Defendants.

Since section 9 of the Act to Regulate Commerce confers exclusive jurisdiction on the Federal courts of actions against carriers for the violation of section 8 of the act, such jurisdiction is not affected by the provisions of the Judicature Act of 1887 and 1888 relating to the place of bringing suits, which apply only to cases over which both the state and Federal courts have concurrent jurisdiction. *Van Patten v. Chicago, M. & St. P. R. Co.*, 74 Fed. 981, S. C. 81 Fed. 545.

Under the Federal Judiciary Act of 1875 as amended, a Federal court of a district in which the plaintiff resides does not have jurisdiction of an action based on the Act Regulating Commerce against a railway company that is a citizen of



another state. *Memphis Cotton Oil Co. v. Illinois C. R. Co.*, 164 Fed. 290.

An action for the violation of the Act Regulating Commerce will not lie under the terms of the Act of March 2, 1887, in a Federal court against a carrier incorporated in another state, in which its principal office is located, although it has an office and agent in the district in which the action was begun and in which the plaintiff resides. *Connor v. Vicksburg & M. R. Co.*, 36 Fed. 273.

An action for damages sustained by a carrier's violation of the Act Regulating Commerce may, under the Act of March 3, 1887, 24 St. at L. 552, as amended, be maintained in a Federal court of the district in which the plaintiff resides, where the defendant, although a citizen of another state, carries on business, has an agent and maintains an office within the district. *Riddle v. New York, L. E. & W. R. Co.*, 39 Fed. 290.

A Federal court of the district in which a carrier may be found has jurisdiction of a shipper's action against the carrier for the recovery of overcharges on interstate freight collected in violation of the Interstate Commerce Act. *Van Patten v. Chicago, M. & St. P. R. Co.*, 74 Fed. 981.

#### (c) Actions for Violation of Act Regulating Commerce.

##### In General.

Federal courts have exclusive jurisdiction of actions for injuries sustained by a shipper in consequence of a carrier's violation of the Act Regulating commerce. *Sheldon v. Wabash R. Co.*, 105 Fed. 785.

Section 9 of the Interstate Commerce Act, permitting a person claiming damages from a carrier subject to the provisions thereof, to petition the Interstate Commerce Commission or to bring an action in the Federal courts for redress, relates to such wrongs as can, consistently with the context of the act, be redressed by the courts without previous action by the Commission. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 462, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075, reversing 38 Tex. Civ. App. 366, 85 S. W. 1052.

Section 9 of the Act Regulating Commerce, which permits the person damaged by any carrier subject to its provisions, to apply to the Interstate Commerce Commission or to bring suit in a Federal court for redress, was impliedly repealed by section 16 of the act, as amended, to the extent of precluding actions for discriminatory practices of carriers regarding interstate freight rates, or for grievances which are of a general character,

since the right conferred by section 9 is confined to actions for wrongs which may be redressed by the courts, consistent with the context of the act, without previous action by the Interstate Commerce Commission. *Langdon v. Pennsylvania R. Co.*, 194 Fed. 486, S. C. 186 Fed. 237, reversed sub nom. *Pennsylvania R. Co. v. Carbon C. & C. Co.*, 125 C. C. A. 361, 208 Fed. 145.

The original jurisdiction of Federal courts under section 9 of the Act to Regulate Commerce was not entirely destroyed by section 16 as amended, since they may still give redress for such wrongs as can, consistently with the context of the act, be redressed without previous action by the Interstate Commerce Commission. *Langdon v. Pennsylvania R. Co.*, 186 Fed. 237, S. C. 194 Fed. 486, reversed sub nom. *Pennsylvania R. Co. v. Carbon C. & C. Co.*, 125 C. C. A. 361, 208 Fed. 145.

#### (d) Actions Pertaining to Rates and Charges.

##### Excessive and Unreasonable Rates and Charges.

A shipper's common-law action for the recovery of the excess above a reasonable sum exacted for an interstate shipment is not within the exclusive jurisdiction of the Federal courts. *Halliday Milling Co. v. Louisiana & N. W. R. Co.*, 80 Ark. 536, 98 S. W. 374.

The Act to Regulate Commerce vested the Federal courts therein mentioned with exclusive jurisdiction to inquire into alleged unfair and discriminatory interstate rates. *Fitzgerald v. Fitzgerald & M. Const. Co.*, 41 Neb. 374, 59 N. W. 838.

##### Overcharges.

Exclusive jurisdiction of actions for the recovery of overcharges collected for interstate freight is conferred on the Federal courts by sections 8 and 9 of the Interstate Commerce Act. *Van Patten v. Chicago, M. & St. P. R. Co.*, 74 Fed. 981.

The Federal courts and the Interstate Commerce Commission have exclusive jurisdiction of an action for overcharges on interstate shipments growing out of excessive rates or misroutings. *Siggins v. Chicago & N. W. R. Co.*, 153 Wis. 122, 140 N. W. 1128.

Under section 24 of the Federal Judiciary Code a Federal court has original jurisdiction of an action by a shipper against a carrier for overcharges on interstate shipments. *Smith v. Atchison, T. & S. F. R. Co.*, 210 Fed. 988.

A district court of the United States has jurisdiction of an action involving the question whether an interstate shipper was overcharged for small packages under

a rule of an express company permitting two or more consignors to assemble or aggregate such packages into one large package weighing less than 100 pounds, the question not being one within the exclusive jurisdiction of the Interstate Commerce Commission. *Barrett v. Gimble*, 141 C. C. A. 379, 226 Fed. 623, reversing on other grounds 218 Fed. 880.

Where timbers were shipped as lumber and at destination the shipper was compelled to pay a higher interstate rate applicable to contractor's supplies, an action to recover the overcharge is not based on the Act Regulating Commerce so as to confer exclusive jurisdiction on the Federal courts or the Interstate Commerce Commission. *Hardaway v. Southern R. Co.*, 90 S. C. 475, 73 S. E. 1020, Ann. Cas. 1913 D. 266.

#### **Undercharges.**

Under section 24 of the Judicial Code a Federal court has jurisdiction of an action by a carrier for the recovery of undercharges for transporting interstate shipments, since it is a suit under the Act Regulating Commerce. *Atchison, T. & S. F. R. Co. v. Kinkade*, 203 Fed. 165.

An action by a carrier for the recovery of undercharges from a shipper for interstate shipments of freight is one arising under the Act Regulating Commerce of which a Federal district court is given original jurisdiction by section 24 of the Judicial Code of 1911. *Illinois C. R. Co. v. Segari*, 205 Fed. 998.

#### **Demurrage Charges.**

Neither the Federal courts nor the Interstate Commerce Commission have exclusive jurisdiction to determine whether a shipper has incurred liability for demurrage charges under an interstate freight tariff. *Kells Mills & L. Co. v. Pennsylvania R. Co.*, — N. J. —, 98 Atl. 309.

#### **Misroutings.**

The Federal courts and Interstate Commerce Commission have exclusive jurisdiction of an action by a shipper for the recovery of overcharges caused by a carrier's misrouting of an interstate shipment. *Siggins v. Chicago & N. W. R. Co.*, 153 Wis. 122, 140 N. W. 1128.

#### **Action by Interstate Commerce Commission as Condition Precedent.**

Federal courts have jurisdiction of a shipper's action for damages sustained in consequence of the giving of unlawful rebates to competitors in violation of the Act to Regulate Commerce, without him first seeking redress from the Interstate Commerce Commission. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 181 Fed. 403, S. C. 183 Fed. 908, 112 C. C. A. 637,

192 Fed. 475, modified and affirmed 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916.

Resort to the Interstate Commerce Commission for redress is a condition precedent to the maintenance of an action by a shipper in a Federal court to recover damages occasioned solely by the payment to a carrier of excessive, unjust and unreasonable interstate freight rates, even when collected as the result of a combination or conspiracy of carriers in violation of the Sherman Anti-trust Law. *Meeker v. Lehigh V. R. Co.*, 162 Fed. 354, see 175 Fed. 320, 106 C. C. A. 94, 183 Fed. 548.

An action will not lie in a Federal court against a carrier under section 16 of the Act Regulating Commerce for the recovery of damages for overcharges on interstate freight unless based on a reparation order of the Interstate Commerce Commission. *Franklin v. Philadelphia & R. R. Co.*, 203 Fed. 134.

Section 9 of the Act Regulating Commerce conferring on aggrieved persons the right to complain to the Interstate Commerce Commission or to sue in the Federal courts for damages caused by a carrier's violation of such act, and section 22 preserving existing common-law and statutory remedies, do not permit an original action in the Federal courts to recover overcharges collected by a carrier of interstate freight, without first obtaining a reparation order from the Interstate Commerce Commission, notwithstanding that the rate in question has been declared unreasonable in a proceeding to which the plaintiff was not a party. *Franklin v. Philadelphia & R. R. Co.*, 203 Fed. 134.

The question whether, in an action against an interstate carrier under section 16 of the Act to Regulate Commerce to recover excessive freight charges, it is necessary, as a condition precedent to the jurisdiction of a Federal court to entertain the action, for the plaintiff to allege a previous finding of the Interstate Commerce Commission that the rate charged was excessive, and fixing the plaintiff's damages and awarding reparation, does not go to the jurisdiction of such court as a Federal court, but is a challenge of its right to entertain the action upon principles of general law. *Phillips v. Grand Trunk R. Co.*, 115 C. C. A. 94, 195 Fed. 12, affirmed 236 U. S. 662, 59 L. ed. 774, 35 Sup. Ct. Rep. 444.

#### **(e) Actions for Discriminations, Preferences and Rebates.**

##### **In General.**

The Federal courts and the Interstate Commerce Commission have exclusive

jurisdiction of a shipper's claim for damages resulting from unjust discriminations practiced against him by a carrier in violation of the Act Regulating Commerce. *Copp v. Louisville & N. R. Co.*, 43 La. Ann. 511, 9 So. 441, 12 L. R. A. 725, 26 Am. St. Rep. 198.

#### **Car Services Charges.**

A Federal court cannot award a shipper damages for alleged discriminations against him by the exaction of car service charges for shipments made on local bills of lading and not on others, when such practice is in accordance with the established tariffs of a carrier, since the Interstate Commerce Commission only has jurisdiction. *Clement v. Louisville & N. R. Co.*, 153 Fed. 979.

#### **Stopping Train for One Class of Passengers Only.**

The Federal courts and the Interstate Commerce Commission have exclusive jurisdiction of an action for unjust discriminations caused by stopping an interstate passenger train at a station for one class of passengers only. *Gulf, C. & S. F. R. Co. v. Moore*, 98 Tex. 302, 83 S. W. 362, 4 Ann. Cas. 470, reversing — *Tex. Civ. App.* —, 80 S. W. 426.

#### **Distribution of Cars.**

##### **—Action by Interstate Commerce Commission as Condition Precedent.**

A Federal court does not have jurisdiction of a shipper's action against a carrier for unjust discrimination in violation of section 3 of the Act to Regulate Commerce, in the distribution of cars for the interstate shipment of coal, until the Interstate Commerce Commission has passed upon the reasonableness of the method of distribution adopted by the carrier. *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. Rep. 938, affirming 106 C. C. A. 269, 183 Fed. 929, and 176 Fed. 748.

#### **Rebates.**

##### **—Action by Interstate Commerce Commission as Condition Precedent.**

The question whether action by the Interstate Commerce Commission is a condition precedent to a shipper's action in the Federal circuit court against a carrier for damages sustained from the giving of rebates to a competitor in violation of the Act to Regulate Commerce, is one going to the jurisdiction of such court. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 112 C. C. A. 637, 192 Fed. 475, S. C. 183 Fed. 908, modified and affirmed 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916.

#### **(f) Actions for Failure to Furnish Cars or Other Shipping Facilities.**

##### **Cars.**

The Hepburn Act does not confer exclusive jurisdiction on either the Federal courts or the Interstate Commerce Commission with respect to an action against a carrier for its failure to furnish cars for interstate use. *Midland V. R. Co. v. Hoffman Coal Co.*, 91 Ark. 180, 120 S. W. 380.

##### **Switch Connections.**

The Interstate Commerce Act does not confer on the Federal courts exclusive jurisdiction of actions against carriers for unjust discrimination in refusing to provide a shipper with switch connections as required by the terms of the Act Regulating Commerce. *Langhill v. Pennsylvania R. Co.*, — Pa. —, 98 Atl. 873.

#### **(g) Actions for Negligence.**

##### **In General.**

An action by a shipper against a carrier for damages for the negligent handling of an interstate shipment of live stock in violation of the Federal law, and for attorney fees, is one arising under the Interstate Commerce Act and of which a Federal court has original jurisdiction. *Smith v. Atchison, T. & S. F. R. Co.*, 210 Fed. 988.

#### **(h) Actions Removed From State Courts.**

##### **Jurisdiction to Determine Federal Questions.**

Where a state court does not have jurisdiction of a shipper's action for damages sustained from the collection of an excessive interstate freight rate by a carrier, a Federal court, to which the action is removed, is also without jurisdiction, notwithstanding that it would have had jurisdiction had the action been originally brought in such Federal court. *Darnell v. Illinois C. R. Co.*, 190 Fed. 656, appeal dismissed 225 U. S. 243, 56 L. ed. 1072, 32 Sup. Ct. Rep. 760.

A Federal court does not have jurisdiction to determine a shipper's action against a carrier for the recovery of excessive interstate freight charges, when removed from a state court which did not have jurisdiction under section 16 of the Act to Regulate Commerce because the action was brought without a reparation order from the Interstate Commerce Commission. *Darnell v. Illinois C. R. Co.*, 190 Fed. 656, appeal dismissed 225 U. S. 243, 56 L. ed. 1072, 32 Sup. Ct. Rep. 760.

**3. Interstate Commerce Commission.****Exclusiveness of Jurisdiction.****— Reasonableness of Rates.**

The Interstate Commerce Commission has exclusive jurisdiction of the question whether the charges made by a carrier for interstate car load shipments were excessive because the cars furnished were too small to earn the rate demanded. *St. Louis S. R. Co. v. Patterson*, 181 Ind. 304, 104 N. E. 512.

**— Overcharges.**

The Interstate Commerce Commission and the Federal courts have exclusive jurisdiction of all claims for overcharges on interstate shipments whether growing out of excessive rates or misroutings. *Siggins v. Chicago & N. W. R. Co.*, 153 Wis. 122, 140 N. W. 1128.

Where timbers were shipped as lumber and at destination the shipper was compelled to pay the higher interstate tariff rate applicable to contractor's supplies, an action by the latter for the recovery of the difference between the two rates is based on the common law and not on the Act Regulating Commerce, and, under section 22 of such act, neither the Interstate Commerce Commission nor the Federal courts have exclusive jurisdiction thereof. *Hardaway v. Southern R. Co.*, 90 S. C. 475, 73 S. E. 1020, Ann. Cas. 1913 D. 266.

**— Demurrage Charges.**

The Interstate Commerce Commission has exclusive jurisdiction to give redress with respect to car service charges required only on shipments made under local bills of lading, when such practice is in accordance with the provisions of the duly established tariffs. *Clement v. Louisville & N. R. Co.*, 153 Fed. 979.

Neither the Interstate Commerce Commission nor the Federal courts have exclusive jurisdiction to determine whether a shipper has incurred liability for demurrage charges established by an interstate tariff schedule. *Kells Mill & L. Co. v. Pennsylvania R. Co.*, — N. J. —, 98 Atl. 309.

**— Failure to Furnish Cars.**

The Hepburn Act does not confer exclusive jurisdiction on either the Interstate Commerce Commission or the Federal courts with respect to actions against carriers for failing to furnish cars for interstate shipments. *Midland V. R. Co. v. Hoffman Coal Co.*, 91 Ark. 180, 120 S. W. 380.

**— Damages for Unjust Discriminations.**

A shipper can recover damages result-

ing from unjust discriminations against him by a carrier, only in proceeding before the Interstate Commerce Commission. *Copp v. Louisville & N. R. Co.*, 43 La. Ann. 511, 9 So. 44, 12 L. R. A. 725, 26 Am. St. Rep. 198.

**— Stopping Train for One Class of Passengers Only.**

The Interstate Commerce Commission and the Federal courts have exclusive jurisdiction of an action arising from the unjust discriminations of a carrier in stopping an interstate passenger train at a station for one class of passengers only. *Gulf, C. & S. F. R. Co. v. Moore*, 98 Tex. 302, 83 S. W. 362, 4 Ann. Cas. 470, reversing — *Tex. Civ. App.* —, 80 S. W. 426.

**— Violation of Act Regulating Commerce.**

The Interstate Commerce Commission has exclusive jurisdiction over proceedings for damages for injuries sustained by a carrier's violation of the Act Regulating Commerce. *Sheldon v. Wabash R. Co.*, 105 Fed. 785.

**— Validity of Rules of Carrier.**

The Interstate Commerce Commission has exclusive jurisdiction of the question whether a rule of a carrier violates the Act Regulating Commerce. *Carlisle v. Missouri P. R. Co.*, 168 Mo. 652, 68 S. W. 898.

**4. State Courts.**

Enforcement by state courts of contracts limiting carrier's liability, see *supra* VI, M, 6.

**(a) In General.****When Relation of Carrier and Shipper Does Not Exist**

When an express company wrongfully acquires possession of an interstate shipment without the authority of the owner, and at destination requires him to pay the usual transportation charges, the latter may recover the same from the carrier in an action in a state court, without previous application to the Interstate Commerce Commission for redress. *U. S. Nickel Co. v. Barrett*, 86 Misc. 337, 148 N. Y. Supp. 325.

**Act Regulating Commerce as Part of State Laws.**

The Interstate Commerce Act is part of the law of a state and enforceable in its courts when rights under it arise incident to a trial. *Pittsburgh, C. C. & St. L. R. Co. v. Mitchell*, 175 Ind. 196, 91 N. E. 735, rehearing denied 175 Ind. 196, 93 N. E. 996.

### When No Administrative or Discretionary Question Involved.

Sections 8, 9 and 22 of the Act Regulating Commerce prevent the jurisdiction of the Interstate Commerce Commission from superseding that of state courts in any case in which the decision does not involve matters calling for the exercise of the administrative power and discretion of the Commission, or relate to subjects over which the Federal courts have exclusive jurisdiction. *Pennsylvania R. Co. v. Puritan Coal M. Co.*, 237 U. S. 121, 59 L. ed. 867, 35 Sup. Ct. Rep. 484, affirming 237 Pa. 420, 85 Atl. 426, Ann. Cas. 1914 B. 37.

### Amount.

A state court has exclusive jurisdiction of actions involving less than \$2,000 for injuries sustained from a carrier violating the Act Regulating Commerce. *Delaware, L. & W. R. Co. v. Lyne*, 113 C. C. A. 604, 193 Fed. 984, affirming and reversing in part 170 Fed. 847.

### Loss of Baggage.

There is nothing in the Interstate Commerce Act which prevents a common-law action in a state court for the recovery of the full value of a passenger's baggage transported under a ticket and rules and regulations filed with the Commission, limiting a carrier's liability for the loss of baggage to \$100, where the reasonableness of such regulation is not assailed. *Homer v. Oregon S. L. R. Co.*, 42 Utah, 15, 128 Pac. 522, reversed 235 U. S. 693, 59 L. ed. 429, 35 Sup. Ct. Rep. 207.

### Refusal to Haul Private Cars.

A state court has jurisdiction of a shipper's action against a carrier for damages sustained in consequence of violation of a state statute by refusing to haul wooden coal cars which the shipper desired to purchase and use in his business, notwithstanding that they were to be used in interstate commerce, since Congress has not legislated with respect to such matters. *Walnut Coal Co. v. Pennsylvania R. Co.*, 237 Pa. 410, 85 Atl. 440..

### Actions Pertaining to Freight.

The Hepburn Act does not deprive a state court of jurisdiction of an action for the breach of a carrier's common-law or contractual duty with respect to an interstate freight shipment. *Chicago, R. I. & P. R. Co. v. Clements*, 53 Tex. Civ. App. 143, 115 S. W. 664.

### Failure to Furnish Switch Connections.

An action against a carrier for an unjust discrimination in refusing to provide a shipper with switch connections as required by the Act Regulating Commerce, is within the jurisdiction of a state court.

*Langhill v. Pennsylvania R. Co.*, — Pa. —, 98 Atl. 873.

### Validity of Rules.

A state court cannot determine whether a rule of an interstate carrier violates the Interstate Commerce Act, since that is a question within the exclusive jurisdiction of the Commission and the Federal courts. *Carlisle v. Missouri P. R. Co.*, 168 Mo. 652, 68 S. W. 898.

### (b) Actions Under Carmack and Cummins Amendments.

#### In General.

An action against a carrier under the Carmack Amendment will lie in a state court, since neither the Interstate Commerce Commission nor the Federal courts have exclusive jurisdiction. *Pittsburgh, C. C. & St. L. R. Co. v. Knox*, 177 Ind. 344, 98 N. E. 295; *Chesapeake & O. R. Co. v. Jordan*, — Ind. App. —, 114 N. E. 461; *Herring v. Atlantic C. L. R. Co.*, 160 N. C. 252, 76 S. E. 527; *Pace Mule Co. v. Seaboard A. L. R. Co.*, 160 N. C. 215, 76 S. E. 513; reversed on other grounds 234 U. S. 751, 58 L. ed. 1576, 34 Sup. Ct. Rep. 775.

A state court has jurisdiction to enforce the provisions of the Carmack Amendment when invoked as a bar to a defense asserted under a bill of lading in an action against a carrier for the loss of an interstate shipment. *Pittsburgh, C. C. & St. L. R. Co. v. Mitchell*, 175 Ind. 196, 91 N. E. 735, rehearing denied 175 Ind. 196, 93 N. E. 996.

A state court has jurisdiction of an action against an initial carrier for the misrouting of an interstate shipment of grain by a connecting carrier, which deprived the shipper of the privilege of milling it in transit. *McCullough v. Missouri P. R. Co.*, — Kan. —, 160 Pac. 214.

### (c) Actions Pertaining to Contracts.

#### For Special Train.

An action for the breach of a carrier's contract to furnish a special interstate train will lie in a state court without previous action by the Interstate Commerce Commission. *Burrus v. Nevada C. O. R. Co.*, 38 Nev. 156, 145 Pac. 926, 8 N. C. C. A. 777.

### (d) Actions Pertaining to Rates and Charges.

#### In General.

A state court may entertain a shipper's action against a carrier where the correct application of a published interstate freight tariff is involved. *Dreyfus v. Pennsylvania R. Co.*, 90 Misc. 581, 153 N. Y. Supp. 966.

A state court has jurisdiction of an action involving the meaning and interpretation of an interstate freight tariff. *St. Louis, S. F. & T. Co. v. Roff Oil & C. Co.*, — Tex. Civ. App. —, 128 S. W. 1194.

#### Validity of Short Haul Charges.

Whether the difference and value of coal from two different mines justifies the making of a higher tariff interstate rate on coal for a shorter than for a longer haul, cannot be determined by a state court. *Sunderland v. Baltimore & O. S. W. R. Co.*, — Mo. App. —, 190 S. W. 650.

#### Demurrage Charges.

A state court has jurisdiction to determine whether demurrage charges have been incurred under a schedule filed with the Interstate Commerce Commission. *Kells Mill & L. Co. v. Pennsylvania R. Co.*, — N. J. —, 98 Atl. 309.

Although a state court does not have jurisdiction to affect a filed and published demurrage rate on interstate shipments, it may, in a proper action, find that a charge was made for a greater number of days than cars were held by a shipper, and may give him a judgment for the overcharge. *Chesapeake & O. R. Co. v. Rogers*, 75 W. Va. 556, 84 S. E. 248.

#### Charges in Excess of Tariff Rate.

A state court has jurisdiction of a shipper's action for the recovery of interstate freight charges exacted by a carrier in excess of its established tariff rates when no question of the reasonableness of the rates is involved. *Chicago, R. I. & P. R. Co. v. Lena Lumber Co.*, 99 Ark. 105, 137 S. W. 562; *Coad v. Chicago, St. P. M. & O. R. Co.*, — Ia. —, 154 N. W. 396; *Banner v. Wabash R. Co.*, 131 Ia. 405, 108 N. W. 759; *Wolverine Brass Works v. Southern P. Co.*, 187 Mich. 393, 153 N. W. 778; *Sunderland v. Baltimore & O. S. W. R. Co.*, — Mo. App. —, 190 S. W. 650; *Spence v. Southern R. Co.*, — S. C. —, 90 S. E. 750, S. C. 101 S. C. 436, 85 S. E. 1058; *Aldrich v. Southern R. Co.*, 95 S. C. 427, 79 S. E. 316; *Hardaway v. Southern R. Co.*, 90 S. C. 475, 73 S. E. 1020, Ann. Cas. 1913 D. 266.

A cause of action within the jurisdiction of a state court is shown by a petition alleging an interstate shipment of property on the payment of an agreed rate and the refusal of the carrier to deliver the same at destination, although the owner agreed to pay for any excess weight at the stipulated rate, where there was nothing on the face of the petition to show that the contract rate was not a lawful one and in accordance with the established tariff, and such jurisdiction cannot be affected by any showing to the contrary in the defendant's answer. *Porter v. Pecos & N. T. R. Co.*, 56 Tex. Civ. App. 479, 121 S. W.

897, S. C. — Tex. Civ. App. —, 156 S. W. 267, 183 S. W. 98.

#### Excessive and Unreasonable Charges.

Under section 22 of the Act Regulating Commerce a state court has jurisdiction of an action against a carrier for the recovery of excessive interstate freight charges which have been declared unreasonable by the Interstate Commerce Commission. *Robinson v. Baltimore & O. R. Co.*, 64 W. Va. 406, 63 S. E. 323, affirmed 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114.

Where, in a shipper's action for the recovery of the excess above a reasonable interstate freight rate paid a carrier, the complaint, although based on a state law, discloses a common-law right of action, a state court has jurisdiction thereof under section 22 of the Act Regulating Commerce. *Halliday Milling Co. v. Louisiana & N. W. R. Co.*, 80 Ark. 536, 98 S. W. 374.

An action will lie in a state court on the common-law right of a shipper for unjust and unreasonable exactions for interstate shipments when such right can be enforced consistently with a due observance of the Act Regulating Commerce. *Blitch v. Atlantic C. L. R. Co.*, 87 S. C. 107, 69 S. E. 16.

Under section 22 of the Act to Regulate Commerce a state court has jurisdiction of a shipper's action against a carrier for unjust discriminations in interstate freight rates, since jurisdiction is not vested by such act exclusively in the Interstate Commerce Commission or the Federal courts. *Lilly v. Northern P. R. Co.*, 64 Wash. 589, 117 Pac. 401.

#### Charges in Excess of Contract Rate.

The exclusive jurisdiction conferred on Federal courts for violations of the Act Regulating Commerce does not include actions for overcharges on interstate shipments in excess of a contract rate where there was no established joint through rate. *Kansas City S. R. Co. v. Albers Comm. Co.*, 79 Kan. 59, 99 Pac. 819, reversed on other grounds 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316.

An action will lie in a state court for the recovery of charges collected by a carrier in excess of the contract rate for an interstate shipment, where it does not appear that rates therefor had been established as required by the Act Regulating Commerce. *Mott Store Co. v. St. Louis & S. F. R. Co.*, 184 Mo. App. 50, 168 S. W. 322.

A state court has jurisdiction of an action by a shipper for the recovery of interstate freight rates collected by a carrier in excess of a contract rate which was less than that shown by tariffs filed with the Interstate Commerce Commis-

sion, which the carrier merely distributed among its station agents without posting copies thereof as required by law, although notices were posted stating where the tariffs could be found. *Sloop v. Wabash R. Co.*, 200 Mo. 198, 98 S. W. 607.

#### **Recovery of Charges Not Covered by Schedules or Tariffs.**

An action will lie in a state court for overcharges exacted for icing an interstate shipment when it does not appear that rates for such services had been established as required by the Act Regulating Commerce, since a compliance will not be presumed. *Blitch v. Atlantic C. L. R. Co.*, 87 S. C. 107, 69 S. E. 16.

#### **Overcharges Caused by Misclassification.**

Where timbers were shipped as lumber and at destination the shipper was compelled to pay a higher interstate rate on contractor's supplies, a state court has jurisdiction of an action to recover the overcharge. *Hardaway v. Southern R. Co.*, 90 S. C. 475, 73 S. E. 1020 Ann. Cas. 1913 D. 266.

#### **Overcharges Due to Misrouting.**

Where a carrier quoted a shipper the correct interstate freight rate but at destination the latter was compelled to pay a greater rate by reason of a misrouting of the shipment, a state court has jurisdiction of an action to recover the overcharge. *Pine Tree Lumber Co. v. Chicago, R. I. & P. R. Co.*, 123 La. 588, 49 So. 202, affirmed 234 U. S. 748, 58 L. ed. 1575, 34 Sup. Ct. Rep. 673.

The Interstate Commerce Act does not preclude an action in a state court for the recovery of additional freight charges incurred by reason of a carrier transporting an interstate shipment to the wrong place. *Read v. Central Vt. R. Co.*, 76 N. H. 555, 86 Atl. 161.

Section 22 of the Act Regulating Commerce, preserving all existing common law and statutory remedies, does not confer jurisdiction on a state court of a shipper's action for overcharges caused by the misrouting of an interstate shipment, where each carrier received only its true portion of the regular tariff charge, since section 9 confers exclusive jurisdiction in such a case on the Interstate Commerce Commission and the Federal courts. *Siggins v. Chicago & N. W. R. Co.*, 153 Wis. 122, 140 N. W. 1128.

#### **Overcharges Caused by Furnishing Small Cars.**

A state court does not have jurisdiction of a shipper's action for the recovery of overcharges for carload interstate shipments due to a carrier's providing cars of small capacity which could not earn the charge made, since the Interstate Com-

merce Commission has exclusive jurisdiction of such a controversy. *St. Louis S. R. Co. v. Patterson*, 181 Ind. 304, 104 N. E. 512.

#### **Recovery of Undercharges.**

An action by a carrier for the recovery of an undercharge on an interstate shipment of freight due to a mistake may be maintained in a state court. *St. Louis S. W. R. Co. v. Gramling*, 97 Ark. 353, 133 S. W. 1129.

An action may be maintained in a state court by a carrier for the recovery from a shipper of the difference between lawful charges for services relating to interstate shipments as shown by the duly established tariffs, and the amount actually collected for such services. *Cleveland, C. C. & St. L. R. Co. v. Talge Mahogany Co.*, — Ind. —, 112 N. E. 890.

A state court has jurisdiction of an action by a carrier to recover from a shipper the balance due for interstate transportation of freight according to the established tariff rate where a lower rate was mistakenly quoted, since not founded on a violation of the Act to Regulate Commerce. *Baltimore & S. W. R. Co. v. New Albany Box & B. F. Co.*, 48 Ind. App. 647, 96 N. E. 28, S. C. 48 Ind. App. 647, 94 N. E. 906.

A carrier may maintain an action in a state court to recover undercharges for transporting interstate freight, although it is necessary to determine what are proper charges under established tariffs. *Southern P. Co. v. Frye*, 82 Wash. 9, 143 Pac. 163.

#### **Application to Interstate Commerce Commission as Condition Precedent.**

##### **— Charges in Excess of Tariff Rates.**

A state court has jurisdiction, without previous action by the Interstate Commerce Commission, of a shipper's action against a carrier for the recovery of an overcharge on an interstate freight shipment, where the only controversy is as to what tariff rate is applicable. *Great Western Oil R. & P. L. Co. v. Chicago, M. & St. P. R. Co.*, 275 Ill. 58, 113 N. E. 876, reversing 192 Ill. App 208.

An action to recover charges collected on an interstate shipment of emigrant movables in excess of the tariff rates on the theory that a portion of the goods were not within such designation, will lie in a state court without previous application to the Interstate Commerce Commission for a determination of the correct rate. *Kansas City S. R. Co. v. Tonn*, 102 Ark. 20, 143 S. W. 577.

##### **— Unreasonable Rates.**

A shipper cannot maintain a common-law action in a state court to recover the

excess above a reasonable rate exacted by a carrier for an interstate shipment, when the rate collected was that shown by the established tariff, until its unreasonableness has been declared by the Interstate Commerce Commission. *Robinson v. Baltimore & O. R. Co.*, 64 W. Va. 406, 63 S. E. 323, affirmed 222 U. S. 506, 56 L. ed. 289, 32 Sup. Ct. Rep. 114.

A shipper cannot maintain an action in a state court to obtain reparation for excessive interstate freight rates collected by a carrier in accordance with regularly established tariffs, in the absence of an order by the Interstate Commerce Commission for reparation. *Foster Lumber Co. v. Union P. R. Co.*, 97 Neb. 669, 151 N. W. 168.

A state court does not have jurisdiction under section 16 of the Act to Regulate Commerce of a shipper's action against a carrier for the recovery of damages from the collection of excessive interstate freight rates, until the Interstate Commerce Commission has declared that the shipper is entitled to an award of damages and the carrier refuses or neglects to pay the same. *Darnell v. Illinois C. R. Co.*, 190 Fed. 656, appeal dismissed 225 U. S. 243, 56 L. ed. 1072, 32 Sup. Ct. Rep. 760.

Where the rate charged for a through interstate shipment is the aggregate of the local rates of two connecting lines, and the connecting carrier alone had previously adopted and filed with the Interstate Commerce Commission a tariff under which its proportion of the charge on the through shipment was collected, the shipper cannot recover from the carrier in a state court on the theory that the rate was unjust and unreasonable, since redress must be sought from the Interstate Commerce Commission. *Missouri, K. & T. R. Co. v. New Era Milling Co.*, 80 Kan. 141, 101 Pac. 1011.

#### —Furnishing Larger Cars Than Ordered.

When, for the convenience of a carrier, an interstate shipper was furnished a larger freight car than he ordered, such fact being noted on the bill of lading, and at destination he was compelled to pay the tariff charge for the larger car, which the published tariffs did not require under such circumstances, he may in a state court recover the difference between the charges for the two cars without first presenting his claim to the Interstate Commerce Commission. *Western & A. R. Co. v. White Provision Co.*, 142 Ga. 246, 82 S. E. 644.

#### (c) Actions for Unlawful Preferences and Discriminations.

##### In General.

An action for injuries sustained by a shipper in consequence of a carrier's violation

of the Act to Regulate Commerce will not lie in a state court, since the Federal courts have exclusive jurisdiction over such actions. *Sheldon v. Wabash R. Co.*, 103 Fed. 785.

A state court is without jurisdiction of a shipper's action for damages caused by unjust discriminations practiced against him by a carrier in violation of the Act Regulating Commerce, since exclusive jurisdiction of such cases is conferred on the Interstate Commerce Commission and the Federal courts. *Copp v. Louisville & N. R. Co.*, 43 La. Ann. 511, 9 So. 441, 12 L. R. A. 725, 26 Am. St. Rep. 198.

#### Stoppage of Trains at Stations.

An action for an unjust discrimination in stopping an interstate passenger train at a station for one class of passengers and not for others, will not lie in a state court, since, as a violation of the Act Regulating Commerce is in question, the matter is within the exclusive jurisdiction of the Interstate Commerce Commission or the Federal courts. *Gulf, C. & S. F. R. Co. v. Moore*, 98 Tex. 302, 83 S. W. 362, 4 Ann. Cas. 470, reversing — *Tex. Civ. App.* —, 80 S. W. 426.

#### Failure to Furnish Cars.

Under section 22 of the Interstate Commerce Act the jurisdiction of state courts is concurrent with that of the Federal courts over actions on behalf of shippers for the recovery of damages for the failure of carriers to furnish cars for interstate shipments. *Eastern R. Co. v. Littlefield*, 237 U. S. 140, 59 L. ed. 878, 33 Sup. Ct. Rep. 489, dismissing writ of error to — *Tex.* —, 154 S. W. 543; *Midland V. R. Co. v. Hoffman Coal Co.*, 91 Ark. 180, 120 S. W. 380; *Fort Worth & D. C. R. Co. v. Matador L. & C. Co.*, — *Tex. Civ. App.* —, 150 S. W. 461.

#### Unjust Distribution of Cars.

A state court has jurisdiction of an action by a shipper for the refusal of a carrier during normal conditions to supply a reasonable number of cars for the interstate shipment of coal, although the carrier relied on a rule which did not entitle the shipper to the number of cars he demanded, since no administrative question that was within the exclusive jurisdiction of the Interstate Commerce Commission was involved. *Pennsylvania R. Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120, 61 L. ed. —, 37 Sup. Ct. Rep. 46, affirming 241 Pa. 487, 88 Atl. 746.

A state court has jurisdiction of a shipper's action against a carrier for damages sustained from unjust discriminations in the distribution of cars for the interstate shipment of coal, since as no matter involving the exercise of the administrative power and discretion of the Inter-



state Commerce Commission is involved, jurisdiction is, by sections 8, 9 and 22 of the Act to Regulate Commerce, conferred on both state and Federal courts. *Pennsylvania R. Co. v. Puritan Coal M. Co.*, 237 U. S. 121, 59 L. ed. 867, 35 Sup. Ct. Rep. 484, affirming 237 Pa. 420, 85 Atl. 426, Ann. Cas. 1914 B. 37.

A state court has jurisdiction of an interstate shipper's action for damages resulting from unjust discriminations against him in the distribution of coal cars by a carrier in violation of its own rule which had been previously declared unjustly discriminatory by the Interstate Commerce Commission, and its further enforcement prohibited. *Pennsylvania R. Co. v. Stineman Coal Co.*, 242 U. S. 298, 61 L. ed. —, 37 Sup. Ct. Rep. 118, reversing 241 Pa. 509, 98 Atl. 761.

A state court has jurisdiction of a shipper's action against a carrier for unjust discrimination in the distribution of coal cars, although at the option of the shipper, some of the cars were used in interstate commerce. *Stineman Coal Co. v. Pennsylvania R. Co.*, 241 Pa. 509, 88 Atl. 761, reversed on other grounds 242 U. S. 298, 61 L. ed. —, 37 Sup. Ct. Rep. 118.

A state court is without jurisdiction of an action by a shipper involving the question of unjust discrimination in the distribution of cars used in interstate commerce. *St. Louis S. W. R. Co. v. Patterson*, 181 Ind. 304, 104 N. E. 512.

#### **Action by Interstate Commerce Commission as Condition Precedent.**

Sections 8, 9 and 22 of the Act to Regulate Commerce confers concurrent jurisdiction on both state and Federal courts over actions by shippers against carriers for unjust discrimination in the distribution of cars for the interstate transportation of coal, without previous application being made to the Interstate Commerce Commission for redress, since no administrative question is involved. *Pennsylvania R. Co. v. Puritan Coal M. Co.*, 237 U. S. 121, 59 L. ed. 867, 35 Sup. Ct. Rep. 484, affirming 237 Pa. 420, 85 Atl. 426, Ann. Cas. 1914 B. 37; *Illinois C. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 59 L. ed. 1306, 35 Sup. Ct. Rep. 760, affirming 257 Ill. 80, 100 N. E. 151.

An action against an interstate carrier for discrimination in the use of a wharf at the terminus of its line will lie in a state court without previous action by the Interstate Commerce Commission. *Gulf & S. I. R. Co. v. Buddendorf*, 110 Miss. 752, 70 So. 704, L. R. A. 1916 D. 253.

Where the refusal of a carrier to provide an interstate shipper with a switch connection as required by the Act Regulating Commerce, does not involve any discriminatory rule of the carrier or the enforcement of an unreasonable one, an

action against the carrier for damages will lie in a state court, since no administrative question is involved which requires preliminary action by the Interstate Commerce Commission. *Langhill v. Pennsylvania R. Co.*, — Pa. —, 98 Atl. 873.

#### **(f) Actions for Allowances, Concessions and Rebates.**

##### **Allowances for Furnishing Grain Doors for Cars.**

A state court cannot award damage for the construction by a shipper of grain doors or bulkheads for carload interstate shipments, where the tariffs of a carrier do not provide for compensation therefor. *Loomis v. Lehigh V. R. Co.*, 240 U. S. 43, 60 L. ed. 517, 36 Sup. Ct. Rep. 228, affirming 208 N. Y. 312, 101 N. E. 907, 147 App. Div. 195, 132 N. Y. Supp. 138.

State courts have jurisdiction of an action by a shipper for repairing box cars so as to hold interstate shipments of grain where the maximum charge for such repairs is fixed in the carrier's duly established tariffs. *Rock Milling & E. Co. v. Atchison, T. & S. F. R. Co.*, — Kan. —, 154 Pac. 254, S. C. — Kan. —, 158 Pac. 859.

##### **Rebates.**

A state court has jurisdiction of a shipper's action for the recovery of rebates on interstate shipments of cotton made subject to compress privileges where the only contention is the meaning and interpretation of an interstate freight tariff. *St. Louis, S. F. & T. R. Co. v. Roff Oil & G. Co.*, — Tex. Civ. App. —, 128 S. W. 1194.

##### **Charges in Excess of Tariff Rates.**

A state court has jurisdiction of an interstate shipper's action growing out of the giving of secret rebates by a carrier to other interstate shippers similarly situated. *Murray v. Chicago & N. W. R. Co.*, 62 Fed. 24, affirmed 35 C. C. A. 62, 92 Fed. 868.

#### **Action by Interstate Commerce Commission as Condition Precedent.**

Action by the Interstate Commerce Commission is not a condition precedent to the maintenance of an action against a carrier under sections 8 and 9 of the Interstate Commerce Act by an interstate shipper of coal for damages resulting from the giving of allowances or rebates to competitors for hauling coal from the mines to railway stations, when the hauling was actually done by the carrier and such services were a part of the established interstate tariff rates, since such allowances were in violation of such act. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916, affirming and modifying 183 Fed. 908.

**(g) Actions for Loss of and Injury to Shipments.****In General.**

The fact that Congress has legislated regarding interstate shipments does not deprive state courts of jurisdiction of actions against carriers for injuries to the same. *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb. 463, 56 N. W. 957, 22 L. R. A. 335; *Jackson v. Chicago & N. W. R. Co.*, 34 S. D. 153, 147 N. W. 732.

**Conversion.**

An action lies in a state court for the conversion by a carrier of an interstate shipment notwithstanding that the plaintiff previously filed a petition with the Interstate Commerce Commission for a determination of the proper applicable rate and for damages, and that an award was made by that body, since it was without jurisdiction to assess damages for a conversion. *Pecos & N. T. R. Co. v. Porter*, — Tex. Civ. App. —, 156 S. W. 267, S. C. 56 Tex. Civ. App. 479, 121 S. W. 897, 183 S. W. 98.

**Violation of Live Stock Act.**

A state court has jurisdiction of an action against a carrier for injuries caused live stock by its failure to unload them for food, rest and water as required by the 28 Hour Act. *St. Louis & S. F. R. Co. v. Piburn*, 30 Okla. 262, 120 Pac. 923.

**D. Parties.****2. Plaintiffs.****Assignee.**

An assignee of a shipper's claim for damages against a carrier for overcharges on interstate freight may maintain an action in his own name in a Federal court against a carrier under section 9 of that act, when the law of the state in which the action is brought recognizes the assignee's right to sue. *Edmunds v. Illinois C. R. Co.*, 80 Fed. 78.

**Consignor.**

One who ships goods on consignment may maintain an action against an initial carrier under the Carmack Amendment for their loss or injury. *Phillips v. Seaboard A. L. R. Co.*, — N. C. —, 89 S. E. 1057.

**3. Defendants.****Negligent Carrier in Action Under Carmack Amendment.**

A negligent connecting carrier need not be joined with an initial carrier in an action against the latter under the Carmack Amendment. *Southern R. Co. v. Avey*, — Ky. —, 191 S. W. 460.

**E. Pleading.****1. In General.****Striking Reference to Supplemental Order of Interstate Commerce Commission.**

In an action against a carrier based on a reparation order of the Interstate Commerce Commission, the defendant's motion to strike from the complaint portions relating to a supplemental order made by the Commission to correct a formal defect in the original order, was properly overruled. *Missouri P. R. Co. v. Ferguson Saw Mill Co.*, — C. C. A. —, 235 Fed. 474.

**2. What Must Be Alleged.****(a) In General.****Payment of Freight Charges by Plaintiff.**

A declaration in a shipper's action against a carrier for reparation for the exaction of an excessive interstate freight rate on lumber, is demurrable where it does not allege that such charge was paid by the plaintiff or by anyone in his behalf. *Davis v. Mobile & O. R. Co.*, 114 C. C. A. 8, 194 Fed. 374.

**Excessiveness and Unreasonableness of Charges.**

The complaint in a shipper's action for damages sustained by the collection of excessive, unjust or unreasonable interstate freight rates, even though in consequence of a combination or conspiracy in violation of the Sherman Anti-trust Law, must aver that such rates have been declared excessive, unreasonable or unjust by the Interstate Commerce Commission. *Meeker v. Lehigh V. R. Co.*, 162 Fed. 354, see S. C. 175 Fed. 320, 106 C. C. A. 94, 183 Fed. 548.

**(d) Possession of Bill of Lading.****In General.**

That he is the holder of a written bill of lading or receipt for an interstate shipment need not be alleged by the plaintiff in an action under the Carmack Amendment against an initial carrier. *Ricks Sheep Co. v. Oregon S. L. R. Co.*, 180 Ill. App. 220.

**(j) Waiver.****Notice of Damage Claims.**

The waiver of a requirement for the giving of written notice of loss or injury to an interstate shipment within a designated time must be pleaded. *Atchison, T. & S. F. R. Co. v. Baldwin*, 53 Colo. 416, 128 Pac. 449; *Westerfield v. Fargo*, 80 Misc. 40, 141 N. Y. Supp. 544.

### 3. Sufficiency.

#### Sufficiency to Show Particular Facts.

##### — Invalidity of Contract to Expedite Shipment.

A bill of complaint for the breach of a contract to expedite an interstate shipment does not show the invalidity thereof under the Act Regulating Commerce or the Elkins Act where the pleadings do not show that such special service was not covered by the carrier's published tariffs. *Roberts v. Nashville, C. & St. L. R. Co.*, 135 Tenn. 48, 185 S. W. 69.

##### — Damages.

An allegation that the plaintiff's business was extensive and prosperous prior to a combination or conspiracy between carriers in violation of the Sherman Anti-trust Law to drive independent dealers from business, and that his business was greatly curtailed thereby and conducted at a loss or a small profit, is sufficient as against a general demurrer, in an action against the carrier for damages. *Meeker v. Lehigh V. R. Co.*, 106 C. C. A. 94, 183 Fed. 548, reversing 175 Fed. 320, S. C. 162 Fed. 354.

A complaint by an independent coal dealer against interstate carriers, in an action under the Sherman Anti-trust Law for injuries resulting from a conspiracy among the carriers to drive the dealer from business, sufficiently sets up the plaintiff's damages by an allegation that, prior to such conspiracy, his business was extensive and prosperous and that it was greatly curtailed and conducted at a loss or at a small profit only since the alleged conspiracy. *Meeker v. Lehigh V. R. Co.*, 106 C. C. A. 94, 183 Fed. 548, reversing 175 Fed. 320, S. C. 162 Fed. 354.

An allegation that a shipper of coal was compelled to pay excessive and illegal interstate freight rates is not sufficient in the absence of any other facts, to show damages to the plaintiff's business or property so as to sustain an action against the carrier. *Meeker v. Lehigh V. R. Co.*, 162 Fed. 354, see S. C. 175 Fed. 320, 106 C. C. A. 94, 183 Fed. 548.

##### — Determination by Interstate Commerce Commission of Unreasonableness of Rates.

An allegation of a shipper's complaint that he was obliged to pay excessive and unlawful interstate freight rates is not equivalent to an averment that such rates have been declared excessive, unjust or unreasonable by the Interstate Commerce Commission. *Meeker v. Lehigh V. R. Co.*, 162 Fed. 354, see S. C. 175 Fed. 320, 106 C. C. A. 94, 183 Fed. 548.

#### To Show Cause of Action.

##### — Recovery of Charges by Carrier.

A petition discloses a cause of action in favor of a carrier for the collection of an interstate freight rate, although it neither averred nor proved that its schedule of rates was published as required by the Act Regulating Commerce, since publication will be presumed, and if not properly made is a matter of defense. *International & G. N. R. Co. v. Carter*, — Tex. Civ. App. —, 180 S. W. 663.

##### — Collection of Illegal Rates.

A cause of action against a carrier under section 16 of the Act to Regulate Commerce on a reparation order of the Interstate Commerce Commission, is sufficiently stated as against a general demurrer, where the rate collected is alleged to have been unjust, unreasonable and in violation of law. *Denver & R. G. R. Co. v. Baer Bros. M. Co.*, 126 C. C. A. 399, 209 Fed. 577, affirming 200 Fed. 614.

Where, in an action against a carrier for unjust discrimination against a shipper in interstate freight rates, the complaint does not show the failure of the defendant to file rate schedules as required by the Act Regulating Commerce, nor allege that the rates collected were excessive, a cause of action was not disclosed, since, in the absence of an allegation of the violation of the law in that respect, a violation will not be presumed. *Lilly v. Northern P. R. Co.*, 64 Wash. 589, 117 Pac. 401.

##### — Discrimination in Switching Charges.

An allegation in an action against a carrier for unjust discrimination in switching charges on interstate carload shipments, that the carrier absorbed or itself paid such charges for other shippers similarly situated does not state a cause of action under the Act Regulating Commerce or at common law, since it did not show that such discrimination operated to the injury of the plaintiff. *Lilly v. Northern P. R. Co.*, 64 Wash. 589, 117 Pac. 401.

##### — Unfair Discriminations and Preferences.

A declaration states a cause of action against a carrier where it alleges in substance that the plaintiff, an interstate shipper, was injured by the conduct of the defendant in granting in violation of the Act to Regulate Commerce, to a competitor, the use of cars without demurrage charges after the expiration of "free time" and the denial of a similar privilege to the plaintiff. *Lyne v. Delaware, L. & W. R. Co.*, 170 Fed. 847, modified 113 C. C. A. 604, 193 Fed. 984.

A cause of action under the Sherman Anti-trust Law is shown by a complaint of a shipper of coal against a carrier alleging a combination between carriers to force independent dealers from the field

and to obtain control of the coal market by increasing the price of coal at the mines and by raising interstate freight rates so as to make the price of coal at the mines exceed the market price, without alleging prior application to the Interstate Commerce Commission for redress. *Meeker v. Lehigh V. R. Co.*, 106 C. C. A. 94, 183 Fed. 548, reversing 175 Fed. 320, S. C. 162 Fed. 354.

#### — Violation of Live Stock Act.

In order to state a cause of action against a carrier for failing to unload live stock for feed, water and rest as required by the 28 Hour Act, the plaintiff's petition must show that the defendant was not within the exemption of the act relieving it from liability when prevented from compliance therewith by storms or other accidental causes. *Hale v. Missouri P. R. Co.*, 36 Neb. 266, 54 N. W. 517.

In order to permit a shipper to recover for a carrier's violation of the 28 Hour Act it is only necessary for the complaint to show a violation by the carrier of the duty imposed on it by law and a resulting injury to the plaintiff. *Reynolds v. Great N. R. Co.*, 40 Wash. 163, 82 Pac. 161, 111 Am. St. Rep. 883.

A complaint in an action against a carrier for damages resulting from a violation of the 28 Hour Act discloses a cause of action by alleging the confinement by a carrier of live stock, in the absence of storms or other accidental causes, continuously in cars for more than 28 hours without unloading for rest, feed and water, and that by reason of their long confinement the animals became run down so that some of them died. *Reynolds v. Great N. R. Co.*, 40 Wash. 163, 82 Pac. 161, 111 Am. St. Rep. 883.

An allegation of the plaintiff's petition in an action for injuries to live stock, that the defendant negligently held it in cars between interstate points for 43 hours without unloading for food, water and rest, which neglect in part caused the injury complained of, is sufficient to bring the action within the terms of the 28 Hour Act. *Chicago, B. & Q. R. Co. v. Simpson*, 23 Wyo. 342, 151 Pac. 902.

#### 4. Demurrer.

##### In Action Under Carmack Amendment.

##### — In Action Against Negligent Connecting Carrier.

A demurrer setting up that, under the Carmack Amendment, the initial carrier only could be sued for the loss of an interstate shipment, was properly overruled in an action against the terminal carrier for its own negligence. *Southern R. Co. v. Waxelbaum Produce Co.*, — Ga. App. —, 90 S. E. 987.

#### 5. Plea or Answer.

##### What Must Be Pleaded.

##### — Failure to Bring Action Within Stipulated Period.

The failure of a shipper to bring an action for injuries to a shipment within the stipulated period may be raised by an amendment to the defendant's answer. *Kansas City S. R. Co. v. Bull*, 120 Ark. 43, 179 S. W. 172.

##### — Failure to Give Notice of Damages Within Stipulated Time.

The failure of a shipper to comply with a requirement of a contract of shipment for the giving of written notice of the loss of or injury to an interstate shipment must be pleaded by the defendant. *Gilinski v. Illinois C. R. Co.*, 98 Neb. 858, 154 N. W. 720.

The failure of a shipper to give written notice of damage claim within the stipulated time must be raised by answer and not by demurrer. *St. Louis, I. M. & S. R. Co. v. Cumbie*, 101 Ark. 172, 141 S. W. 939, S. C. 118 Ark. 478, 177 S. W. 910.

##### What May Be Shown Under General Issue.

That a contract for the interstate transportation of freight violates the Interstate Commerce Act may be shown under the general issue in an action by a shipper against a carrier for the breach of such agreement. *Southern R. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144.

A carrier cannot show under the general issue in a shipper's action for the recovery of the difference between an interstate rate quoted him and the higher tariff rate he was compelled to pay, that the rate quoted was less than that established by the schedules and tariffs. *Baldwin Sheep & L. Co. v. Columbia S. R. Co.*, 58 Ore. 285, 114 Pac. 469.

#### 6. Amendments.

##### When Amendment May Be Made.

A carrier was not prejudiced by the refusal to permit an amendment to its answer setting up that the shipment sued for was interstate, and introducing and relying on certain limitations permitted by the Carmack Amendment, where compliance with such limitations had been waived. *Cincinnati, N. O. & T. P. R. Co. v. Smith*, 165 Ky. 235, 176 S. W. 1013.

In an action against a carrier for the breach of its contract to furnish a special interstate train, the defendant was not prejudiced by the denial of a motion to amend its answer during the trial by setting up the illegality of the agreement because of noncompliance with the Act to Regulate Commerce in establishing

rates for such service, where the motion was made many months after the cause was at issue and after the defendant had made a number of dilatory pleas and motions. *Burrus v. Nevada C. O. R. Co.*, 38 Nev. 156, 145 Pac. 926, 8 N. C. C. A. 777.

A carrier was properly denied permission on a second trial 3 years after a cause of action accrued, to amend its answer by setting up that a shipment was controlled by the Carmack Amendment, and for the first time asserting that the failure of the shipper to give notice of damages within the time limited by the contract of carriage was a bar to the action, since a compliance with such requirement was, under the circumstances, waived. *Cincinnati, N. O. & T. P. R. Co. v. Smith*, 165 Ky. 235, 176 S. W. 1013.

#### When New Cause of Action Stated.

In an action for damages caused by a carrier's discriminating against an interstate shipper in the distribution of coal cars, a new cause of action was not introduced after the running of the statute of limitations by an amendment to the complaint increasing the claim of damages because of the inability of the plaintiff, in consequence of the conduct of the defendant, to ship as large amount of coal as he would otherwise have done. *Puritan Coal M. Co. v. Pennsylvania R. Co.*, 237 Pa. 420, 85 Atl. 426, Ann. Cas. 1914 B. 37, affirmed 237 U. S. 420, 59 L. ed. 867, 35 Sup. Ct. Rep. 484.

#### F. Damages.

Allowance of damages by Interstate Commerce Commission, see *supra* III, 5, (c).

Damages in reparation proceedings before Interstate Commerce Commission, see *supra* III, 5, (c).

Damages for collecting excessive rates, see *supra* IV, J, 3, (d).

Enforcement of awards of damages made by Interstate Commerce Commission, see *supra* III, 5, (c) and (g).

Instructions as to damages, see *infra* XIII, H, 7.

Measure of damages in actions on reparation orders of Interstate Commerce Commission, see *supra* III, C, 5, (c), (g).

##### 1. In General.

#### Injury to Part of Goods Shipped Under Limited Liability Contract.

The liability of a carrier for injury to a portion of an interstate shipment is not limited to the proportion which the value of the injured goods bear to the value of the whole shipment as fixed by the bill of lading. *Central of Ga. R. Co. v. Broda*, 190 Ala. 266, 67 So. 437.

#### Punitive Damages.

Punitive damages are not recoverable in an action against an initial carrier under the Carmack Amendment. *Harman v. Southern R. Co.*, — S. C. —, 90 S. E. 1023.

Punitive damages cannot be awarded in an action under the Carmack Amendment for the failure of a carrier to transport an interstate shipment within a reasonable time, unless knowledge of the willful or wanton conduct of its employees is brought home to the carrier either by knowledge before the event or ratification thereafter. *DeLoach v. Southern R. Co.*, — S. C. —, 90 S. E. 701.

The fact that the Cummins Amendment renders a carrier liable for the "full, actual loss, damage or injury to" an interstate shipment, does not create an inference that it is liable for punitive damages under the Carmack Amendment whenever there is willfulness or wantonness on the part of its employees resulting in injury to an interstate shipment. *DeLoach v. Southern R. Co.*, — S. C. —, 90 S. E. 701.

Punitive damages may be awarded for a carrier's breach of a contract to make a round trip with a special interstate train to procure the plaintiff's son, who, to the knowledge of the carrier, was ill at a place where necessary medical attention, which was urgently required to save his life, could not be had, where the carrier, on the arrival of the train at its destination, refused to return immediately and caused a delay of three hours by running the train to another point to obtain passengers and live stock. *Burrus v. Nevada C. O. R. Co.*, 38 Nev. 156, 145 Pac. 926, 8 N. C. C. A. 777.

##### 2. Delays.

#### Failure to Transport Within Stipulated Time.

The measure of damages for a carrier's breach of its agreement to transport an opera company in interstate commerce within a stipulated time is the loss sustained by the failure of the troupe to arrive at destination in time to give a performance the date of which was known to the defendant. *Copp v. Louisville & N. R. Co.*, 50 Fed. 164.

Damages for the loss of engagements due to the breaking up of an opera troupe in consequence of the inability to pay the members as the result of a carrier's failure to get them to their destination within a stipulated time, cannot be recovered in an action against the carrier. *Copp v. Louisville & N. R. Co.*, 50 Fed. 164.

The measure of damages for a carrier's breach of its contract to transport the baggage and instruments of the members of an orchestra in time to give a matinee

concert, is the loss of the plaintiff's percentage of the gross receipts of the performance for which the tickets were redeemed, where the defendant does not show that the loss was reduced by the saving of any expenses that the giving of the concert would have entailed; but there can be no recovery on account of the diminished attendance at the evening concert as the result of the late arrival of the instruments and baggage, when such element of recovery rests on speculation and conjecture. *Altschuler v. Atchison, T. & S. F. R. Co.* 155 Wis. 146, 144 N. W. 294, 49 L. R. A. (N. S.) 491.

### 5. Injury to Live Stock.

#### Failure to Feed, Water and Rest.

The measure of damages in an action against a carrier for failure to unload live stock for food, water and rest as required by the 28 Hour law, is the difference between their fair market value at destination in the condition in which they were delivered and what it would have been if the statute had been observed. *St. Louis & S. F. R. Co. v. Piburn*, 30 Okla. 262, 120 Pac. 923.

### 6. Mental Anguish.

#### Failure to Transport Sick Person According to Contract.

Damage for mental anguish may be awarded a father for the breach by a carrier of its agreement to make an immediate round trip with a special interstate train for the conveyance of the former's son, who was, to the knowledge of the carrier, at a point where he could not obtain medical treatment which was necessary to save his life, where on the arrival of the train at such place the carrier refused to return immediately and caused a delay of several hours by running the train to another point to obtain passengers and live stock. *Burrus v. Nevada, C. O. R. Co.*, 38 Nev. 156, 145 Pac. 926, 8 N. C. C. A. 777.

#### Reasonableness of Allowance.

A verdict for \$10,000 against a carrier for mental anguish and punitive damages in an action by a father for the breach by the carrier of its contract to make an immediate round trip with an interstate special train to obtain the plaintiff's son, who, to the knowledge of the carrier, was ill at a place where medical attention which was necessary to save his life, could not be obtained, is excessive, where there was a delay of but three hours, and a new trial was ordered unless the plaintiff remit \$5,000. *Burrus v. Nevada C. O. R. Co.*, 38 Nev. 156. 145 Pac. 926, 8 N. C. C. A. 777.

### 8. Discriminations, Preferences and Unjust Rates.

#### Unjust Rates.

Ordinarily the damage sustained by a shipper from the exaction of an excessive interstate freight rate is the difference between the rate paid and a reasonable one, legal damages to the shipper being imputed from the payment of the unreasonable rate. *Darnell-Taenzer Co. v. Southern P. Co.*, 137 C. C. A. 460, 221 Fed. 890, reversing 190 Fed. 659, S. C. 143 C. C. A. 663, 229 Fed. 1022, certiorari denied 238 U. S. 629, 59 L. ed. 1497, 35 Sup. Ct. Rep. 792.

In an action against a carrier under section 16 of the Act to Regulate Commerce for the recovery of unreasonably excessive interstate freight rates, the plaintiff need not demonstrate mathematically that he was damaged pecuniarily to the amount of the excess above a reasonable rate. *Darnell-Taenzer L. Co. v. Southern P. Co.*, 137 C. C. A. 460, 221 Fed. 890, reversing 190 Fed. 659, S. C. 143 C. C. A. 663, 229 Fed. 1022, certiorari denied 238 U. S. 629, 59 L. ed. 1497, 35 Sup. Ct. Rep. 792.

Payment by a shipper of excessive and unreasonable interstate freight rates imports legal damages to the extent of the excess above a reasonable charge, and such presumption cannot be overcome by anything short of definite proof negating the fact of damage or the extent thereof. *Darnell-Taenzer Co. v. Southern P. Co.*, 137 C. C. A. 460, 221 Fed. 890, reversing 190 Fed. 659, S. C. 143 C. C. A. 663, 229 Fed. 1022, certiorari denied 238 U. S. 629, 59 L. ed. 1497, 35 Sup. Ct. Rep. 792.

The fact that excessive interstate freight rates were added by a shipper to the price of a commodity and paid by the consignee does not, as a matter of law, in an action against the carrier under section 16 of the Act Regulating Commerce, overcome the prima facie effect of a finding by the Interstate Commerce Commission that the shipper was damaged to the extent of the excess above a reasonable rate. *Darnell-Taenzer L. Co. v. Southern P. Co.*, 137 C. C. A. 460, 221 Fed. 890, reversing 190 Fed. 659, S. C. 143 C. C. A. 663, 229 Fed. 1022, certiorari denied 238 U. S. 629, 59 L. ed. 1497, 35 Sup. Ct. Rep. 792.

The presumption of injury from the payment of an excessive interstate freight rate cannot be overcome, in an action against a carrier under section 16 of the Act Regulating Commerce, by anything short of definite proof not resting on uncertainty or conjecture which negates the facts or amount of damages. *Darnell-Taenzer L. Co. v. Southern P. Co.*, 137 C. C. A. 460, 221 Fed. 890, re-

versing 190 Fed. 659, S. C. 143 C. C. A. 663, 229 Fed. 1022, certiorari denied 238 U. S. 629, 59 L. ed. 1497, 35 Sup. Ct. Rep. 792.

### **Discriminations Between Long and Short Haul.**

The measure of damages in an action by a shipper against a carrier for unlawful discriminations in rates between long and short hauls under similar conditions in violation of the Act to Regulate Commerce, is the difference between such rates. *Junod v. Chicago & N. W. R. Co.*, 47 Fed. 290; *Osborne v. Chicago & N. W. R. Co.*, 48 Fed. 49, reversed 3 C. C. A. 347, 52 Fed. 912, certiorari denied in both cases 146 U. S. 354, 36 L. ed. 1002, 13 Sup. Ct. Rep. 281.

### **Giving Rebates to Competitors.**

Under section 8 of the Interstate Commerce Act a carrier is not liable to a shipper, who paid full tariff rates for the interstate transportation of coal, for the full amount of rebates given competitors for similar shipments, but only for such damages as the illegal payments caused such shipper, the true measure of damages being the actual pecuniary loss sustained by him. *Pennsylvania R. Co. v. International Coal M. Co.*, 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915 A. 315, reversing 97 C. C. A. 383, 173 Fed. 1.

The damages sustained by a shipper from the granting by a carrier of unlawful rebates to a competitor on similar interstate shipments, where the injured party paid the full tariff rates, is not, under section 8 of the Interstate Commerce Act declaring that any carrier doing any act thereby prohibited shall be liable for full amount of damages sustained by any person in consequence thereof, to be measured by the difference between the two rates, but is confined to the actual pecuniary injury sustained. *Pennsylvania R. Co. v. International Coal M. Co.*, 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915 A. 315, reversing 97 C. C. A. 383, 173 Fed. 1.

### **Failure to Make Shipment Because of Unlawful Rate.**

The measure of damages in an action for the refusal of a carrier to accept car load interstate shipments of cotton seed except on the payment of an unlawful rate, is the loss of profit on seed actually purchased by the shipper and which profit he would have received had the shipment been made, rather than the difference between the true rate and that demanded. *Aldrich v. Southern R. Co.*, 95 S. C. 427, 79 S. E. 316.

## **G. Evidence.**

### **2. Judicial Notice.**

#### **Classifications, Schedules and Tariffs.**

An official classification of interstate freight rates will not be judicially noticed by a state court. *Warren v. Cleveland C. & St. L. R. Co.* 156 Ill. App. 111.

A state court will not take judicial notice of the duly published schedules of interstate rates filed with the Interstate Commerce Commission. *Hartwell R. Co. v. Kidd*, 10 Ga. App. 771, 74 S. E. 310.

#### **Adjudications and Orders of Interstate Commerce Commission.**

Section 14 of the Act to Regulate Commerce does not require state courts to take judicial notice of the published decisions of the Interstate Commerce Commission, although they are admissible without proof of their genuineness, unless they are offered in evidence in the same manner as other competent proof. *Robinson v. Baltimore & O. R. Co.*, 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114, affirming 64 W. Va. 406, 63 S. E. 323.

A state court will not take judicial notice of an adjudication of the Interstate Commerce Commission as to the unreasonableness of a freight rate, but such holding must be proven by the record thereof. *Robinson v. Baltimore & O. R. Co.*, 64 W. Va. 406, 63 S. E. 323, affirmed 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114.

### **3. Admissions.**

#### **Effect.**

In an action against an initial carrier for the misrouting by a connecting carrier of an interstate grain shipment, the admission of the misrouting made by the defendant's attorney at the trial, and the denial only of the loss claimed by the plaintiff, relieves the plaintiff from showing the defendant's fault. *McCullough v. Missouri P. R. Co.*, — Kan. —, 160 Pac. 214.

### **4. Presumptions.**

#### **Knowledge of Existence of Freight Rates.**

Every shipper is presumed to know of the existence of interstate freight schedules and that they are open for inspection. *Wyrick v. Missouri, K. & T. R. Co.*, 74 Mo. App. 406; *Gerber v. Wabash R. Co.*, 63 Mo. App. 145.

#### **Validity of Contracts Not Complying With Law.**

A shipper is presumed to know the terms of the Interstate Commerce Act that avoid every contract of affreightment

which is not made in accordance with the requirements of such law. *Wyrick v. Missouri, K. & T. R. Co.*, 74 Mo. App. 406; *Gerber v. Wabash R. Co.*, 63 Mo. App. 145.

#### **Date When Rates Effective.**

A schedule of rates of an express company, although certified by the Secretary of the Interstate Commerce Commission several months previously to the making of an interstate shipment, will be presumed to have been in force at the date of the shipment. *Martin v. Adams Express Co.*, 187 Ill. App. 214.

#### **Correctness of Rates and Charges.**

Interstate freight rates established by a schedule filed with the Interstate Commerce Commission are presumptively correct. *Foster v. Kansas City S. R. Co.*, 121 La. 1053, 41 So. 1014.

Demurrage charges imposed under a tariff approved by the Interstate Commerce Commission will be presumed reasonable by a state court. *Erie R. Co. v. Wanaqua Lumber Co.*, 75 N. J. L. 878, 69 Atl. 168.

### **5. Burden of Proof.**

#### **Establishment of Rates and Charges.**

The burden is on a carrier to show that an interstate joint freight tariff was published as required by law. *Atlanta, K. & N. R. Co. v. Horne*, 106 Tenn. 73, 59 S. W. 134.

The burden is not on a shipper, in an action to enforce a contract giving a milling in transit privilege and agreeing to maintain a designated rate between competitive points, to show that the carrier has filed a proper schedule of rates with the Interstate Commerce Commission. *Laurel Cotton Mills v. Gulf & S. I. R. Co.*, 84 Miss. 339, 37 So. 134, 66 L. R. A. 453, S. C. 91 Mjss. 166, 45 So. 982.

#### **Validity of Contract of Carriage.**

When the plaintiff's petition in an action against a carrier shows a legal contract for an interstate freight shipment, the burden of establishing its invalidity under the terms of the Act Regulating Commerce, rests on the defendant. *St. Louis, S. F. & T. R. Co. v. Birge-Forbes Co.*, Tex. City. App., 139 S. W. 3.

The burden is on a carrier, in an action for the recovery of charges refunded from interstate freight charges, to show that an agreement fixing a rate with a shipper in violation of the Act to Regulate Commerce was contrary to the carrier's established tariffs. *Southern P. Co. v. Frye*, 82 Wash. 9, 143 Pac. 163.

In an action against a carrier for the

breach of a contract for the interstate transportation of the members of an orchestra by failing to deliver their baggage and instruments in time for a matinee concert, the burden is on the defendant to show that the agreement was in violation of the Act to Regulate Commerce. *Altschuler v. Atchison, T. & S. F. R. Co.*, 155 Wis. 146, 144 N. W. 294, 49 L. R. A. (N. S.) 491.

Where, in an action by a carrier for the recovery of the legal tariff rate for an interstate shipment of freight, the plaintiff's allegation of an original agreement with the defendant to pay the legal rates, is denied by the latter, it is incumbent on the carrier to prove the agreement. *Oregon R. & N. Co. v. Coolidge*, 59 Oreg. 5, 116 Pac. 93.

When connecting carriers that do not have an established joint through interstate freight rate, contract with a shipper for through transportation at an agreed rate, the burden is on one of the carriers when sued by the shipper for charges collected in excess of the contract rate, to show the invalidity of such agreement. *Kansas City S. R. Co. v. Albers Comm. Co.*, 79 Kan. 59, 99 Pac. 819, reversed on other grounds 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316.

#### **Overcharges.**

The plaintiff has the burden of showing that he was overcharged for the transportation of interstate freight. *Blalock Hardware Co. v. Seaboard A. L. R. Co.*, 170 N. C. 395, 86 S. E. 1025.

A shipper has the burden of showing that an interstate freight rate collected in excess of a contract rate, was higher than that shown by the carrier's tariffs. *Baltimore & O. R. Co. v. LaDue*, 128 App. Div. 594, 112 N. Y. Supp. 964, reversing 57 Misc. 614, 108 N. Y. Supp. 659.

A shipper need not allege or prove in an action for the recovery of charges collected in excess of the contract rate for an interstate shipment, that the rate paid was one fixed by the published tariffs, since that is a matter of defense. *Southern Kansas R. Co. v. Burgess*, Tex. Civ. App., 90 S. W. 189.

By showing the payment under protest at destination of a rate in excess of that stated in a bill of lading for an interstate shipment, a prima facie case is established against a carrier, and it has the burden of showing that it collected the established tariff rate. *Hunter v. St. Louis & S. F. R. Co.*, 167 Mo. App. 624, 150 S. W. 733.

#### **Validity of Released Valuation Contract.**

The burden is on a carrier to show that a shipper assented to a limitation of the carrier's liability for an interstate



shipment. *Warren v. Cleveland, C. C. & St. L. R. Co.*, 156 Ill. App. 111.

The burden is on a carrier to show a valid release of its liability for an interstate shipment which the shipper undervalues, and to prove all facts essential to such a defense. *St. Louis & S. F. R. Co. v. Mounts*, — Okla. —, 144 Pac. 1036, reversed without opinion 241 U. S. 654, 60 L. ed. 1223, 36 Sup. Ct. Rep. 725.

#### **Notice of Loss or Damage.**

##### **— Absence of Consideration.**

A shipper has the burden of showing absence of consideration for a stipulation for giving notice of loss or damage within a designated time. *Dunlap v. Chicago & N. W. R. Co.*, 187 Mo. App. 201, 172 S. W. 1178.

##### **— Reasonableness.**

The burden is on a carrier to show the reasonableness of a stipulation requiring the giving of 1 day's notice of the injury to an interstate shipment of live stock before their removal at destination. *Kansas City, M. & O. R. Co. v. Hansard*, — Tex. Civ. App. —, 184 S. W. 329.

##### **— Compliance.**

The plaintiff has the burden of showing that notice was given as required by a contract of carriage. *St. Louis, I. M. & S. R. Co. v. Cumbie*, 118 Ark. 478, 177 S. W. 910, S. C. 105 Ark. 406, 151 S. W. 237.

The plaintiff has the burden of showing compliance with a requirement for giving written notice of injury to live stock before their removal and mingling with other animals at destination. *Chicago, R. I. & P. R. Co. v. Conway*, 34 Okla. 356, 125 Pac. 1110.

##### **— Noncompliance.**

A carrier has the burden of showing noncompliance with a requirement of a contract of carriage for the giving of written notice of damages claim within a specified time. *Presley Co. v. Illinois C. R. Co.*, 120 Minn. 295, 139 N. W. 609.

#### **Negligence.**

In an action under the Carmack Amendment against an initial carrier for the delay in transporting vegetables, the plaintiff must not only show negligence on the part of some of the carriers, but also that it was the proximate cause of the injury. *Van Epps v. Atlantic C. L. R. Co.*, — S. C. —, 89 S. E. 1035.

#### **Negligence Concurring with Act of God.**

In an action under the Carmack Amendment for the destruction of an interstate shipment by the Act of God in connection with a negligent delay, the plaintiff in order to recover has the burden of

showing that other negligence contributed to the loss. *Northwestern Cons. Milling Co. v. Chicago, B. & Q. R. Co.*, — Minn. —, 160 N. W. 1028.

#### **Failure to Observe Twenty-Eight Hour Act.**

A shipper does not have the burden of showing, in an action against a carrier for damages to live stock sustained in consequence of a failure to observe the 28 Hour law, that the defendant did not stop the shipment for feed, water and rest at such places as were available. *Chicago, B. & Q. R. Co. v. Slatterly*, 76 Neb. 721, 107 N. W. 1045, 124 Am. St. Rep. 825.

#### **Negligence of Connecting Carrier.**

In an action against a connecting carrier for the loss of or injury to an interstate shipment the plaintiff has the burden of showing that the damages occurred on the line of such carrier and not on that of some other carrier. *Southern R. Co. v. Avey*, — Ky. —, 191 S. W. 460.

#### **Injury Caused by Consignee.**

In an action against an initial carrier, under the Carmack Amendment, when the plaintiff shows the receipt by the carrier of property in good condition and the issue of a bill of lading therefor, the burden rests on the defendant to show that at the time of loss its liability as a common carrier had terminated, and that the damage was caused by the act of the consignee. *St. Louis, I. M. & S. R. Co. v. Cunningham Comm. Co.*, — Ark. —, 188 S. W. 1177.

#### **8. Tariffs, Classifications and Schedules.**

Parol evidence to show meaning of schedules and tariffs, see *infra* XIII, G, 11.

#### **Copies of Schedules and Tariffs.**

Copies of rate schedules filed with the Interstate Commerce Commission are, under section 18 of the Act Regulating Commerce, admissible in an action for the loss of an interstate shipment. *Bass v. Erie R. Co.*, 195 Ill. App. 508.

#### **Letters Construing Schedules.**

The admission of a carrier's letter quoting an interstate freight rate to a shipper, in an action against the delivering carrier for collecting a higher rate on the theory of a wrong classification, is harmless, where the rate quoted was that shown by the bill of lading and the duly established joint tariffs introduced in evidence, and the court instructed the jury that the defendant could collect the higher rate if the plaintiff by fraud or mistake made the shipment under a classification carrying a lower trade. *Hardaway v. Southern R.*

Co., 90 S. C. 475, 73 S. E. 1020, Ann. Cas. 1913 D. 266.

### **Certified Copies.**

Certified copies of the findings, opinions, arguments and judgments of the Interstate Commerce Commission relating to the proper applicable freight rates, are admissible in a subsequent action against a carrier for the conversion of the interstate shipment in question, since the Act Regulating Commerce makes such copies prima facie evidence of the facts found. *Pecos & N. T. R. Co. v. Porter*, — Tex. Civ. App. —, 156 S. W. 267, S. C. 56 Tex. Civ. App. 479, 121 S. W. 897, 183 S. W. 98.

A copy of a carrier's classifications and table of graduated charges is, when certified by the Secretary of the Interstate Commerce Commission, admissible in evidence in an action for the loss of an interstate shipment, where the defense is a limitation of the carrier's liability to an agreed amount. *Martin v. Adams Express Co.*, 187 Ill. App. 214.

Where the secretary of the Interstate Commerce Commission certified that he was the custodian of the schedules and tariffs of a carrier and that he had compared a copy thereof with the originals, and that the copy was a correct transcript of the original, the copy is, under section 771 of the Oregon laws, admissible in evidence in an action by a carrier against a shipper for the recovery of the legal interstate freight rates. *Oregon R. & N. Co. v. Coolidge*, 59 Ore. 5, 116 Pac. 93.

A schedule of rates of an express company certified by the Secretary of the Interstate Commerce Commission several months before the making of an interstate shipment, although not sufficient proof without the basing book of differential rates, is competent as part of the proof in an action for the loss of an interstate shipment. *Martin v. Adams Express Co.*, 187 Ill. App. 214.

### **Conclusions in Certified Copies.**

A statement by the Secretary of the Interstate Commerce Commission in a certified copy of a carrier's interstate freight schedules and tariffs, that the copy shows the combined through rates and rules and regulations governing the same, and that they are applicable to the shipment in question, are conclusions of law which are not binding on a state court in an action by a carrier for the recovery of the legal interstate freight rate. *Oregon R. & N. Co. v. Coolidge*, 59 Ore. 5, 116 Pac. 93.

Copies of interstate freight schedules are admissible in an action in a state court, although not attested as required by the *lex fori*, where such copies were shown to have been compared with and found to be exact copies of the original on

file with the Interstate Commerce Commission. *Southern R. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144.

A certificate of the Secretary of the Interstate Commerce Commission stating that a schedule of freight rates on file with the Commission disclosed a certain rate on car load lots of hogs between designated points, when based on valuation, is not admissible in evidence under section 16 of Act Regulating Commerce making certified copies competent evidence, since the contents of such certificates was merely a conclusion. *Shelton v. St. Louis S. F. R. Co.* 131 Mo. App. 560, 110 S. W. 627.

### **Findings of Interstate Commerce Commission Relating to Rates.**

When the declaration in an action against an interstate carrier for the recovery of excessive freight charges, fails in terms to state what particular rates were passed upon by the Interstate Commerce Commission in holding the rates to be unreasonable, the Commission's decisions may be considered by the court, where the declaration refers to the volume and page where they may be found. *Phillips v. Grand Trunk W. R. Co.*, 115 C. C. A. 94, 195 Fed. 12, affirmed 236 U. S. 662, 59 L. ed. 774, 35 Sup. Ct. Rep. 444.

A finding by the Interstate Commerce Commission of the correctness of an interstate freight rate is admissible in an action between the same parties for a conversion of an interstate shipment by a carrier on the refusal of the owner to pay an excessive charge. *Pecos & N. T. R. Co. v. Porter*, — Tex. Civ. App. —, 183 S. W. 98, S. C. 156 S. W. 267, 56 Tex. Civ. App. 479, 121 S. W. 897.

An opinion of the Interstate Commerce Commission that waste and overflow traps, when mixed in the same package with plumber's supplies, were subject to the interstate freight rates applicable to the highest rated article in the box, is not admissible in a shipper's action for the recovery of charges exacted in excess of the regular tariff rate on an interstate shipment of brass waste and overflows, in order to show that they were brass fittings within the meaning of the tariff and schedules. *Wolverine Brass Works v. Southern P. R. Co.*, 187 Mich. 393, 153 N. W. 778.

## **10. Damages.**

### **In General.**

In an action by a shipper for overcharges on an interstate shipment evidence of rates paid three years previously on similar shipments is not admissible. *Texas & P. R. Co. v. Dickson*, — Tex. Civ. App. —, 167 S. W. 33.

**Decline of Market.**

It may be shown on the question of damages, in an action under the Carmack Amendment against an initial carrier for a decline in the market price of vegetables as the result of delay in the movement of an interstate shipment by a connecting carrier, that the carrier was informed at the time the shipment was made of the time it was to be sold, notwithstanding a stipulation of the bill of lading to the effect that the shipment was not to be carried or delivered with respect to any specified time. *Van Epps v. Atlantic C. L. R. Co.*, — S. C. —, 89 S. E. 1035.

**Injury to Live Stock.**

In an action against a carrier for injuries to live stock which were properly watered and fed before shipment, the plaintiff may show by opinion evidence that the appearance of the cattle at their destination indicated that they were suffering for food and water. *Southern R. Co. v. Proctor*, 3 Ala. App. 413, 57 So. 513.

The intrinsic value of live stock at destination may be shown in an action against an initial carrier for injuries caused by its violation of the 28 Hour Act, where the stock arrived in such a badly damaged condition as to have no market value. *Texas & P. R. Co. v. McMillen*, — Tex. Civ. App. —, 183 S. W. 773.

The condition of live stock on arrival at destination may be shown in an action against an initial carrier for injuries caused by its failure to comply with the requirements of the 28 Hour Act. *Texas & P. R. Co. v. McMillen*, — Tex. Civ. App. —, 183 S. W. 773.

In an action against a carrier for damages caused by a violation of the 28 Hour Act, testimony is admissible, in view of the condition of the weather, feed and shelter during the intervening time, to show the condition of live stock three months after its shipment. *Chicago, B. & Q. R. Co. v. Simpson*, 23 Wyo. 342, 151 Pac. 902.

**11. Parol Evidence.****To Show Meaning of Schedules and Tariffs.**

Since the published rate schedules of a carrier are the best evidence of the tariff for an interstate shipment, evidence of statements made by the carrier's agent at the place of shipment, is inadmissible to establish the correct rate. *St. Louis, I. M. & S. R. Co. v. McNabb*, — Okla. —, 162 Pac. 811.

When by a state statute it is the duty of the court to construe the legal effect of documents offered in evidence, the court may, in an action by a carrier for the recovery of the correct tariff interstate

freight rates, refuse to permit a rate expert to construe the rate sheets of the carrier and state therefrom the true rate to the jury. *Oregon R. & N. Co. v. Coolidge*, 59 Oreg. 5, 116 Pac. 93.

**To Explain Ambiguity in Bill of Lading.**

When a bill of lading for an interstate shipment is ambiguous as to any element of the contract, parol evidence is admissible in an action against the initial carrier under the Carmack Amendment, to show the terms of the agreement in that respect. *Sturges v. Detroit, G. H. & M. R. Co.*, 166 Mich. 231, 131 N. W. 706.

**H. Instructions.****1. In General.****Nature of Shipment.**

In an action for the recovery of the difference between the rate under which an interstate shipment was made and a higher rate collected by the delivering carrier under the theory of an improper classification, the jury was correctly instructed that in determining the real nature of the shipment they might consider how similar shipments had been previously regarded and dealt with by the parties, where the jury was also cautioned that no device, agreement, custom or course of dealing between the parties could avail to make the shipment other than what it really was. *Hardaway v. Southern R. Co.*, 90 S. C. 475, 73 S. E. 1020, Ann. Cas. 1913 D. 266.

**Effect of Falsely Representing Character of Shipment.**

In an action for the loss of an interstate shipment the jury was correctly instructed that the plaintiff could not recover if the character of the property was falsely represented to the carrier in order to obtain a lower freight rate. *Central of Ga. R. Co. v. Broda*, 190 Ala. 266, 67 So. 437.

**Validity of Reparation Order.**

In an action on a reparation order of the Interstate Commerce Commission awarding damages to an interstate shipper of coal for unjust discriminations in the distribution of cars, it was reversible error to refuse to instruct the jury to the effect that the plaintiff could not recover if the Commission based its award on the percentage of cars supplied other mines, where an award on that basis could be reasonably inferred from the evidence, and such refusal was held not cured by the general charge, since the plaintiff's damage was measured by the extent to which the favoring of other shippers reduced the number of cars he was entitled to receive in the general allotment. *Pennsylvania R. Co.*

v. Jacoby, 242 U. S. 89, 61 L. ed. —, 37 Sup. Ct. Rep. 49.

The jury was erroneously instructed, in an action on a reparation order made by the Interstate Commerce Commission, to the effect that their verdict might be reached without reference to such order, as the Commission may or may not have been justified in making it, and that the question for the jury was independent and apart from the order and should be determined from the evidence, since the instruction was calculated to impress the jury with the idea that the lawfulness or unlawfulness of the order was an immaterial consideration which should in no way influence them in reaching a verdict. *Western N. Y. & P. R. Co. v. Penn. Refining Co.*, 70 C. C. A. 23, 137 Fed. 343, affirmed on other grounds 208 U. S. 208, 52 L. ed. 456, 28 Sup. Ct. Rep. 268.

### 5. Delay in Transit.

#### As Evidence of Negligence.

An instruction that a showing by a preponderance of evidence that there was an unreasonable delay in the delivery of an interstate shipment of vegetables, was prima facie evidence of negligence which the defendant must overcome if it would escape liability, is not objectionable, in an action against an initial carrier under the Carmack Amendment for the negligence of a subsequent carrier, where the jury was further instructed that the plaintiff had the burden of showing negligence, and that if he showed that he sustained damages as the proximate result of an unreasonable delay of the shipment, the jury should find in his favor unless the defendant should show by the greater weight of the evidence that the delay was not due to the negligence of itself or any connecting carrier. *Van Epps v. Atlantic C. L. R. Co.*, — S. C. —, 89 S. E. 1035.

#### Delay in Moving Live Stock.

##### — In General.

An instruction based on the 28 Hour Act was erroneously given in a common-law action for a negligent delay in the interstate transportation of live stock. *McFall v. Chicago, B. & Q. R. Co.*, 181 Mo. App. 142, 168 S. W. 341.

In an action for the death of hogs moved in interstate commerce alleged to have been the result of an unusual delay in transit, the jury was correctly instructed to the effect that the disease of which they died must have been the result of the defendant's conduct, and that the plaintiff could not recover if the delay was not the sole cause of the loss, and that the delay must have been due to negligence. *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131.

##### — Delay Due to Unloading for Feed, Water and Rest.

In an action for delay in transporting an interstate shipment of live stock the jury was correctly instructed to the effect that the defendant could not be charged with a delay due to compliance with the 28 Hour Act, unless there was a delay beyond the time necessary for unloading, feeding, watering, resting and reloading the cattle. *St. Louis, I. M. & S. R. Co. v. Gunter*, 44 Tex. Civ. App. 480, 99 S. W. 152.

In an action for a delay of an interstate shipment of live stock the jury should be instructed that if it could not have been transported within 28 hours, the carrier was not answerable for a delay due to unloading the cattle for feed, water and rest, in compliance with the 28 Hour Act. *St. Louis, I. M. & S. R. Co. v. Smith*, — Tex. Civ. App. —, 135 S. W. 597.

In an action for delay in the transportation of an interstate shipment of live stock the jury should be instructed that they should not consider damages accruing from the necessary unloading of the cattle for feed, water and rest in transit, unless held in unloading pens for an unreasonable length of time, that it was the duty of the carrier to hold them in the pens for not less than 5 hours, exclusive of the time required for unloading and reloading, and that the question of what constituted a reasonable time would be governed by the circumstances surrounding the shipment. *Pecos & N. T. R. Co. v. Jarman*, — Tex. Civ. App. —, 138 S. W. 1131.

An instruction to find for the defendant if it could not have transported an interstate shipment of live stock within 28 hours, was properly refused in an action for delay, where the line of the defendant did not extend to destination, and the damages alleged and shown resulted from unloading the stock into and holding them in muddy pens. *Missouri K. & T. R. Co. v. House*, 51 Tex. Civ. App. 603, 113 S. W. 154.

Where it required 60 hours to transport an interstate shipment of live stock, the jury should, in an action for a delay, be instructed concerning the requirements of the Federal law with respect to the unloading of stock for feed, water and rest. *International & G. N. R. Co. v. Landa*, — Tex. Civ. App. —, 183 S. W. 384.

An instruction that a carrier could not avail itself of the benefit of the 28 Hour Act as a defense to an action for delay of an interstate shipment of live stock if it was unloaded into pens that were in such condition that the stock could not be fed, watered and rested therein, was improperly given where damages resulting from the condition of the pens was not claimed. *St. Louis, I. M. & S. R. Co. v. Davenport*,

97 Ark. 82, 133 S. W. 186, S. C. 98 Ark. 609, 146 S. W. 1199.

Where live stock was shipped in cars that permitted them to be fed and watered without unloading, and after being on the road 14 hours, they were delayed for 11 hours, which prevented their arrival at destination in time for market, an instruction that the carrier was not answerable for resulting damages if the delay was no greater than was necessary for feeding, watering and resting the stock as required by the 28 Hour Act, was properly refused. *Missouri P. R. Co. v. Hall*, 14 C. C. A. 133, 66 Fed. 868.

The jury was erroneously instructed in an action for the delay of an interstate shipment of live stock, in which it did not appear that there was any unreasonable delay, that they should find for the plaintiff if the carrier negligently and carelessly delayed the shipment for an unnecessary and unreasonable length of time for feed, water and rest, and that the latter was answerable for the depreciation of the value of the stock. *St. Louis, I. M. & S. R. Co. v. Davenport*, 97 Ark. 82, 133 S. W. 186, S. C. 98 Ark. 609, 146 S. W. 1199.

When live stock was on the road 60 hours during a journey which required not more than 48 or 50 hours, including the time necessary for unloading for feed, water and rest in compliance with the 28 Hour Act, it was not error to refuse to instruct the jury that the time consumed in unloading and reloading the cattle for such purpose could not be included as part of the time required for transportation, where it appeared that the animals were detained for 15 hours when unloaded. *Chicago, R. I. & P. v. Scott*, — *Tex. Civ. App.* —, 156 S. W. 294.

#### — Stopping for Feed, Water and Rest in Violation of Shipper's Directions.

The jury was correctly instructed in an action for damages resulting from the decline of the market, to find for the plaintiff if he had requested in writing that an interstate shipment of live stock should be run for 36 hours without unloading for feed, water and rest, and instead the carrier caused a delay by stopping them for such purpose, since it was negligence to do so unless the stock was in such a condition that it would have been inhuman treatment to have kept them in cars for 36 hours. *St. Louis, S. F. & T. R. Co. v. Drahn*, — *Tex. Civ. App.* —, 143 S. W. 357.

#### 6. Notice of Damage Claims.

##### Failure to Give Notice.

An instruction in an action under the Carmack Amendment was properly refused when to the effect that the failure

of a shipper to give the carrier notice of a claim for damages within 5 days after the removal of live stock from a car would relieve the carrier from liability for injuries, where no exception to such rule was stated, and the jury was instructed that the 5 day period would begin to run from the time of unloading if the carrier was refused an opportunity to inspect the injured animals. *Cleveland, C. C. & St. L. R. Co. v. Hayes*, — *Ind.* —, 104 N. E. 581, S. C. 181 *Ind.* 87, 102 N. E. 34.

#### 7. Damages.

##### Value at Place of Shipment.

It is reversible error, in an action against a carrier for the conversion of an interstate shipment, to instruct the jury to award damages according to the value of the property at the time and place of the conversion, where the bill of lading provided that the damages should be computed on the value of the property at the time and place of shipment. *Brockman Comm. Co. v. Missouri P. R. Co.*, — *Mo. App.* —, 188 S. W. 920.

#### 8. Injuries to Live Stock.

Instructions as to damages for delay, see *supra* XIII, H, 5.

##### Failure to Unload for Feed, Water and Rest.

An instruction that a carrier might, without incurring liability, keep an interstate shipment of live stock on cars for 28 hours without unloading them for feed, water and rest, as required by the Federal law, unless there was other negligence on the part of the carrier, was properly refused. *Missouri P. R. Co. v. Ivy*, 79 *Tex.* 444, 15 S. W. 692.

An instruction as to the liability of a carrier to a shipper of live stock for a violation of the 28 Hour law was properly given, where the negligence complained of was the confinement of stock in cars for 43 hours without unloading them for rest, food and water. *Chicago, B. & Q. R. Co. v. Simpson*, 23 *Wyo.* 342, 151 *Pac.* 902.

In an action against a carrier for injuries sustained by live stock from confinement in cars for more than 28 hours, the jury was properly instructed to the effect that it was the duty of the carrier, if necessary for the safety of the animals, to unload them for food, water and rest at a point where there were facilities for doing so, and that if by reason of the carrier's refusal to unload them they were injured, the plaintiff, unless by his own conduct he waived the unloading, could recover such damages as he had sustained. *Durrett v. Chicago, R. I. & P. R. Co.*, 20 *N. Mex.* 114, 146 *Pac.* 962.

In an action for injuries to live stock an instruction as to the liability of a carrier for a violation of the 28 Hour Act should not be given where the evidence shows that the animals were confined in cars only 15 hours. *Southern R. Co. v. Forgey*, 105 Va. 599, 54 S. E. 477.

An instruction as to the measure of damages approved, in an action against an initial carrier for failing to perform a customary duty of feeding live stock before the expiration of the 28 hour period and before their delivery to a connecting carrier, where such failure resulted in delay in the delivery of the cattle at the market. *Wisecarver v. Chicago, R. I. & P. R. Co.*, 141 Ia. 121, 119 N. W. 532.

In an action for injuries to live stock as the result of their confinement in cars for 32 hours in violation of the Federal law, the court should not instruct the jury that it was negligence, since that question was, under all of the circumstances of the case, a question for the jury. *St. Louis S. W. R. Co. v. Dolan*, — Tex. Civ. App. —, 77 S. W. 415.

In an action for injuries sustained by an interstate shipment of live stock it was error to instruct the jury that in accordance with the state laws the carrier was not bound to afford the shipper on demand an opportunity to feed, water and rest the stock at reasonable, usual and customary places, since, as the shipment was interstate, it was governed by the Federal law. *International & G. N. R. Co. v. Startz*, 37 Tex. Civ. App. 51, 82 S. W. 1071.

#### Placing in Improper Stock Pens.

In an action for damages resulting from a carrier unloading an interstate shipment of live stock into improper pens, an instruction as to the duty of the owner under the contract of shipment to unload and reload the cattle was properly refused. *Southern P. Co. v. Stewart*, 147 C. C. A. 630, 233 Fed. 956.

In an action against a carrier for unloading an interstate shipment of live stock into pens which were dusty and exposed to the heat of the sun, an instruction requested by the defendant was properly refused when to the effect that it was not answerable if, after the confinement of the cattle for only 19 hours, it was more humane to unload them where they were than to run them for 36 hours under the written request of the shipper, since the instruction ignored the right of the latter to control the shipment and the negligence of the carrier in placing the cattle in improper pens. *Southern P. Co. v. Stewart*, 147 C. C. A. 630, 233 Fed. 956.

The jury was correctly instructed to find for a shipper if live stock was unloaded, in conformity with the 28 Hour Act, into

pens which were too small, and which had insufficient facilities for properly feeding and watering the stock, in consequence of which they suffered injury, since the conduct of the carrier constituted negligence. *St. Louis, S. F. & T. R. Co. v. Drahn*, — Tex. Civ. App. —, 143 S. W. 357.

#### I. Directing Verdict.

Directing verdict in actions on reparation orders, see supra III, C, 5, (g).

#### In Actions for Loss of or Injuries to Live Stock.

A carrier is not entitled to a directed verdict in an action against it for unloading an interstate shipment of live stock into pens which were dusty and unprotected from the sun, since the 28 Hour Act requires that cattle shall be placed in properly equipped pens for feed, water and rest. *Southern P. Co. v. Stewart*, 147 C. C. A. 630, 233 Fed. 956.

A peremptory instruction cannot be given for the defendant in an action for damages resulting from a decline in the market in consequence of a delay in transporting an interstate shipment of live stock, because of the shipper's failure to comply with a requirement of the bill of lading for written notice of claims for injuries received during transportation, since the loss sustained did not fall within such requirement. *Panhandle & S. F. R. Co. v. Bell*, — Tex. Civ. App. —, 189 S. W. 1097.

Where the evidence in a shipper's action for injuries sustained by live stock, in consequence of a carrier's violation of the 28 Hour Act, tends to show that the sickness and death of the stock were due to their lack of vitality as the result of their confinement in cars for 45 hours, a prima facie case is established against the carrier, and it is error to withdraw the case from the jury. *Pierson v. Northern P. R. Co.*, 52 Wash. 595, 100 Pac. 999, S. C. 61 Wash. 450, 112 Pac. 509.

#### J. Questions of Law and Fact.

##### In General.

In an action against an initial carrier for the loss of the privilege of milling grain during interstate transportation, the question whether such privilege would have been exercised had it been available is a question of fact where the evidence tends to show that it would have been. *McCullough v. Missouri P. R. Co.*, — Kan. —, 160 Pac. 214.

##### Knowledge of Existence of Rates.

Since an interstate shipper is bound to know that a carrier's duly established tariffs contain two rates, one with and one without a limitation of liability, the

question of the shipper's knowledge should not be left to the jury in an action for an injury to a shipment. *Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 119 Mo. App. 1, 137 S. W. 479.

#### **Reasonableness of Rates.**

The question whether an interstate freight rate is discriminatory or reasonable is a question for the jury in an action on a reparation order of the Interstate Commerce Commission, when there is room for a difference of opinion. *Western N. Y. & P. R. Co. v. Penn. Refining Co.*, 70 C. C. A. 23, 137 Fed. 343, affirmed on other grounds 208 U. S. 208, 52 L. ed. 456, 28 Sup. Ct. Rep. 268.

#### **Similarity of Circumstances Attending Shipments.**

Whether shipments were made under similar circumstances within the meaning of the Interstate Commerce Act, is a question for the jury in a shipper's action for damages caused by the exaction of greater charges for a short than for a longer haul made under similar circumstances. *Osborne v. Chicago & N. W. R. Co.*, 48 Fed. 49, reversed 3 C. C. A. 347, 52 Fed. 912, certiorari denied 146 U. S. 354, 36 L. ed. 1002, 13 Sup. Ct. Rep. 281.

#### **Demand for Unlawful Rates.**

Where after goods were loaded into cars for interstate shipment in reliance upon the quotation of a lower freight rate than prescribed by the tariffs, the carrier notified the shipper of the mistake and demanded a higher rate than it was permitted to charge, the question whether there was a refusal to transport the shipment except upon payment of an unlawful rate is for the jury in an action by the shipper against the carrier for losses resulting from failure to make the shipment. *Aldrich v. Southern R. Co.*, 95 S. C. 427, 79 S. E. 316.

#### **Injuries to Live Stock.**

##### **— Failure to Unload for Food, Water and Rest.**

The question of a carrier's negligence in failing to unload an interstate shipment of live stock for feed, water and rest, as required by the 28 Hour Act, is for the jury, where the evidence tends to show that, notwithstanding an unprecedented storm, the stock might have been unloaded within the statutory period. *Bell v. Union P. R. Co.*, 177 Ill. App. 374.

Whether it is negligence to confine live stock continuously in cars for 32 hours in violation of the Federal law, is, under all of the circumstances of a case, a question for the jury. *St. Louis S. W. R. Co. v. Dolan*, — Tex. Civ. App. —, 77 S. W. 415.

In an action by a shipper for the alleged violation by a carrier of the 28 Hour Act, it is for the jury to determine whether the evidence justified an inference that the sickness and death of the live stock were due to their lack of vitality resulting from the negligence of the carrier in confining them continuously in cars without feed, water or rest for 45 hours. *Pierson v. Northern P. R. Co.*, 52 Wash. 595, 100 Pac. 999, S. C. 61 Wash. 450, 112 Pac. 509.

Where, in an action for injuries to an interstate shipment of live stock, there is evidence of their lean, lank and gaunt condition on arrival at destination, and the testimony of the defendant tends to show that the 28 Hour Act was fully complied with, the question of the negligence of the latter is for the jury. *Millam v. Southern R. Co.*, 58 S. C. 247, 36 S. E. 571.

##### **— Opportunity for Rest.**

Whether live stock has a proper "opportunity to rest" in transit, within the meaning of the 28 Hour Act, is a question of law for the court, and not of fact for the jury, in an action by a shipper against a carrier for damages sustained from the continuous confinement of cattle in cars in violation of such law. *Northern P. R. Co. v. Finch*, 225 Fed. 676.

##### **— Pneumonia.**

When disinterested reasonable minds might draw different conclusions from the testimony, as to whether the death of hogs moved in interstate commerce was due to pneumonia caused by negligent delay and exposure to extremely cold weather during transit, it became a question for the jury which an appellate court will not disturb, although a close one. *Bowles v. Quincy O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131.

It is a jury question in an action against a connecting carrier for the death of hogs moved in interstate commerce, whether pneumonia caused their death as well as what produced it, where the evidence tended to show that the animals were in good condition when delivered to such carrier, and that during a delay in transit they became piled up in the car and became heated, and that in cold January weather, against the protest of the shipper, they were unloaded and permitted to remain in a pen for 9 hours, and that they were in bad condition when they arrived at destination. *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131.

##### **— Contributory Negligence.**

The question of the contributory negligence of a shipper in failing to unload live stock for feed and water on arrival at destination, after confinement in cars for more than 28 hours, is for the jury in an action for consequent injuries, when

such stock arrived on a dark and stormy night at a place in the woods where there were no unloading conveniences, so that it was necessary to erect a temporary platform, and it appeared that it would have been hazardous to unload them in the dark. *Burns v. Chicago, M. & St. P. R. Co.*, 104 Wis. 646, 80 N. W. 927.

#### **Reasonableness of Time for Giving Notice of Damage.**

What is a reasonable time for requiring a shipper to give notice of a claim for damages to an interstate shipment is a question for the jury in an action under the Carmack Amendment. *Cleveland, C. C. & St. L. R. Co. v. Hayes*, — Ind. —, 104 N. E. 581, S. C. 181 Ind. 87, 102 N. E. 34.

#### **Compliance with Requirement for Notice of Damages.**

The submission to the jury of the question whether a written claim for damages to an interstate shipment was presented to a carrier within the stipulated time, is not erroneous, although the question was one of law because the facts were not in dispute, where the jury's finding was in accordance with the law. *Baird v. Denver & R. G. R. Co.*, — Utah, —, 162 Pac. 79.

#### **Waiver of Failure to Give Notice of Damages.**

The question of waiver is for the jury where a claim was accepted out of time and was afterwards rejected on other grounds. *St. Louis & S. F. R. Co. v. Ladd*, 33 Okla. 160, 124 Pac. 461.

#### **Reasonableness of Time Prescribed for Bringing Action.**

The question of the reasonableness of the time prescribed by an interstate freight contract for the bringing of actions for damages is, since the enactment of the Act Regulating Commerce, for the court and not the jury. *Betka v. Houston & T. C. R. Co.*, — Tex. Civ. App. —, 189 S. W. 532.

The reasonableness of the time prescribed in a contract of interstate affreightment for bringing action for loss or injury, is a question for the jury. *Gulf, C. & S. F. R. Co. v. Hume*, 87 Tex. 211, 27 S. W. 110; *Texas & P. R. Co. v. Hawkins*, — Tex. Civ. App. —, 30 S. W. 1113.

#### **K. Costs, Interest and Attorney Fees.**

##### **Costs.**

Since a Federal court does not have jurisdiction of an action under section 9 of the Act Regulating Commerce for damages caused by a carrier's violation of such act when less than \$2,000 is involved, costs cannot be awarded in such court to

a plaintiff who recovers but one dollar damages. *Delaware, L. & W. R. Co. v. Lyne*, 113 C. C. A. 604, 193 Fed. 984, affirming and reversing in part 170 Fed. 847.

##### **Interest.**

The awarding of interest in a shipper's action against a carrier for unjust discriminations in rates between a short and a longer haul under similar conditions, in violation of the Act Regulating Commerce, is discretionary with the jury. *Junod v. Chicago & N. W. R. Co.*, 47 Fed. 290; *Osborne v. Chicago & N. W. R. Co.*, 48 Fed. 49, reversed 3 C. C. A. 347, 52 Fed. 912, certiorari denied in both cases 146 U. S. 354, 36 L. ed. 1002, 13 Sup. Ct. Rep. 281.

Interest from time of demand may be awarded against a carrier in an action for injuries sustained by live stock being confined in cars for more than 28 hours, in violation of the Federal law. *Southern P. Co. v. Arnett*, 61 C. C. A. 131, 126 Fed. 75.

##### **Attorney's Fees.**

##### **— Action for Overcharges in Rates.**

An attorney fee, as provided for by the Act Regulating Commerce, cannot be awarded a shipper by a state court in an action for the recovery of a charge collected in excess of the lawful interstate tariff rate, since the suit is not based on such act. *Kansas City S. R. Co. v. Tonn*, 102 Ark. 20, 143 S. W. 577.

##### **— Actions for Injuries to or Loss of Interstate Shipments.**

The Carmack Amendment does not prevent the plaintiff, in an action against a carrier for the loss of an interstate shipment, from recovering an attorney fee under a state law providing that a fee not exceeding \$20 may be allowed when an attorney is actually employed, and not more than \$200 is involved, in actions against carriers for the loss of or injury to freight, where such claim is not paid within 30 days and the plaintiff recovers the full amount of his demand. *Missouri, K. & T. R. Co. v. Harris*, 234 U. S. 412, 58 L. ed. 1377, 34 Sup. Ct. Rep. 790.

The provisions of the Interstate Commerce Act as to the allowance of attorney fees in actions against carriers does not extend to and include suits in a state court against an express company for damages to an interstate shipment. *Blair v. Wells Fargo & Co.*, 155 Ia. 190, 135 N. W. 615.

In an action based on the Federal law for the loss of an interstate shipment attorney's fees cannot be allowed the plaintiff under a state law pertaining to actions against carriers. *Andrews v. Union P. R. Co.*, — Kan. —, 161 Pac. 600.



The provision of section 16 of the Act Regulating Commerce allowing attorney fees in actions at law, relates only to proceedings before the Interstate Commerce Commission, and does not apply to actions under the Carmack Amendment. *Missouri P. R. Co. v. Harper*, 121 C. C. A. 570, 201 Fed. 671.

#### — Actions on Reparation Orders of Interstate Commerce Commission.

The provisions of sections 8 and 10 of the Interstate Commerce Act, as amended June 29, 1906, for the allowance of attorney's fees in actions to recover on awards of the Interstate Commerce Commission, are not invalid because purely arbitrary, nor do they impose a penalty for the failure to pay a debt. *Meeker v. Lehigh V. R. Co.*, 236 U. S. 412, 59 L. ed. 644, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916 B. 691, modifying 128 C. C. A. 311, 211 Fed. 785; *Chicago, B. & Q. R. Co. v. Feintuch*, 112 C. C. A. 126, 191 Fed. 482.

The attorney fees taxable in an action based on sections 8 and 16 of the Interstate Commerce Act, as amended June 29, 1906, in favor of a shipper for unjust discriminations and overcharges, are for the services in the action in which recovery is had for the amount awarded by the Interstate Commerce Commission, and do not include allowances for services before the Commission. *Meeker v. Lehigh V. R. Co.*, 236 U. S. 412, 59 L. ed. 644, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916 B. 691, modifying 128 C. C. A. 311, 211 Fed. 785; *Mills v. Lehigh V. R. Co.*, 233 U. S. 473, 59 L. ed. 1414, 35 Sup. Ct. Rep. 888, S. C. 226 Fed. 812.

The reasonable attorney fees to be awarded under section 16 of the Act Regulating Commerce, in an action against a carrier on a reparation order made by the Interstate Commerce Commission "if the petitioner shall finally prevail," cannot be allowed and taxed by the trial court until after the determination of an appeal. *Missouri P. R. Co. v. Ferguson Saw Mill Co.*, — C. C. A. —, 235 Fed. 474.

Under section 16 of the Act to Regulate Commerce, an appellate court may allow a shipper an attorney's fee for proceedings in such court in an action on a reparation order made by the Interstate Commerce Commission, in addition to the allowance of a similar fee for the proceedings in the trial court. *Louisville & N. R. Co. v. Dickerson*, 112 C. C. A. 294, 191 Fed. 705, affirming 187 Fed. 874.

The fact that a Federal district court allowed the plaintiff an attorney's fee, under section 16 of the Act Regulating Commerce, in an action against a carrier based on a reparation order of the Interstate Commerce Commission, does not prevent the district court, after the determi-

nation of an appeal, from allowing a reasonable attorney's fee for services, on appeal in the Circuit Court of Appeals and the Supreme Court of the United States. *Mills v. Lehigh V. R. Co.*, 226 Fed. 812, S. C. 238 U. S. 473, 59 L. ed. 1414, 35 Sup. Ct. Rep. 888.

Under section 16 of the Act Regulating Commerce providing for the allowance of attorney fees in actions on reparation orders of the Interstate Commerce Commission, a district court of the United States may award reasonable attorney fees for proceedings on appeal in the Circuit Court of Appeals and in the Supreme Court of the United States, in addition to a similar allowance for the trial of the action. *Mills v. Lehigh V. R. Co.*, 226 Fed. 812, S. C. 238 U. S. 473, 59 L. ed. 1414, 35 Sup. Ct. Rep. 888.

An objection to the allowance of an attorney's fee in a shipper's action under section 16 of the Act to Regulate Commerce, against a carrier to recover on a reparation order of the Interstate Commerce Commission, does not raise the question whether the court could allow such fee for the proceedings before the Commission. *Denver & R. G. R. Co. v. Baer Bros. M. Co.*, 126 C. C. A. 399, 209 Fed. 577, affirming 200 Fed. 614.

#### M. Appeal and Error.

##### 1. In General.

##### Direct Appeal from District Court to Federal Supreme Court.

A writ of error lies directly to the Supreme Court of the United States from the dismissal by a Federal district court of an action by a shipper against a carrier under sections 8 and 9 of the Interstate Commerce Act for damages sustained in consequence of the granting of unlawful rebates and unreasonable allowances to competitors for interstate shipments of coal, on the ground that such court was without jurisdiction in advance of determination by the Interstate Commerce Commission. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916, affirming and modifying in part 183 Fed. 908, S. C. 112 C. C. A. 637, 192 Fed. 475.

The failure to allege prior action by the Interstate Commerce Commission on a shipper's claim against interstate carriers for damages from an alleged conspiracy to drive him from business, does not deprive a Federal court of jurisdiction of the action, so that, on the sustaining of the complaint, an appeal will lie directly to the Supreme Court of the United States rather than to the Circuit Court of Appeals. *Meeker v. Lehigh V. R. Co.*, 106 C. C. A. 94, 183 Fed. 548, reversing 175 Fed. 320, S. C. 162 Fed. 354.

A question of the jurisdiction of a Federal circuit court which is reviewable directly by the Supreme Court of the United States on writ of error is not presented by the dismissal of an action against a carrier for the recovery of freight charges in excess of a reasonable rate for interstate shipments, on the ground that the declaration did not allege that reparation had been ordered by the Interstate Commerce Commission. *Darnell v. Illinois C. R. Co.*, 225 U. S. 243, 56 L. ed. 1072, 32 Sup. Ct. Rep. 760, S. C. below 190 Fed. 656.

#### United States Circuit Court of Appeals.

The United States Circuit Court of Appeals does not have jurisdiction of an appeal from an order of a circuit court dismissing a shipper's action against a carrier for damages resulting from the giving of unlawful rebates to competitors, on the ground that the court was without jurisdiction because the Interstate Commerce Commission had not adjudicated the matter, since an appeal lies directly to the Federal Supreme Court. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 112 C. C. A. 637, 192 Fed. 475, S. C. 183 Fed. 908, modified and affirmed 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916.

An appeal lies to the United States Circuit Court of Appeals and not directly to the Supreme Court from a decision of a Federal district court sustaining a demurrer to a complaint in an action by a shipper under section 16 of the Act Regulating Commerce against a carrier for the recovery of overcharges for interstate freight shipments, because of the failure of the complaint to allege that the plaintiff's demand had been submitted to and established by the Interstate Commerce Commission. *National Pole Co. v. Chicago & N. W. R. Co.*, 127 C. C. A. 501, 211 Fed. 65, reversing 200 Fed. 185.

Where a Federal circuit court held that the complaint in a shipper's action against a carrier for damages caused by a combination or conspiracy between carriers in violation of the Sherman Anti-trust law to drive independent coal dealers from business, did not state a cause of action because previous application to the Interstate Commerce Commission for redress was not alleged, the failure to aver such fact did not deprive the court of jurisdiction of the action and was not the sole question involved, so as to preclude an appeal to the United States Circuit Court of Appeals. *Meeker v. Lehigh V. R. Co.*, 106 C. C. A. 94, 183 Fed. 548, reversing 175 Fed. 320.

Where one of the defendants in a shipper's action in a Federal court against several carriers to recover overcharges on interstate freight shipments, questioned the jurisdiction of the court, the entire

proceeding may be determined by the United States Circuit Court of Appeals, when the liability of all the defendants depends on the same facts, and a severance was not demanded in the trial court. *Phillips v. Grand Trunk W. R. Co.*, 115 C. C. A. 94, 195 Fed. 12, affirmed 236 U. S. 662, 59 L. ed. 774, 35 Sup. Ct. Rep. 444.

#### What Considered on Appeal.

The United States Supreme Court will not determine whether a state court gave due effect to the Federal act relating to the confinement of live stock in cars for more than 28 hours, when, in an action for delay in the transportation of live stock, the jury was instructed to the effect that the defendant was not answerable if it was impossible to transport the stock within such time without unloading for feed, water and rest, where the defendant did not except to such instructions given or request instructions on the subject. *St. Louis & S. F. R. Co. v. Shepherd*, 240 U. S. 240, 60 L. ed. 622, 36 Sup. Ct. Rep. 274, S. C. below 40 Okla. 589, 139 Pac. 833.

On writ of error to a state court the Supreme Court of the United States will examine the evidence to determine whether it fairly supports the conclusion that an assistant chief railway mail clerk, who was killed by the negligence of a carrier, was accepted as a gratuitous passenger on his own private business, for interstate transportation under his official pass, where the carrier contends that he did so in violation of the provisions of the Hepburn Act against the giving of free transportation. *Southern P. R. Co. v. Schuyler*, 227 U. S. 601, 57 L. ed. 662, 33 Sup. Ct. Rep. 277, 43 L. R. A. (N. S.) 901, affirming 37 Utah, 581, 595, 612, 109 Pac. 458, 464, 1025.

The question whether a carrier was liable at common law as a forwarder of freight for delivery to a connecting carrier, and whether such carriers were associated so as to be jointly and severally liable for the failure of the first carrier to furnish cars for the interstate shipment of live stock, are concluded, so far as the Supreme Court of the United States is concerned, by a decision of a state court in an action against the initial carrier for damages arising from such failure. *Eastern R. Co. v. Littlefield*, 237 U. S. 140, 59 L. ed. 878, 35 Sup. Ct. Rep. 489, dismissing writ of error to — Tex. —, 154 S. W. 543.

A finding of a state court that for an interstate trip a passenger paid less than the published tariff rate, is binding on the Supreme Court of the United States, although it is alleged that the rate paid was the lawful one and that there was no undercharge in violation of the Interstate Commerce Act, where the tariffs are not included in the record. *Louisville &*

*N. R. Co. v. Maxwell*, 237 U. S. 94, 59 L. ed. 853, 35 Sup. Ct. Rep. 494.

Where the plaintiff, in an action against a carrier under sections 9 and 16 of the Act Regulating Commerce, for overcharges on interstate shipments, was the owner of part of the shipment, the question whether he might recover as the assignee of the claims of the other owners, even though such question is open on the record to consideration on appeal, is immaterial. *National Pole Co. v. Chicago & N. W. R. Co.*, 127 C. C. A. 501, 211 Fed. 65, reversing 200 Fed. 185.

Where the plaintiff in an action under the Carmack Amendment, requested an instruction that the time fixed in a bill of lading for giving notice of claims for damages, was reasonable, the failure to submit such question to the jury is not erroneous. *Cleveland, C. C. & St. L. R. Co. v. Hayes*, — Ind. —, 104 N. E. 581, S. C. 181 Ind. 87, 102 N. E. 34.

## 2. Federal Questions.

### When Involved.

The Supreme Court of the United States has appellate jurisdiction when a state court of last resort passes adversely on rights asserted by the appellant under the Act Regulating Commerce. *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 61 L. ed. —, 37 Sup. Ct. Rep. 120, reversing 161 Ky. 212, 170 S. W. 633.

A Federal question does not arise in an action against a carrier for the death of an assistant chief mail clerk while traveling on his official pass on his own private business, on the theory that he was violating the Hepburn Act in doing so. *Schuyler v. Southern P. Co.*, 37 Utah, 612, 109 Pac. 1025, affirmed on other grounds 227 U. S. 601, 57 L. ed. 662, 33 Sup. Ct. Rep. 277.

A Federal question is presented by the holding of a state court that a pass issued under section 1 of the Hepburn Act to the wife of a railway employee for interstate transportation, was in consideration of the husband's services, and that the holder was not bound by a condition exempting the carrier from liability for negligent injuries. *Charleston & W. C. R. Co. v. Thompson*, 234 U. S. 576, 58 L. ed. 1476, 34 Sup. Ct. Rep. 964, reversing 13 Ga. App. 528, 541, 79 S. E. 242, 80 S. E. 1097.

Where copies of a carrier's duly established tariffs were admitted in evidence, although not properly certified in an action for the loss of an interstate passenger's baggage, to show a limitation of the carrier's liability, an appellate court denied the defendant a Federal right by absolutely disregarding such tariffs because of the defective authentication, when there was no settled rule of such court requiring

such action. *New York C. & H. R. R. Co. v. Beaham*, 242 U. S. 148, 61 L. ed. —, 37 Sup. Ct. Rep. 43.

A holding by a state court of last resort, in a shipper's action for a carrier's breach of a contract to make an interstate shipment at an agreed rate, that such contract constituted an unfair discrimination in violation of the Act to Regulate Commerce, is not reviewable by the Supreme Court of the United States under U. S. R. S. section 709, on a writ of error sued out by shipper, since the decision was not against any title, right, privilege or immunity claimed by him under any law of the United States. *Kizer v. Texarkana & F. S. R. Co.*, 179 U. S. 199, 45 L. ed. 152, 21 Sup. Ct. Rep. 100, dismissing writ of error to 66 Ark. 348, 50 S. W. 871.

A Federal question, which is reviewable by the Supreme Court of the United States, is presented by a holding of a state court of last resort, under appropriate pleadings, that a shipper might recover the excess over a reasonable charge for an interstate shipment, although made under a carrier's duly established tariff, which the Interstate Commerce Commission had not declared unreasonable. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 462, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075, reversing 38 Tex. Civ. App. 366, 85 S. W. 1052.

A decree of a state court of last resort holding that an embargo placed by a railway company at the request of a paper mill on interstate shipments which the carrier was bound to accept and the mill to receive under contract, violated the Hepburn Act, and that on the removal of the embargo without notice to the paper company it was liable for demurrage charges on cars held by it beyond the free period as the result of the congestion on its private tracks, presents a Federal question. *Menasha Paper Co. v. Chicago & N. W. R. Co.*, 241 U. S. 55, 60 L. ed. 885, 36 Sup. Ct. Rep. 501, affirming 159 Wis. 508, 149 N. W. 751.

## 3. Admission and Rejection of Evidence.

### Waiver of Erroneous Admission.

An objection to the admissibility in evidence of portions of the report and order of the Interstate Commerce Commission as to reparation by a carrier for unjust discriminations against a shipper, on the ground that such portions were not findings of fact, are waived by the carrier, in an action based on such report and order, if any error is not obviated by the exclusion of the objectionable matter from the consideration of the jury, where the defendant failed to direct the attention of the court to the subject when the jury was

charged. *Meeker v. Lehigh V. R. Co.*, 236 U. S. 412, 59 L. ed. 644, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916 B. 691, modifying 128 C. C. A. 311, 211 Fed. 785.

#### 4. Instructions.

Correctness of instructions in general, see *supra* XIII, H.

#### Recovery Under State Law for Loss of Interstate Shipment.

Although the recovery for the loss of an interstate shipment is governed by the Federal to the exclusion of the state laws, an instruction that a recovery might rest on compliance with a state statute pertaining to the refusal of a carrier to settle damage claims, does not require a reversal of a judgment for the plaintiff when it appears that the substantial rights of the defendant were not prejudiced. *Andrews v. Union P. R. Co.*, — Kan. —, 161 Pac. 600.

#### 5. Questions Not Raised Below.

##### In General.

The denial of a contention as to the application of the 28 Hour Act, when raised for the first time on a motion for a rehearing in a state court of last resort in an action based on the Carmack Amendment, will not be considered by the Supreme Court of the United States on writ of error. *St. Louis & S. F. R. Co. v. Shepherd*, 240 U. S. 240, 60 L. ed. 622, 36 Sup. Ct. Rep. 274, S. C. below 40 Okla. 589, 139 Pac. 833.

The failure to take private cars into consideration in determining the extent of a carrier's discrimination against an interstate shipper in the distribution of coal cars, will not be considered in an action for damages, when raised for the first time in an appellate court. *Puritan Coal M. Co. v. Pennsylvania R. Co.*, 237 Pa. 420, 85 Atl. 426, Ann. Cas. 1914 B. 37, affirmed 237 U. S. 121, 59 L. ed. 867, 35 Sup. Ct. Rep. 484.

Whether live stock might have been transported to destination within 28 hours without unloading as required by the Federal law, will not be considered on appeal, where an action for damages caused by delay was tried on the theory that the shipper consented to the continuous confinement of the stock for 36 hours. *Underwood v. Chicago & N. W. R. Co.*, — Neb. —, 159 N. W. 408.

A carrier was held estopped by its answer, and by former adjudications in its favor in an appellate court, from setting up for the first time on a third appeal, that the bills of lading relied on by the plaintiff were void under the Federal laws. *Sealy v. Missouri, K. & T. R. Co.*, — Kan. —, 158 Pac. 62.

#### Jurisdictional Questions.

The question of the jurisdiction of a state court of an action for the failure to furnish cars, some of which were intended for interstate use, will not be considered when raised for the first time on appeal. *Dobbins v. Syracuse, B. & N. Y. R. Co.*, 215 N. Y. 674, 721, 109 N. E. 79, 1073, affirming 157 App. Div. 80, 883, 141 N. Y. Supp. 637, 1116.

#### Federal Questions.

Whether a carrier may waive a requirement of a contract of carriage with respect to giving notice of loss or damage to an interstate shipment is a Federal question which may be raised for the first time on appeal. *Wall v. Northern P. Co.*, — Mont. —, 161 Pac. 518, S. C. 50 Mont. 122, 145 Pac. 291, reversed 241 U. S. 87, 60 L. ed. 903, 36 Sup. Ct. Rep. 495.

#### Failure to Bring Action Within Prescribed Time.

That an action for the loss of an interstate shipment was not begun within the time required by a carrier's established tariff will not be considered when questioned for the first time on appeal. *Bass v. Erie R. Co.*, 195 Ill. App. 508.

The failure of the plaintiff to bring action within the time stipulated in a contract of interstate carriage cannot be raised for the first time in an appellate court. *St. Louis & S. F. R. Co. v. Mounts*, — Okla. —, 144 Pac. 1036, reversed without opinion 241 U. S. 654, 60 L. ed. 1223, 36 Sup. Ct. Rep. 725.

#### Decisions of Interstate Commerce Commission.

Decisions of the Interstate Commerce Commission will not be considered by an appellate court when not introduced in evidence at the trial of a shipper's action against a carrier for overcharges on interstate shipments. *Great Western Oil R. & P. L. Co. v. Chicago, M. & St. P. R. Co.*, 275 Ill. 56, 113 N. E. 876, reversing 192 Ill. App. 208.

#### 6. Harmless Error.

##### Questions Submitted by Agreement.

When the question whether a contract limiting a carrier's liability for an interstate shipment was fairly entered into, was supported by a consideration and was reasonable, is submitted at the trial by agreement of the parties, a judgment for the plaintiff, if supported by any evidence, will not be disturbed. *Haskell v. St. L. & S. F. R. Co.*, — Okla. —, 162 Pac. 459.

#### Excessive Damages.

Where the amount recovered by the plaintiff on a reparation order made by the

Interstate Commerce Commission was \$9 less than the amount that the carrier admitted overcharging, the judgment will not be reversed because of an allowance of \$8 charged by another carrier that was not a party to the reparation proceeding. *Missouri P. R. Co. v. Ferguson Saw Mill Co.*, — C. C. A. —, 235 Fed. 474.

#### **Allowance of Attorney Fees.**

A carrier cannot assert on appeal that the amount allowed a shipper as attorney's fee in an action for rebating and unjust discrimination was excessive, where the allowance was based on a transcript of the proceedings before the Interstate Commerce Commission and the statement of counsel in open court, although not made a part of the record, and the carrier did not show the unreasonableness of the

charges, or take exception thereto other than to the allowance of any such fees. *Meeker v. Lehigh V. R. Co.*, 236 U. S. 412, 59 L. ed. 644, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916 B. 691, modifying 128 C. C. A. 811, 211 Fed. 785.

An objection that an attorney's fee was allowed a shipper in an action under section 16 of the Act to Regulate Commerce, against a carrier on a reparation order made by the Interstate Commerce Commission, is without merit when not sustained by the record on appeal. *Denver & R. G. R. Co. v. Baer Bros. M. Co.*, 128 C. C. A. 399, 209 Fed. 577, affirming 200 Fed. 614.

#### **XIV. CRIMINAL LIABILITY.** (Will be covered in No. 4, Vol. I.)

**EMPLOYER'S LIABILITY ACT\*****FEDERAL**

(See also Vol. I, No. 2.)

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  - D. Effect on Particular Laws.
- IV. CONTRACTS AGAINST AND RELEASES FROM LIABILITY.
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## III. OPERATION.

## C. Exclusiveness of Remedy.

## In General.

The Federal Employers' Liability Act provides the exclusive means of redress for negligent injuries sustained by an employee of a railway company while both were actually engaged in interstate commerce. *Grand Trunk R. Co. v. Knapp*, 147 C. C. A. 624, 233 Fed. 950; *Waters v. Guile*, — C. C. A. —, 234 Fed. 532; *Landrum v. Western & A. R. Co.*, — Ga. —, 90 S. E. 710; *New Orleans, M. & C. R. Co. v. Jones*, — Miss. —, 72 So. 681; *Hogarty v. Philadelphia & R. R. Co.*, — Pa. —, 99 Atl. 741, S. C. 245 Pa. 443, 91 Atl. 854.

## D. Effect on Particular Laws.

## Effect on State Laws.

State statutes relating to the liability of carriers for injuries to or the death of employees when engaged in interstate commerce, were superseded by the Federal Employers' Liability Act. *Landrum v. Western & A. R. Co.*, — Ga. —, 90 S. E. 710; *Hein v. Great N. R. Co.*, — N. D. —, 159 N. W. 14; *Hunt v. Illinois S. R. Co.*, 196 Ill. App. 539; *Hogarty v. Philadelphia & R. R. Co.*, — Pa. —, 99 Atl. 741, S. C. 245 Pa. 443, 91 Atl. 854.

## IV. CONTRACTS AGAINST AND RELEASES FROM LIABILITY.

## G. Relief Department Contracts.

## Reduction of Benefits for Suing Employer.

Where an interstate railway company annually paid to a relief department fund an amount equal to one-half of the assessments paid by the members thereof, a provision of a certificate of membership that but one-half of the amount stipulated in the certificate would be paid thereunder, if the employing railway company should be sued for the injury or death of a member, does not violate section 5 of the Federal Employers' Liability Act avoiding all rules, regulations and contracts intended to enable carriers to

exempt themselves from the liability created by such law. *Wilson v. Grand Trunk R. Ins. & P. Society*, — N. H. —, 98 Atl. 478.

#### H. Release of Existing Cause of Action.

##### Validity in General.

A release for a valuable consideration of an existing cause of action under the Federal Employers' Liability Act is not within section 5 thereof, avoiding contracts which exempt carriers from the liability created by that act, and such a release will bar an action for damages. *Ballenger v. Southern R. Co.*, — S. C. —, 90 S. E. 1019.

An employee's release of his cause of action for an injured eye is not within the prohibition of section 5 of the Federal Employers' Liability Act against contracts exempting the employer from the liability created by such act, although there was a consideration of but one dollar and one day's employment, and the former's injury proved more serious than was supposed at the time the release was executed, and subsequently resulted in the loss of an eye. *Panhandle & S. F. R. Co. v. Fitts*, — Tex. Civ. App. —, 188 S. W. 528.

##### Effect of Employer's Fraud.

A release of a cause of action for personal injuries is void and no defense to an action under the Federal Employers' Liability Act, when obtained by fraudulent representations of the defendant's agents that the plaintiff had fully recovered from his injuries, and that he would be given back his old position. *Smith v. St. Louis & S. F. R. Co.*, 95 Kan. 451, 148 Pac. 759.

#### V. WHAT CARRIERS AND TRAFFIC WITHIN ACT.

##### A. In General.

##### Intrastate Line Connecting with Interstate Carriers.

A railway lying wholly within one state is within the purview of the Federal Employers' Liability Act, where, at both ends, such road connects with interstate railway lines, and all of the trains of such company constantly carry indiscriminately both interstate and intrastate passengers and freight. *Chicago, K. & S. R. Co. v. Kindlesparker*, — C. C. A. —, 234 Fed. 1.

##### Express Companies.

An express company that at the time of an employee's injury handled merchandise largely in interstate commerce, was a common carrier within the meaning of the Federal Employers' Liability Act. *Chapman v. United States Express Co.*, — Mich. —, 159 N. W. 308.

An express company engaged in transporting merchandise for hire is not a common carrier by rail within the meaning of the Federal Employers' Liability Act, merely because it contracts with a railroad company for the movement of such merchandise. *Higgins v. Erie R. Co.*, — N. J. —, 99 Atl. 98.

##### F. Logging Roads.

##### Not Within Federal Law.

A logging railroad lying wholly within one state is not within the purview of the Federal Employers' Liability Act, although some of the lumber cut from logs transported over it is subsequently shipped into other states. *Bay v. Merrill & Ring L. Co.*, 211 Fed. 717, affirmed 136 C. C. A. 277, 220 Fed. 295, affirmed 242 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. —; *Nordgard v. Marysville & N. R. Co.*, 211 Fed. 721, affirmed 134 C. C. A. 415, 218 Fed. 737, affirmed 242 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. —.

#### VI. WHAT EMPLOYEES WITHIN THE ACT.

Employment in interstate commerce as question of law or fact, see *infra* XIX, B and C.

##### A. In General.

##### Necessity for Employment in Interstate Commerce.

In order to bring an action within the purview of the Federal Employers' Liability Act it must be shown that the work in which an employee was engaged at the time of his injury was a part of the interstate commerce in which the defendant carrier was engaged. *Norfolk & W. R. Co. v. Short*, 171 Ky. 647, 188 S. W. 786; *Schaeffer v. Illinois C. R. Co.*, — Ky. —, 189 S. W. 237.

The Federal Employers' Liability Act deals only with the liability of railways for injuries to or the death of employees while both are engaged in interstate commerce. *Chesapeake & O. R. Co. v. Harmon*, — Ky. —, 189 S. W. 1135.

##### B. Scope of Employment.

##### Test of Employment in Interstate Commerce.

The true test whether an employee is within the protection of the Federal Employers' Liability Act is the nature of the work he was performing at the time of his injury, and the mere fact that presently he would have been called on to perform a task in interstate commerce will not bring him within such act. *Erie R. Co. v. Welsh*, 242 U. S. 303, 61 L. ed.



—, 37 Sup. Ct. Rep. 116, affirming 89 Ohio, 81, 105 N. E. 189.

A person is engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act, where he is injured while performing any work having for its immediate object in whole or in part the keeping of a railway track in condition for use by interstate trains according to their established schedules, since his work has such a close and direct relation to interstate transportation as to be practically a part thereof. *Southern P. Co. v. Industrial Accident Board*, — Cal. —, 161 Pac. 1139.

#### **Section Man on Way for Tools After Day's Work Over.**

Where, after completing his day's work, a section hand was injured while on his way with a hand car at the direction of his foreman to procure necessary tools for the master's work, he was still an employee of the company within the meaning of the Federal Employers' Liability Act. *Salabrin v. Ann Arbor R. Co.*, — Mich. —, 160 N. W. 552.

#### **C. Employees Engaged in Original Construction Work.**

##### **Tunnels.**

An employee who sustained an injury while working in a tunnel which, when completed, was intended to form a part of an interstate railway system, is not within the Federal Employers' Liability Act. *Raymond v. Chicago, M. & St. P. R. Co.*, 243 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. 268, affirming 147 C. C. A. 245, 233 Fed. 239.

#### **E. Employees Engaged in Maintenance and Repair Work.**

##### **5. Telegraph and Telephone Lines.**

##### **Telephone Lines.**

A lineman in the employ of an interstate railway company, who was engaged nearly all of the time in constructing or repairing telegraph and telephone wires used for conveying necessary messages for the safe and expeditious movement of both interstate and intrastate trains, was within the Federal Employers' Liability Act where he was injured while stringing a wire for a new telephone line between a station and a box office of another road for use of the employees of the connecting lines in moving interstate cars between them. *Collins v. Michigan C. R. Co.*, — Mich. —, 159 N. W. 535.

##### **6. Tracks Used for Interstate Traffic.**

##### **In General.**

When injured while at work on a track employed in interstate commerce, a sec-

tion hand is within the protection of the Federal Employers' Liability Act. *Salabrin v. Ann Arbor R. Co.*, — Mich. —, 160 N. W. 552.

##### **8. Switches and Switch Tracks.**

##### **In General.**

A section man who was injured while repairing a spur or side track leading from a main track to a scale track on which cars of freight destined for other states were weighed in order to ascertain if they were overloaded, was within the Federal Employers' Liability Act. *Dowell v. Wabash R. Co.*, — Mo. App. —, 190 S. W. 939.

##### **14. Handling New or Old Rails.**

##### **Unloading New Rails.**

An employee who was injured while unloading new rails from a car for use in repairing a track which was used to some extent in interstate commerce, was not within the purview of the Federal Employers' Liability Act. *Pierson v. New York, S. & W. R. Co.*, 83 N. J. L. 661, 85 Atl. 233.

##### **Loading Old Rails on Cars.**

A section hand who was injured while loading on a flat car old rails that at some time had been taken out of an interstate track and which were lying along the right of way, was not within the protection of the Federal Employers' Liability Act. *Cincinnati, N. O. & T. P. R. Co. v. Hansford*, — Ky. —, 190 S. W. 690.

##### **18. Moving Buildings on Cars.**

##### **Outhouse.**

Where a new outhouse fell from a train on which it was being moved wholly within one state to replace a similar building at a station provided by an interstate carrier for the use of both interstate and intrastate passengers, and on the following day a member of a bridge gang, whose duties were all performed within such state, was injured while moving the building on a push car, he was within the protection of the Federal Employers' Liability Act. *Nash v. Minneapolis & St. L. R. Co.*, 131 Minn. 209, 154 N. W. 957, reversed without opinion 242 U. S. 619, 61 L. ed. —, 37 Sup. Ct. Rep. 239.

##### **19. Repairing Buildings.**

##### **Erecting Scaffold for Painters.**

A railway employee who was injured while erecting a scaffold for use in painting or whitewashing the ceiling of a freight shed in which interstate freight was handled, was not within the protection of the Federal Employers' Liability Act, since his work had no direct or immediate

connection with and was not a necessary incident to furthering the movement of interstate traffic. *Killes v. Great N. R. Co.*, — Wash. —, 161 Pac. 69.

#### **Riveting Stovepipe.**

An employee who was injured while riveting a stovepipe intended for use in a roundhouse was not within the Federal Employers' Liability Act, where it did not appear that engines employed in interstate commerce were housed therein. *Dunn v. Missouri P. R. Co.*, — Mo. App. —, 190 S. W. 966.

#### **F. Employees Connected with Movement of Interstate Trains.**

##### **1. In General.**

##### **Interstate Train Temporarily Stopped.**

An employee was within the Federal Employers' Liability Act when injured while working on a train which came from another state and which was stopped temporarily in a railway yard. *Norfolk & W. R. Co. v. Short*, 171 Ky. 647, 188 S. W. 786.

##### **2. Particular Employees.**

##### **(f) Cinder Pit Cleaner.**

##### **In General.**

A person was within the Federal Employers' Liability Act when killed while cleaning a pit into which ashes were dumped from locomotives that were employed in both interstate and intrastate commerce. *Grybowski v. Erie R. Co.*, 88 N. J. 1, 95 Atl. 764, affirmed — N. J. L. —, 98 Atl. 1085.

##### **(g) Coal Dock Hands.**

##### **In General.**

A person employed about coal pockets was not within the Federal Employers' Liability Act, where, just after coaling a switch engine at the completion of its day's work, he was killed by the negligence of the person in charge of such engine, which was ordinarily used indiscriminately in handling both interstate and intrastate cars, and which on the day of the accident had moved interstate traffic only. *Giovio v. New York C. R. Co.*, — App. Div. —, 162 N. Y. Supp. 1026.

##### **(i) Crossing Watchmen.**

##### **Injury by Intrastate Train.**

A crossing watchman of an interstate railway was within the Federal Employers' Liability Act where he was struck and injured by a train on a branch line over which both interstate and intrastate traffic was carried indiscriminately. *Southern P. Co. v. Industrial Accident Board*, — Cal. —, 161 Pac. 1142.

A watchman at a street crossing over which many interstate and intrastate trains passed daily, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, when he was struck and killed by an intrastate train while he was attempting to back a horse and vehicle from the track, where it was a part of his duties to keep the track clear from obstructions which might interfere with the passage of trains according to schedule, since a collision between such intrastate train and the horse might have derailed the train, and, by obstructing traffic all along the line, interfered with the movement of interstate trains. *Southern P. Co. v. Industrial Accident Board*, — Cal. —, 161 Pac. 1139.

##### **(k) Electric Railway Employees.**

##### **Lineman.**

An electric lineman was within the Federal Employers' Liability Act when he was killed while removing a telephone wire which had fallen onto a trolley wire used by his employer to furnish power to operate electric cars constituting a part of a railway passenger system over which both interstate and intrastate traffic was carried. *Southern P. Co. v. Industrial Accident Board*, — Cal. —, 161 Pac. 1143.

##### **(m) Express Messengers.**

##### **When Within Federal Act.**

An employee of an express company was within the protection of the Federal Employers' Liability Act where he was injured while handling express matter in the employ of an express company that moved merchandise largely in interstate commerce. *Chapman v. United States Express Co.*, — Mich. —, 159 N. W. 308.

An employee of an express company that is engaged in transporting merchandise over a railroad is not within the Federal Employers' Liability Act. *Higgins v. Erie R. Co.*, — N. J. —, 99 Atl. 98.

##### **Railway Employee Handling Express.**

An employee of a railway company is within the protection of the Federal Employers' Liability Act, although he was also employed by an express company to handle express matter. *Taylor v. Wells Fargo & Co.*, 136 C. C. A. 402, 220 Fed. 796.

##### **(n) Freight Handlers.**

##### **Unloading Freight from Cars.**

A railway employee was within the purview of the Federal Employers' Liability Act where he was injured while assisting

in removing a barrel of oil shipped from another state, from a car of a train moving both interstate and intrastate freight. *Western R. of Ala. v. Mays*, — Ala. —, 72 So. 641.

**(p) Logging Road Employees.**

**Not Within Federal Law.**

An employee who was injured while moving logs on a logging railroad lying entirely within one state, was not within the Federal Employers' Liability Act, although a portion of the lumber subsequently cut from the logs was shipped to other states. *Bay v. Merrill & Ring L. Co.*, 211 Fed. 717, affirmed 136 C. C. A. 277, 220 Fed. 295, affirmed 242 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. —; *Nordgard v. Marysville & N. R. Co.*, 211 Fed. 721, affirmed 134 C. C. A. 415, 218 Fed. 737, affirmed 242 U. S. —, 61 L. ed. —, 27 Sup. Ct. Rep. —.

**(t) Student Employees.**

**Student Fireman Riding in Caboose.**

A student fireman was not an employee of a railway company within the meaning of the Federal Employers' Liability Act, where he was killed while riding in a caboose of a freight train, when he had a permit to ride on the engine only in order to learn the duties of a fireman without receiving compensation for his service and working only at his own pleasure. *Chesapeake & O. R. Co. v. Harmon*, — Ky. —, 189 S. W. 1135.

**4. Movement of Trains.**

**(b) Moving Interstate Train on Intrastate Portion of Journey.**

**Gravel Train.**

An engineer was within the Federal Employers' Liability Act when killed while moving on the intrastate portion of its journey a train loaded with gravel for use by his employers in ballasting tracks in another state, although it was not shown whether such material was intended for use on main or branch lines, since, as the gravel was a subject of interstate commerce, its subsequent use was immaterial. *Hein v. Great N. R. Co.*, — N. D. —, 159 N. W. 14.

**5. Conduct at End of Run.**

**Employee on Way for Supplies for Train.**

A brakeman of a local freight train handling both interstate and intrastate freight indiscriminately wholly within one state, was not within the Federal Employers' Liability Act, where he was injured several hours after the completion of his run, and while his caboose was on a

siding awaiting assignment, as he was on his way for necessary supplies for such car, notwithstanding that he would have been called for duty within a few hours, but without knowing whether for the movement of local or interstate freight. *McBain v. Northern P. R. Co.*, — Mont. —, 160 Pac. 654.

**Employees Sleeping in Caboose.**

A brakeman was not within the protection of the Federal Employers' Liability Act where, while sleeping in a caboose at the end of his run, he was killed several hours before he would have been called for an interstate run, and while the caboose was being moved from a terminal to a switch yard from which his next interstate run would have begun. *Pryor v. Bishop*, — C. C. A. —, 234 Fed. 9.

A freight conductor who customarily slept in his caboose at the end of his run, was not within the Federal Employers' Liability Act where, after being called for his run, but before time for him to report for duty, and while he was dressing preparatory to obtaining something to eat, he was injured in a collision between the caboose and interstate cars that were being placed in his train. *Bumstead v. Missouri P. R. Co.*, — Okla. —, 162 Pac. 347.

**G. Employees Connected with Movement of Intrastate Trains.**

**Employee on Local Train.**

A local freight brakeman is not brought within the purview of the Federal Employers' Liability Act by the fact that at the time of his injury he was performing work connected to a greater extent with interstate than with intrastate commerce. *McBain v. Northern P. R. Co.*, — Mont. —, 160 Pac. 654.

Employment in interstate commerce is not shown within the meaning of the Federal Employers' Liability Act, where it does not appear that a local train on which a brakeman was employed at the time of his death contained either interstate cars or freight. *Chicago & E. R. Co. v. Feightner*, — Ind. App. —, 114 N. E. 659.

**Trains Containing Interstate Traffic.**

A brakeman was within the Federal Employers' Liability Act where he sustained an injury as the result of a carrier's negligence, while he was employed on an intrastate freight train, some of the cars of which contained interstate freight. *Waters v. Guile*, — C. C. A. —, 234 Fed. 532.

A brakeman on an intrastate freight train containing interstate freight was within the Federal Employers' Liability

Act where he was injured while moving cars on a siding at a station, although it did not appear that they were employed in interstate commerce. *Chicago & E. R. Co. v. Feightner*, — Ind. App. — 114 N. E. 659.

#### **Returning with Intrastate Train Which Contained Interstate Traffic on Outward Trip.**

A freight conductor who made an intrastate round trip daily and who was injured while on the return portion of a trip with a train moving intrastate traffic only, was not brought within the purview of the Federal Employers' Liability Act by reason of the fact that his train carried interstate traffic on the outward trip. *Illinois C. R. Co. v. Peery*, 242 U. S. 292, 61 L. ed. —, 37 Sup. Ct. Rep. 122, reversing 128 Minn. 119, 150 N. W. 382, S. C. 123 Minn. 264, 143 N. W. 724.

#### **Empty Cars.**

An employee of an intrastate railway company is not within the purview of the Federal Employers' Liability Act, although such carrier handled much interstate traffic, where he was injured while moving empty cars. *Solomon v. Monongahela R. Co.*, 41 Pa. Co. Ct. 130.

#### **I. Employees Engaged in Switching.**

##### **Switchman on Way for Orders.**

A yard conductor was not within the Federal Employers' Liability Act where, after moving an interstate car, he was injured while on his way to the yardmaster's office for further orders, although had the accident not occurred he would immediately have received instructions to have made up an interstate train. *Erie R. Co. v. Welsh*, 242 U. S. 303, 61 L. ed. —, 37 Sup. Ct. Rep. 116, affirming 89 Ohio 81, 105 N. E. 189.

##### **Coupling Engine to Interstate Car.**

An employee is within the terms of the Federal Employers' Liability Act when injured while coupling an engine to a car which came from one state and which was destined for movement to another state in a train containing other interstate cars that was being made up. *Washington-S. R. Co. v. Smith*, — App. D. C. —, 44 Wash. L. R. 338.

##### **Moving Intrastate Car to Facilitate Shifting of Interstate Car.**

A switch engine fireman who was injured while removing an intrastate freight car from one track to another in order that an interstate car might be obtained and placed in an interstate freight train, was engaged in interstate commerce within the meaning of the Federal Em-

ployers' Liability Act. *Louisville & N. R. Co. v. Parker*, 242 U. S. 13, 161 L. ed. —, 37 Sup. Ct. Rep. 4, overruling 165 Ky. 658, 177 S. W. 465.

##### **Moving Empty Cars for Loading with Interstate Freight.**

A switchman was engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act, where he was injured while moving an iced refrigerator car from an ice house to a warehouse about a mile away, for loading with interstate traffic. *Aldread v. Northern P. R. Co.*, — Wash. —, 160 Pac. 429.

##### **Moving Empty Car Intended for Interstate Shipment From Another Station.**

A switchman was within the Federal Employers' Liability Act when injured while placing an empty car into a local train for transportation to a town 12 miles away for the purpose of being there loaded the same day with interstate freight. *Christy v. Wabash R. Co.*, — Mo. App. —, 191 S. W. 241.

#### **J. Roundhouse Employees.**

##### **Preparing Engine for Trip.**

A roundhouse mechanic in the employ of an interstate carrier was not within the Federal Employers' Liability Act, where he was injured while preparing a locomotive for a trip which was not shown to be interstate. *Narey v. Minneapolis & St. L. R. Co.*, — Ia. —, 159 N. W. 230.

#### **K. Shop Employees.**

##### **Car Repairer on Way for Material.**

Where a car repairer employed on the "heavy" side of a railway repair yard was killed while on his way to the "light" side of the yard to obtain necessary repairs for a car, he acted in the line of his employment, and the carrier is answerable under the Federal Employers' Liability Act for his death, although there was a place on the "heavy" side of the yard where the repairs in question were kept, when it was customary for repairmen to obtain supplies from any place in the yard in which they might be found. *Norfolk & W. R. Co. v. Short*, 171 Ky. 647, 188 S. W. 786.

When a car repairer who was employed on the "heavy" side of a railway yard was killed while on his way across the yard to the "light" side thereof to obtain necessary repairs for a car, he was acting in the line of his employment, and there may be a recovery under the Federal Employers' Liability Act for his death, where there was no rule forbidding repairmen from obtaining supplies from any place in the yard, although the company had a

designated place on the "heavy" side of the yard where the supplies in question could have been obtained. *Norfolk & W. R. Co. v. Short*, 171 Ky. 647, 188 S. W. 786.

#### **Repairing Cars and Engines Used in Interstate Commerce.**

The right of an employee to recover for injuries sustained while repairing cars used solely in interstate commerce must be determined under the Federal Employers' Liability Act. *Smigiel v. Great N. R. Co.*, — Wis. —, 160 N. W. 1057.

A shop employee was not within the protection of the Federal Employers' Liability Act when injured while repairing a locomotive which was out of service four days, before which it had been used in hauling a train containing both interstate and intrastate freight, and which was so employed after the plaintiff's injury, where it did not appear that the engine was intended especially for anything more definite than such business as it might be needed for, since the character of the locomotive as an instrument of interstate commerce depended on its employment at the time of the accident and not upon remote probabilities or accidental later events. *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353, 61 L. ed. —, 37 Sup. Ct. Rep. 170, overruling 126 Minn. 260, 148 N. W. 106, 131 Minn. 181, 496, 154 N. W. 946, 155 N. W. 1103.

An employee was within the terms of the Federal Employers' Liability Act when injured while repairing a locomotive owned by an intrastate railway company, which was used indiscriminately, both before and after its repair, in switching, and in moving on the road both interstate and intrastate traffic. *Chicago, K. & S. R. Co. v. Kindlesparker*, — C. C. A. —, 234 Fed. 1.

An employee may recover under the Federal Employers' Liability Act for injuries sustained while repairing a locomotive which was withdrawn from service for 79 days, where both before and after its repair it was used indiscriminately in switching and moving both interstate and intrastate traffic. *Chicago, K. & S. R. Co. v. Kindlesparker*, — C. C. A. —, 234 Fed. 1.

#### **L. Employees on Way to or From Work.**

##### **On Work Train.**

A bridge carpenter was within the Federal Employers' Liability Act when injured while riding on a work train consisting of a pile driver, service water tank, etc., on the way to repair a bridge used for the passage of both interstate and intrastate trains. *Grand Trunk R. Co. v. Knapp*, 147 C. C. A. 624, 233 Fed. 950.

#### **Employee on Way From Work.**

A hostler employed by an interstate carrier in preparing engines for use in interstate commerce is within the Federal Employers' Liability Act, when injured while on his way home through a railway yard within an hour after he had prepared a locomotive for an interstate trip. *Hinson v. Atlanta & C. A. L. R. Co.*, — N. C. —, 90 S. E. 772.

#### **M. Miscellaneous Employees.**

##### **Employee Unloading From Car Materials From Wrecked Train.**

An employee of an interstate railway company who, while at work in a railway yard unloading materials taken a week previously from a wrecked interstate train, was killed by the fall of a car truck, was not within the Federal Employers' Liability Act, although he was unloading such material so that it might be separated for inspection in order to determine its future usefulness, and notwithstanding that more than a month later the truck was sent to a shop for repairs for subsequent use in interstate commerce. *Schaeffer v. Illinois C. R. Co.*, — Ky. —, 189 S. W. 237.

##### **Watchmen.**

A night watchman charged with the duty of guarding tools and materials intended to be used in constructing a new station and tracks upon a line of interstate railway and designed for use in interstate commerce when completed, is not within the Federal Employers' Liability Act. *New York C. R. Co. v. White*, 243 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. 247, affirming 216 N. Y. 653, 110 N. E. 1051, 169 App. Div. 903, 152 N. Y. Supp. 1149.

### **VII. NEGLIGENCE FOR WHICH CARRIER ANSWERABLE.**

Instructions as to negligence, see *infra* XIX, E, 15.

Negligence as question for jury, see *infra* XIX, C, 3.

#### **A. In General.**

##### **Effect of Federal Act on Common-Law Rules of Negligence.**

The common-law rules of negligence were not modified by the Federal Employers' Liability Act. *Washington S. R. Co. v. Smith*, — App. D. C. —, 44 Wash. L. R. 338.

##### **Negligence Question of Substantive Law.**

The question of negligence is one of substantive law under the Federal Employers' Liability Act. *Manning v. Chi-*

cago G. W. R. Co., — Minn. —, 160 N. W. 787.

### **Estoppel to Claim Relief Under Federal Law.**

An employee who gave his employer a written statement to the effect that no one was to blame for his injuries, is not thereby estopped from prosecuting an action under the Federal Employers' Liability Act on the ground that his injuries were due to his employer's negligence, since such statement went merely to his credibility. *Waters v. Guile*, — C. C. A. —, 234 Fed. 532.

### **C. Negligence as Foundation of Liability.**

#### **In General.**

There can be no recovery under the Federal Employers' Liability Act in the absence of a showing of negligence on the part of the employer which contributed to the injury or death of an employee. *Norfolk & W. R. Co. v. Short*, 171 Ky. 647, 188 S. W. 786; *Gaines v. Grand Trunk R. Co.*, — Mich. —, 159 N. W. 542, S. C. 181 Mich. 376, 148 N. W. 397; *Palmer v. Wichita F. & N. W. R. Co.*, — Okla. —, 159 Pac. 1115; *Going v. Norfolk & W. R. Co.*, — Va. —, 89 S. E. 914.

### **Award Under State Workmen's Compensation as Negating Negligence.**

An award of damages under a state Workmen's Compensation law for injuries sustained by a railway employee, while engaged in interstate commerce, without negligence on the part of the employer, is a bar to a subsequent action founded on the Federal Employers' Liability Act, since negligence is the basis of the action. *Corico v. Smith*, 161 N. Y. Supp. 293.

Where the defendant, in an action under the Federal Employers' Liability Act for injuries sustained by an employee in which negligence on the part of the carrier was essential to a recovery, set up in bar of the action an award of compensation to the plaintiff "duly and properly" made under a state Workmen's Compensation Act, the plaintiff, by demurring to such answer, admitted the truth of its allegations, and, as the award could have been made only for injuries not resulting from the carrier's negligence, it was conclusive of the fact of the absence of negligence, and was a bar to such action. *Corico v. Smith*, 161 N. Y. Supp. 293.

### **E. Accident Attributable to Injured Person's Negligence.**

#### **In General.**

There can be no recovery under the Federal Employers' Liability Act for the

death of an employee which was the sole result of his own negligence. *Trice v. Southern P. Co.* — Cal. —, 161 Pac. 1144; *Norfolk & W. R. Co. v. Short*, 171 Ky. 647, 188 S. W. 786.

There can be no recovery under the Federal Employers' Liability Act for injuries attributable solely to an employee's own reckless and indifferent conduct. *Virginian R. Co. v. Linkous*, 144 C. C. A. 386, 230 Fed. 88, affirmed on rehearing — C. C. A. —, 235 Fed. 49, certiorari denied 242 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. 49.

### **What Accidents Due Solely to Injured Employee's Conduct.**

#### **—Stepping from One Track to Another to Avoid Train.**

When, in order to avoid a train on a track on which he was working, a track hand stepped onto a parallel track and was struck by a caboose which, without a lookout, was being moved from the opposite direction in front of an engine on which there were five employees, the negligence of the injured employee in taking a position on the track instead of between the two tracks was not the sole cause of his injury, so as to relieve the employer from liability under the Federal Employers' Liability Act, since, in failing to have a lookout on the caboose, the employer was guilty of concurring negligence. *Lexington & E. R. Co. v. Smith*, — Ky. —, 188 S. W. 1091.

An employee whose duty was to attend switch lights and to make slight track repairs in a busy railway yard in which employees were constantly moving about, was not bound to keep a lookout for moving trains so as to relieve his employers from liability under the Federal Employers' Liability Act for injuries caused by being struck by a caboose which was backed through the yard without a lookout, and in front of which he stepped in order to avoid a train coming from the opposite direction on a track on which he was working. *Lexington & E. R. Co. v. Smith*, — Ky. —, 188 S. W. 1091.

#### **—Collision Caused by Decedent's Negligence.**

There is no liability under the Federal Employers' Liability Act for the death of an experienced brakeman in consequence of a collision caused by his own negligence, instead of by the alleged defective condition of a car which had been duly inspected by the defendant and which was sufficient for the use to which it was put. *Trice v. Southern P. Co.*, — Cal. —, 161 Pac. 1144.

#### **—Crawling Under Train.**

A carrier is not answerable under the Federal Employers' Liability Act when an

experienced employee, with knowledge of the danger, attempted to pass under the bumpers of a string of cars and was injured when the cars were struck by a switch engine, where the defendant was not aware of the dangerous position assumed by such employee. *Hinson v. Atlanta & C. A. L. R. Co.*, — N. C. —, 90 S. E. 772.

## F. Negligence in General.

### 1. In General.

#### Moving Cars in Violation of Stop Signal.

The fact that a freight conductor was not aware that a brakeman was between cars adjusting the couplers for impact does not absolve the master from liability under the Federal Employers' Liability Act for the killing of the brakeman, when, in violation of his stop signal, the engineer closed the gap between the cars, since the question of the conductor's negligence in not knowing the decedent's whereabouts still remained. *Gulf, C. & S. F. R. Co. v. Cooper*, — Tex. Civ. App. —, 191 S. W. 579.

### 8. Violation of Rules and Regulations.

#### Violation by Coemployees.

Where the conductor, brakeman, engineer and fireman of a train were all killed in a collision, there can be no recovery for the death of the engineer on the theory of the negligence of his coemployees in failing to take the necessary steps required by the rules of their employer to stop the train when the decedent ran past a meeting point contrary to orders of which all of the deceased employees were aware. *Virginian R. Co. v. Linkous*, 144 C. C. A. 386, 230 Fed. 89, affirmed on rehearing — C. C. A. —, 235 Fed. 49, certiorari denied 242 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. 49.

#### Violation by Injured Employee.

A freight conductor who, solely for his own convenience in facilitating the setting out of cars from his train at the next stop, rode on the engine of his train, was held, in an action under the Federal Employers' Liability Act for injuries sustained in a collision, not to be within an exception of a rule forbidding conductors to ride elsewhere than in the cabooses of their trains except in cases of emergency. *Louisville & N. R. Co. v. Paschal*, 145 Ga. 521, 89 S. E. 620.

#### Failure of Car Repairer to Display Signal.

A rule of a carrier requiring the display of designated signals while employees were working between cars making repairs was held, in an action based on the Federal Employers' Liability Act, not to apply to

a car repairer while passing through an open space between standing cars on his way to obtain necessary repairs for other cars. *Norfolk & W. R. Co. v. Short*, 171 Ky. 647, 188 S. W. 786.

### 12. Negligence of Fellow Servants.

#### When Negligence of Coemployee Established.

Negligence on the part of a coemployee cannot be found in an action based on the Federal Employers' Liability Act from mere conclusions which are not sustained by the evidence. *Washington-S. R. Co. v. Smith*, — App. D. C. —, 44 Wash. L. R. 338.

#### For What Acts Answerable.

##### — Holding Torch Over Manhole of Oil Tank.

Where, in the performance of his duty of measuring or gauging the quantity of fuel oil pumped into a locomotive tender, a foreman held a flaming torch over the open manhole, and on being warned by a coemployee not to do so, called the latter a coward and immediately passed the torch several times over the open manhole and caused an explosion, the fact that the foreman was guilty of greater recklessness than the performance of his duties required will not relieve the employer of liability under the Federal Employers' Liability Act for the resulting death of the complaining employee. *Lanis v. Illinois C. R. Co.*, — La. —, 72 So. 788, certiorari denied 242 U. S. 647, 61 L. ed. —, 37 Sup. Ct. Rep. 241.

##### — Engineer Disobeying Signal.

Where a brakeman was thrown from a car by its sudden stoppage it cannot be held, in an action under the Federal Employers' Liability Act, that the defendant was free from negligence if, in response to the plaintiff's signal, the engineer made a service application of the brakes and, on the continuance of the former's signal, applied the remaining air and stopped the cars with sudden violence. *Waters v. Guile*, — C. C. A. —, 234 Fed. 532.

##### — Failure of Section Foreman to Look for Belated Train.

When it does not appear that before starting with his crew a section foreman knew or should have known that a belated train had not arrived at a station, or that he disregarded information regarding such train, there is no basis for a recovery under the Federal Employers' Liability Act for the death of a section man in a collision between such train and a handcar during a dense fog. *Smith v. Pryor*, — Mo. App. —, 190 S. W. 69.

**15. Defective Appliances and Tools.****Defective Switches.**

Negligence on the part of the defendant is shown in an action under the Federal Employers' Liability Act, where a brakeman was injured while operating a jack switch which was old, worn, rusty and out of order. *Ballenger v. Southern R. Co.*, — S. C. —, 90 S. E. 1019.

**Drawbar Pin Working Through Floor of Tender.**

A fireman cannot recover under the Federal Employers' Liability Act for injuries sustained by stumbling over a drawbar pin which worked up through the floor of the tender of a switch engine, where it did not appear that the defendant, if the pin was defective, was chargeable with notice of its condition and no omission of inspection was shown. *Toler v. Northern P. R. Co.*, — Wash. —, 162 Pac. 538.

**Defective Spike Maul Handle.**

Evidence that a section hand was injured while using, at the command of his foreman, a spike maul having a battered head and crooked handle cut by the latter from a nearby bush, in driving into new ties old and crooked spikes which the former was required to use irrespective of their condition, makes a case for the jury in an action based on the Federal Employers' Liability Act. *Dowell v. Washash R. Co.*, — Mo. App. —, 190 S. W. 939.

Since a maul or hammer handle is a simple tool which a master is under no duty to inspect for defects, he is not answerable under the Federal Employers' Liability Act where the breaking of the handle resulted in the death of an employee while engaged in interstate commerce. *Kolasinski v. Chicago, M. & St. P. R. Co.*, — Wis. —, 159 N. W. 563.

**16. Violation of Safety Statutes.****Liability for Injuries Due to Absence of Safety Appliances.**

A brakeman is within the protection of the Federal Employers' Liability Act when injured while in the discharge of his duties by reason of the failure of an interstate carrier to equip cars with the required safety appliances, and he may recover for his injuries in the absence of other facts discharging the carrier from liability. *Louisville & N. R. Co. v. Layton*, 145 Ga. 886, 90 S. E. 53.

**Necessity of Showing Violation of Federal Laws.**

When negligence is shown on the part of a carrier which contributes to the injury of an employee while engaged in interstate commerce, the latter is entitled

to the benefit of the Federal Employers' Liability Act without also showing a violation of the Federal Safety Appliance Act. *Aldread v. Northern P. R. Co.*, — Wash. —, 160 Pac. 429.

**17. Movements of Engines and Cars.****Moving Engine Without Headlight.**

The operation of a locomotive for 47 miles at night without a headlight, in violation of a state law, held negligence as a matter of law in an action under the Federal Employers' Liability Act for injuries sustained by a section hand in a collision between such locomotive and a hand car, since the statute required the use of the headlight for the benefit of both employees and the public. *Salabrin v. Ann Arbor R. Co.*, — Mich. —, 160 N. W. 552.

A railway company is not relieved from liability under the Federal Employers' Liability Act for injuries sustained by an employee in consequence of the failure to have a headlight on an engine at night, as required by a state law which declared that it should not apply if the light became defective while an engine was being used for transportation, where such engine was run 47 miles without a headlight, and it was not shown that the defect developed en route, and if it did it would not relieve the defendant of the charge of negligence. *Salabrin v. Ann Arbor R. Co.*, — Mich. —, 160 N. W. 552.

**Injuries Sustained While Coupling Cars.**

There is no liability under the Federal Employers' Liability Act for injuries sustained by an experienced brakeman while on the footboard of a slowly moving engine making a coupling on a curved track with coupling equipment in perfect condition and adjusted in the customary manner, when at the crucial moment a contingency arose incident to the hazard of his employment, and as he attempted to push the coupling into alignment with his foot, he slipped and was injured. *Washington-S. R. Co. v. Smith*, — App. D. C. —, 44 Wash. L. R. 338.

Negligence on the part of the defendant is not shown in an action founded on the Federal Employers' Liability Act for injuries sustained by an employee when about to make a coupling from the footboard of an engine moving 4 miles an hour when about 10 feet from the car to which a coupling was to be made, where the evidence does not disclose the speed of the engine at the point where the coupling was made. *Washington-S. R. Co. v. Smith*, — App. D. C. —, 44 Wash. L. R. 338.

**Failure to Maintain Lookout.****— For Track Repairers.**

The failure of the engineer of a switch



engine to keep a lookout for stop signals while using a yard track which he knew repairmen had in a dangerous condition, was held concurrent negligence in an action under the Federal Employers' Liability Act for injuries sustained by a repairman who, while attempting to give the engineer a stop signal, was struck by a kicked car on a parallel track on which it was moved without an attendant. *Brightwell v. Lusk*, — Mo. App. —, 189 S. W. 413.

#### — For Cinder Pit Cleaners.

In an action under the Federal Employers' Liability Act for the death of an employee who, while in the manhole of a cinder pit, was struck and killed by an engine, it cannot be said as a matter of law that those in charge of the engine were free from negligence where they backed it from over the pit without ringing the bell or ascertaining whether anyone was in a position of danger. *Grybowski v. Erie R. Co.*, 88 N. J. L. 1, 95 Atl. 764, affirmed — N. J. L. —, 98 Atl. 1085.

#### Warning of Movement of Kicked Cars.

The failure of a carrier to give warning of the movement of kicked cars and of the making of running switches without having a person in charge of the cars, is negligence for which it is answerable under the Federal Employers' Liability Act, where, had there been a lookout on the negligently moved car which struck an employee, he would have been seen in time to have been warned of his danger. *Norfolk & W. R. Co. v. Short*, 171 Ky. 647, 188 S. W. 786.

### VIII. PROXIMATE CAUSE.

#### Concurring Negligence of Employer and Injured Servant.

When it appears that the negligence of an employer and a servant concurred in producing the injury of the latter, under the Federal Employers' Liability Act the negligence of both will be deemed the proximate cause. *Louisville & N. R. Co. v. Paschal*, 145 Ga. 521, 89 S. E. 620.

#### Removing Truck from Car Door.

Where it was customary not to remove a truck from the door of an express car until those within the car were through with it, and an employee was injured by stepping from the door without notice that a truck had been removed, the negligence of the defendant in doing so in violation of such custom rather than the failure of the injured employee to ascertain whether the truck was in position was held, in an action under the Federal Employers' Liability Act, to have been the proximate cause of the accident. *Chapman v. United*

*States Express Company*, — Mich. —, 159 N. W. 308.

### IX. ASSUMED RISK.

Assumed risk as question of fact, see *infra* XIX, C, 3.

Instructions as to assumed risk, see *infra* XIX, E, 2.

#### B. Effect of Federal Act on Common-Law Rule.

##### In General.

Assumed risk is a bar to an action under the Federal Employers' Liability Act, except when the violation by the employer of some Federal statute enacted for the safety of employees causes or contributes to the injury or death of an employee. *Young v. Norfolk & W. R. Co.*, 171 Ky. 510, 188 S. W. 621; *Gaines v. Grand Trunk R. Co.*, — Mich. —, 159 N. W. 542; *S. C. 181 Mich. 376*, 148 N. W. 397; *Chicago, R. I. & P. R. Co. v. Jackson*, — Okla. —, 160 Pac. 736; *Gulf, C. & S. F. R. Co. v. Cooper*, — Tex. Civ. App. —, 191 S. W. 579; *Swanson v. Oregon, W. R. & N. Co.*, 92 Wash. 423, 159 Pac. 379; *Smigiel v. Great N. R. Co.*, — Wis. —, 160 N. W. 1057.

##### C. Violation of Safety Statutes.

##### Safety Appliance Act.

Assumption of risk is eliminated as a defense in an action under the Federal Employers' Liability Act when an employee is killed or injured in consequence of a carrier's violation of the Federal Safety Appliance Act. *Washington-S. R. Co. v. Smith*, — App. D. C. —, 44 Wash. L. R. 338; *Christy v. Wabash R. Co.*, — Mo. App. —, 191 S. W. 241.

##### Hours of Labor Act.

Assumed risk is not available as a defense to an action under the Federal Employers' Liability Act for injuries sustained by an employee as the proximate result of being required to work for more than 16 hours in violation of the Hours of Service Act, although his injury did not occur during such violation, but 14 hours thereafter. *Baltimore & O. R. Co. v. Wilson*, 242 U. S. 295, 61 L. ed. —, 37 Sup. Ct. Rep. 123, affirming 194 Ill. App. 491.

##### D. What Risks Assumed.

###### 1. In General.

##### Dangers Incident to Employment.

The rule that a servant assumes the ordinary risks of his employment applies to an action predicated on the Federal

Employers' Liability Act. *Hightower v. Southern R. Co.*, — Ga. —, 91 S. E. 52.

#### Obeying Command.

An employee who sustains an injury while complying with a direct order negligently given by his master, cannot recover under the Federal Employers' Liability Act, where he was aware of the peril of complying with the command, or when he had equal means with his master of knowing of the peril, or might have known it by the exercise of ordinary care. *Hightower v. Southern R. Co.*, — Ga. —, 91 S. E. 52.

#### Jack Springing from Position.

A car repairer who, while using a jack for forming and pressing back a sheet of steel composing the side and bottom of a car, was struck and injured by the bar used in turning the jack when the jack sprang out of place, was held, in an action under the Federal Employers' Liability Act, to have assumed the risk of injury. *Smigiel v. Great N. R. Co.*, — Wis. —, 160 N. W. 1057.

#### Violation of Rules by Employer.

A section foreman whose duty it was to look out for the safety of himself and the men under him does not, under the Federal Employers' Liability Act, assume the risk of injury from the negligence of those in charge of a backing train in failing to station a man on the front car, as required by the rules of the defendant of which the decedent was aware. *Will-ever v. Delaware, L. & W. R. Co.*, — N. J. L. —, 99 Atl. 321, reversing 87 N. J. L. 348, 94 Atl. 959.

### 2. Negligence of Employer.

#### In General.

A brakeman cannot be charged with assumption of risk, in an action under the Federal Employers' Liability Act, where, while between cars adjusting a coupler for impact, he was killed when in violation of his stop signal an engineer shoved the cars together, since the negligence of the latter was that of the defendant. *Gulf, C. & S. F. R. Co. v. Cooper*, — Tex. Civ. App. —, 191 S. W. 579.

### 3. Negligence of Fellow Servants.

#### Not an Assumed Risk.

The negligence of coemployees is not an assumed risk under the Federal Employers' Liability Act, unless actually known to the injured employee or of such a character as to charge him with notice. *Chapman v. United States Express Co.*, — Mich. —, 159 N. W. 308.

#### Particular Acts of Coemployees.

##### —Holding Torch Over Manhole of Oil Tank.

An employee who, while assisting in filling a locomotive tank with fuel oil, was killed by an explosion, was held, in an action under the Federal Employers' Liability Act, not to have assumed the risk of his foreman's using a flaming torch over the open manhole of the oil tank. *Lanis v. Illinois C. R. Co.*, — La. —, 72 So. 788, certiorari denied 243 U. S. 647, 61 L. ed. —, 37 Sup. Ct. Rep. 241.

### 4. Defective Appliances.

#### Jack Switch.

That the defective condition of a jack switch was not so plain and obvious that, under the Federal Employers' Liability Act, a brakeman assumed the risk of injury when he was compelled to operate the switch hurriedly, and it appeared to be in proper condition until the lever was lifted to a perpendicular position, where it stuck, and in order to avoid a wreck the brakeman threw his weight on the lever, which suddenly released to his injury. *Ballenger v. Southern R. Co.*, — S. C. —, 90 S. E. 1019.

#### Defective Car Door.

A demurrer to the plaintiff's evidence was properly overruled in an action under the Federal Employers' Liability Act for injuries sustained by a brakeman when a defective car door fell on him, where he was not aware of the condition thereof, and the car was not inspected by the defendant before sending it out, since the plaintiff did not assume the risk of injury. *Smith v. St. Louis & S. F. R. Co.*, 95 Kan. 451, 148 Pac. 759.

#### Defective Tools.

Under the Federal Employers' Liability Act an employee does not assume the risk of his employer's negligence in furnishing defective tools unless the former is aware thereof. *Panhandle & S. F. R. Co. v. Fitts*, — Tex. Civ. App. —, 188 S. W. 528.

Where an employee was injured by a sliver of steel that flew from the head of an old and defective hammer or nail which a fellow employee was driving, the former cannot, in an action under the Federal Employers' Liability Act, be held, as a matter of law, to have assumed the risk of injury, when the work was performed under the direction and supervision of a superior, since the injured employee might rightfully assume that safe and proper instrumentalities were furnished. *Panhandle & S. F. R. Co. v. Fitts*, — Tex. Civ. App. —, 188 S. W. 528.

## 5. Unsafe Place.

### Custom of Leaving Switch Open.

A custom of leaving a main line switch open while engines were on a siding taking coal and water has no bearing on the question of assumed risk in an action under the Federal Employers' Liability Act for injuries sustained by a roadmaster from the derailment of a motor car at the open switch, even though he was aware of or should have known of such custom. *Kansas City, M. & O. R. Co. v. Finke*, — Tex. Civ. App. —, 190 S. W. 1143.

### Failure to See Open Switch.

Where a roadmaster was injured by the derailment of a motor car at an open switch, the fact that the switch target showed the danger and would have been seen by him had he been looking, does not, when he was not aware that an engine was on the siding taking coal and water, charge him as a matter of law with assumption of risk in an action under the Federal Employers' Liability Act. *Kansas City, M. & O. R. Co. v. Finke*, — Tex. Civ. App. —, 190 S. W. 1143.

### Cars Not in Clear.

A freight brakeman, who, to the knowledge of his employer, had but a few days' experience, was held, in an action based on the Federal Employers' Liability Act, not to have assumed the risk of injury from the too close proximity of cars on another track near the entrance to a siding, where he had neither knowledge nor warning of the danger, although his superiors were aware thereof. *Chicago & E. R. Co. v. Feightner*, — Ind. App. —, 114 N. E. 659.

### Pieces of Slag in Railway Yard.

Where a brakeman was injured when he jumped from a slowly moving train and alighted on a large piece of slag lying beside a track in a railway yard, knowledge on his part of the conditions out of which the risk arose cannot be presumed, in an action under the Federal Employers' Liability Act, from the fact that an ordinarily prudent person under like circumstances would have ascertained the conditions just before jumping from the train, since such fact established contributory negligence rather than assumed risk. *Cincinnati, N. O. & T. P. R. Co. v. Thompson*, — C. C. A. —, 236 Fed. 1.

The fact that a brakeman knew that there were pieces of slag of the size of a hen's egg and smaller lying between the tracks in a railway yard cannot, as a matter of law, charge him, in an action under the Federal Employers' Liability Act, with assuming the risk of injury from

stepping on a much larger piece of slag when he alighted from a slowly moving train in the discharge of his duties, where he denied knowledge of the presence of large chunks of slag in the yard, and there was conflicting evidence as to the presence of such a number of large pieces as to charge him with constructive knowledge. *Cincinnati, N. O. & T. P. R. Co. v. Thompson*, — C. C. A. —, 236 Fed. 1.

## 6. Movements of Trains and Cars.

### Movement of Trains in Railway Yard.

A trackwalker who was killed by a passing train in a railway yard in which there was a constant movement of cars, was held, in an action under the Federal Employers' Liability Act, to have assumed the risk of injury, where the decedent was enveloped in a cloud of steam at the time of the accident and he disregarded the warning of an employee of the danger therefrom, and the steam prevented the lookout on the train from seeing the decedent. *Connelley v. Pennsylvania R. Co.*, 142 C. C. A. 614, 228 Fed. 322, affirming 221 Fed. 508, S. C. 119 C. C. A. 392, 201 Fed. 54, 47 L. R. A. (N. S.) 867, reversed without opinion 231 U. S. 764, 58 L. ed. 472, 34 Sup. Ct. Rep. 327.

A trackwalker whose duty it was to patrol, watch over and repair tracks on which trains were constantly passing, was held, in an action under the Federal Employers' Liability Act, to have assumed the risk of injury from being struck by a passing train. *Connelley v. Pennsylvania R. Co.*, 142 C. C. A. 614, 228 Fed. 322, affirming 221 Fed. 508, S. C. 119 C. C. A. 392, 201 Fed. 54, 47 L. R. A. (N. S.) 867, reversed without opinion 231 U. S. 764, 58 L. ed. 472, 34 Sup. Ct. Rep. 327.

### Boarding Moving Cars.

Under the Federal Employers' Liability Act an employee assumes the risk of injury from attempting to board the end of a slowly moving flat car by seizing the brake-staff and placing his foot on a handhold, where the sides of the cars were equipped with stirrups. *Young v. Norfolk & W. R. Co.*, 171 Ky. 510, 188 S. W. 621.

## 7. Insufficient Numbers of Employees.

### Handling Rails.

An employee who, while hastening to the assistance of coemployees whom he was aware were unable to handle a heavy rail in safety, was injured when it fell from their grasp, cannot recover under the Federal Employers' Liability Act, since he assumed the risk of injury. *Cetola v. Lehigh V. R. Co.*, — N. J. L. —, 99 Atl. 310.

**10. Improper Method of Doing Work.****Driving Old Spikes Into New Ties.**

An employee who was injured when, at the peremptory command of his superior, he attempted, against his protest, to drive an old spike into a new cross tie, cannot recover under the Federal Employers' Liability Act, where he was fully aware that old spikes were liable to jump and rebound when driven into new ties. *Hightower v. Southern R. Co.*, — Ga. —, 91 S. E. 52.

**Loading Rails.**

An experienced section hand who knew and appreciated the danger arising from an alleged negligent method of loading old rails on a flat car, and who continued at the work without protest until he was injured, cannot recover under the Federal Employers' Liability Act, since he assumed the risk. *Chicago, R. I. & P. R. Co. v. Jackson*, — Okla. —, 160 Pac. 736.

**Striking Drawbar Plunger with Hammer.**

An experienced car repairer was held, in an action founded on the Federal Employers' Liability Act, to have assumed the risk of injury from the plunger of a defective drawbar being driven against him when the compression spring was released as he struck the plunger with a hammer. *Gaines v. Grand Trunk R. Co.*, — Mich. —, 159 N. W. 542, S. C. 181 Mich. 376, 148 N. W. 397.

**Pushing Coupler with Foot.**

An experienced brakeman of mature years was held, in an action under the Federal Employers' Liability Act, to have assumed the risk of injury from attempting, while standing on the footboard of a slowly moving engine, to push a coupler into line with his foot so as to make a coupling with a car standing on a curved track. *Washington-S. R. Co. v. Smith*, — App. D. C. —, 44 Wash. L. R. 338.

**X. CONTRIBUTORY NEGLIGENCE.**

Contributory negligence as jury question, see *infra* XIX, C, 3.

Instructions as to contributory negligence, see *infra* XIX, E, 5.

Instructions as to diminution of damages for contributory negligence, see *infra* XIX, E, 6.

**B. Effect of Federal Law on Common Law Rule.****In General.**

Contributory negligence does not bar a recovery under the Federal Employers' Liability Act. *Smithson v. Atchison, T. & S. F. R. Co.*, — Cal. —, 162 Pac. 111;

*Lexington & E. R. Co. v. Smith*, — Ky. —, 188 S. W. 1091; *Norfolk & W. R. Co. v. Short*, 171 Ky. 647, 188 S. W. 786; *Chapman v. United States Express Co.*, — Mich. —, 159 N. W. 308; *Brightwell v. Lusk*, — Mo. App. —, 189 S. W. 413; *Gulf, C. & S. F. R. Co. v. Cooper*, — Tex. Civ. App. —, 191 S. W. 579.

It is error, in an action based on the Federal Employers' Liability Act, to deprive the defendant of the defense of contributory negligence when no violation of any Federal law enacted for the safety of employees causes or contributes to the injury or death of an employee. *Smithson v. Atchison, T. & S. F. R. Co.*, — Cal. —, 162 Pac. 111.

**C. Reduction of Damages for Contributory Negligence.****In General.**

The contributory negligence of an injured employee merely tends to diminish the amount of his recovery under the Federal Employers' Liability Act. *Western R. of Ala. v. Mays*, — Ala. —, 72 So. 641; *Lexington & E. R. Co. v. Smith*, — Ky. —, 188 S. W. 1091; *Chapman v. United States Express Co.*, — Mich. —, 159 N. W. 308; *Brightwell v. Lusk*, — Mo. App. —, 189 S. W. 413; *Gulf, C. & S. F. R. Co. v. Cooper*, — Tex. Civ. App. —, 191 S. W. 579.

**Method of Reduction.**

Under the Federal Employers' Liability Act, when the casual negligence is attributable partly to the employer and partly to the injured servant, the latter shall not recover his full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the defendant bears to the negligence attributable to both, the purpose of the law being to exclude from the recovery a proportionate part of the damages corresponding to the employee's contribution to the total negligence. *Dowell v. Wabash R. Co.*, — Mo. App. —, 190 S. W. 939.

**D. Effect of Violation of Safety Statutes.****In General.**

Federal statutes only are within section 3 of the Federal Employers' Liability Act, providing that contributory negligence shall not be a defense when the violation by an employer of any statute enacted for the safety of employees shall cause or contribute to the injury or death of a servant. *Smithson v. Atchison, T. & S. F. R. Co.*, — Cal. —, 162 Pac. 111.

**Violation of Hours of Labor Act.**

Contributory negligence is not a defense to an action under the Federal Employers' Liability Act for injuries sus-

tained by an employee as the proximate result of being required to work for more than 16 hours in violation of the Hours of Service Act, although his injury did not occur during such violation, but 14 hours thereafter. *Baltimore & O. R. Co. v. Wilson*, 242 U. S. 295, 61 L. ed. —, 37 Sup. Ct. Rep. 123, affirming 194 Ill. App. 491.

#### State Law Relating to Minors.

The fact that a minor employee was required to work between the hours of 10 p. m. and 5 a. m., in violation of a state statute, does not, under section 3 of the Federal Employers' Liability Act, relieve such employee from the effect of his contributory negligence, since Federal statutes only are within the provisions of such section. *Smithson v. Atchison, T. & S. F. R. Co.*, — Cal. —, 162 Pac. 111.

#### Violation of Safety Appliance Act.

Contributory negligence is not in issue in an action based on the Federal Employers' Liability Act for injuries sustained by an employee in consequence of the employer's violation of the Safety Appliance Act. *Christy v. Wabash R. Co.*, — Mo. App. —, 191 S. W. 241.

#### E. What Amounts to Contributory Negligence.

##### Replacing Defective Car Door.

A brakeman was held, in an action under the Federal Employers' Liability Act, not guilty of contributory negligence where he was injured by the fall of a defective car door which he attempted to replace when it was suspended by one hanger only. *Smith v. St. Louis & S. F. R. Co.*, 95 Kan. 451, 148 Pac. 759.

##### Standing on Roof of Car.

It cannot be said as a matter of law, in an action founded on the Federal Employers' Liability Act for injuries sustained by a brakeman who was thrown from the top of a car by a negligent emergency application of the air brakes, that he was guilty of contributory negligence where he stood near the middle of the car in the proper discharge of his duties. *Waters v. Guile*, — C. C. A. —, 234 Fed. 532.

##### Knowledge of Danger or Defects.

A brakeman who was injured by the fall of a defective car door cannot, in an action under the Federal Employers' Liability Act, be charged with contributory negligence where he was not aware of the condition of the door. *Smith v. St. Louis & S. F. R. Co.*, 95 Kan. 451, 148 Pac. 759.

##### Improper Method of Removing Freight From Car.

The contributory negligence of an em-

ployee in attempting without sufficient assistance to remove from a car a heavy barrel of oil moved in interstate commerce, will not bar a recovery under the Federal Employers' Liability Act for resulting injuries. *Western R. of Ala. v. Mays*, — Ala. —, 72 So. 641.

#### XI. FELLOW-SERVANT DOCTRINE.

##### Effect of Federal Act on Common-Law Rule.

The fellow-servant doctrine is not a defense to an action founded on the Federal Employers' Liability Act. *Lanis v. Illinois C. R. Co.*, — La. —, 72 So. 788, certiorari denied 242 U. S. 647, 61 L. ed. —, 37 Sup. Ct. Rep. 241.

#### XIII. WHO ENTITLED TO BENEFIT OF ACT.

##### A. In General.

##### Employees of Carriers Only Within Act.

The Federal Employers' Liability Act does not apply to injuries received by a person not an employee of a railway company at the time of the accident. *Chesapeake & O. R. Co. v. Harmon*, — Ky. —, 189 S. W. 1135.

##### C. In Case of Death of Employee.

##### When Action in Name of Beneficiaries Bar to Suit Under Federal Law.

The sustaining of an exception to the plaintiff's petition in an action by a widow in her own name under a state statute against an employer railway company for the death of her husband, on the ground that the suit was governed by the Federal Employers' Liability Act, is not res judicata of her individual demand so as to prevent a recovery by her in a representative capacity under the Federal law. *Lanis v. Illinois C. R. Co.*, — La. —, 72 So. 788, certiorari denied 242 U. S. 647, 61 L. ed. —, 37 Sup. Ct. Rep. 241.

##### Question of Dependency.

It was reversible error, in an action under the Federal Employers' Liability Act for the benefit of an infant child of a deceased employee, to submit to the jury the question whether during minority the former might expect any pecuniary assistance from the decedent, since he was under a legal obligation to support his child. *Davis v. Cincinnati, N. O. & T. P. R. Co.*, — Ky. —, 188 S. W. 1061.

##### Payment of Alimony for Benefit of Child.

The fact that a father was ordered by a divorce decree to pay a stated sum to his wife for the support of their minor

child, is not a bar to the recovery of damages for the benefit of the infant under the Federal Employers' Liability Act for the father's death. *Davis v. Cincinnati, N. O. & T. P. R. Co.*, — Ky. —, 188 S. W. 1061.

#### **Recovery for Parent's Benefit When Surviving Children.**

There cannot be a recovery under the Federal Employers' Liability Act for the benefit of surviving parents of a deceased son who left an infant child surviving him. *Davis v. Cincinnati, N. O. & T. P. R. Co.*, — Ky. —, 188 S. W. 1061.

#### **When Dependency of Parent Established.**

There can be no recovery under the Federal Employers' Liability Act for the benefit of a surviving mother with whom a deceased employee had lived, where he made her but trifling gifts of money more as the result of affection than in recognition of any obligation to support her. *Davis v. Cincinnati, N. O. & T. P. R. Co.*, — Ky. —, 188 S. W. 1061.

#### **Brothers and Sisters.**

##### **— Half Blood.**

A sister of the half blood is the next of kin of a deceased employee within the meaning of the Federal Employers' Liability Act where the latter left no other surviving relatives. *Smith v. Pryor*, — Mo. App. —, 190 S. W. 69.

##### **— Dependency.**

A sister of the half blood is not dependent on an employee within the meaning of the Federal Employers' Liability Act, where the only pecuniary assistance she ever received from the decedent was voluntary gifts aggregating but \$37. *Smith v. Pryor*, — Mo. App. —, 190 S. W. 69.

#### **Next of Kin.**

##### **— Necessity for Dependency.**

Dependency on a deceased employee must be shown in order to permit a recovery under the Federal Employers' Liability Act for the benefit of next of kin other than a surviving husband, wife, child or parents. *Smith v. Pryor*, — Mo. App. —, 190 S. W. 69.

##### **— What Constitutes Dependency.**

Mere occasional gifts of money do not make next of kin a dependent upon the donor within the meaning of the Federal Employers' Liability Act. *Smith v. Pryor*, — Mo. App. —, 190 S. W. 69.

### **XIV. SURVIVAL OF EMPLOYEE'S RIGHT OF ACTION.**

#### **In General.**

A cause of action under the Federal Employers' Liability Act for injuries sus-

tained by an employee, at his death passes to his administrator when appointed. *St. Louis S. W. R. Co. v. Smitha*, — Tex. Civ. App. —, 190 S. W. 237.

#### **When No Appreciable Continuance of Life.**

When the evidence is conflicting as to whether an employee, although wholly unconscious, continued to breathe for about 10 minutes after his fatal injury or whether there was no appreciable continuance of life, damages for conscious pain and suffering cannot be awarded in an action founded on the Federal Employers' Liability Act. *Great N. R. Co. v. Capital Trust Co.*, 242 U. S. 144, 61 L. ed. —, 37 Sup. Ct. Rep. 41, reversing 128 Minn. 537, 150 N. W. 1102 and 127 Minn. 144, 149 N. W. 14, 7 N. C. C. A. 154.

### **XV. ADMINISTRATION OF DECEDENT'S ESTATE.**

#### **When Sole Asset Cause of Action.**

A cause of action under the Federal Employers' Liability Act constitutes an estate upon which administration may be granted. *St. Louis S. W. R. Co. v. Smitha*, — Tex. Civ. App. —, 190 S. W. 237.

#### **Cause of Action Arising in Foreign State.**

Where an employee was injured while engaged in interstate commerce in a foreign state, and brought an action under the Federal Employers' Liability Act in the county in which he was domiciled, although his residence was in another state in which he afterwards died, the court of the forum may grant administration on the decedent's estate and his personal representative may prosecute such action, although of a transitory nature, to a conclusion. *St. Louis S. W. R. Co. v. Smitha*, — Tex. Civ. App. —, 190 S. W. 237.

#### **Administration When Decedent Resident of Foreign State.**

Notwithstanding the transitory nature of the cause of action given by the Federal Employers' Liability Act, the situs of a right of action for fatal injuries sustained in a foreign state, is, for the purpose of administration, the domicile of the decedent, although he was a resident of a different state. *St. Louis S. W. R. Co. v. Smitha*, — Tex. Civ. App. —, 190 S. W. 237.

An administrator may be appointed by the courts of a decedent's domicile to prosecute an action under the Federal Employers' Liability Act, although the latter was a resident of a foreign state and his injuries were received in a different state, where the employer was a resident of the domicile and could not be sued in the state in which the decedent re-

sided. *St. Louis S. W. R. Co. v. Smitha*, — Tex. Civ. App. —, 190 S. W. 237.

#### **Appointment of Temporary Administrator to Prosecute Action.**

A temporary administrator may be appointed under Texas R. S., Arts. 3297, 3298, to prosecute an action under the Federal Employers' Liability Act for wrongful death, although the action will necessarily extend beyond the time for the next meeting of the probate court. *Gulf, C. & S. F. R. Co. v. Cooper*, — Tex. Civ. App. —, 191 S. W. 579.

#### **Effect of Settlement With Illegally Appointed Administrator.**

A personal representative appointed by a probate court of the forum may recover under the Federal Employers' Liability Act for the death of an employee, notwithstanding a previous settlement by the defendant with an administrator appointed by a probate court of a foreign state in which the decedent had no estate and of which he was not a resident, since such appointment was a nullity. *Gilman v. Hoosac T. & W. R. Co.*, — Vt. —, 98 Atl. 982.

#### **Collateral Attack.**

Neither the full faith and credit clause of the Federal Constitution nor the Act of Congress thereunder, prevents an inquiry, in an action under the Federal Employers' Liability Act for wrongful death, into the jurisdiction of a probate court of a foreign state to appoint an administrator with whom the defendant previously had made a settlement, by showing that such court was without jurisdiction because the decedent was not a resident of such state and did not have any estate therein at the time of his death. *Gilman v. Hoosac T. & W. R. Co.*, — Vt. —, 98 Atl. 982.

Since state statutes providing that the jurisdiction assumed by probate courts, so far as depending on the residence of a person or the location of his estate, may be contested only on appeal from such courts, or when want of jurisdiction appears on the record, and that the court first taking cognizance of the matter shall have exclusive jurisdiction, apply only to the probate courts of the state, they do not preclude the plaintiff, in an action in a court of such state, under the Federal Employers' Liability Act for the death of an employee, from contesting the jurisdiction of a probate court of another state to appoint an administrator for the estate of the decedent, with whom the defendant previously had made a settlement, on the ground that the decedent was not a resident of and never had any estate in the foreign state. *Gilman v. Hoosac T. & W. R. Co.*, — Vt. —, 98 Atl. 982.

### **XVI. ACTIONS.**

#### **A. In General.**

##### **Joinder of Common Law and Federal Act.**

There may be a joinder of causes of action against a railway company and a depot company for injuries to an employee of the latter company, although its liability rests on the Federal Employers' Liability Act and that of the railway company on the common law. *Doyle v. St. Paul Union Depot Co.*, — Minn. —, 159 N. W. 1081.

#### **C. Limitations.**

##### **In General.**

Since the Federal Employers' Liability Act creates a new liability and takes away defenses formerly available, the right of action thereby created is conditional upon its enforcement within two years. *Bement v. Grand Rapids & I. R. Co.*, — Mich. —, 160 N. W. 424.

In order to recover under the Federal Employers' Liability Act the plaintiff must prove that his action was begun within two years from the day his right of action accrued. *Corico v. Smith*, 161 N. Y. Supp. 293.

##### **Conduct of Defendant Preventing Timely Action.**

The failure to bring an action for personal injuries under the Federal Employers' Liability Act within two years precludes a recovery, although the delay was due to reliance placed by the plaintiff upon the fraudulent representations made by the defendant. *Bement v. Grand Rapids & I. R. Co.*, — Mich. —, 160 N. W. 424.

#### **D. What Law Controls.**

Controlling effect of Federal Law as question for court, see *infra* XIX, B.

##### **1. Federal.**

##### **In General.**

The Federal Employers' Liability Act controls, although not considered at the trial, when the evidence shows that the plaintiff sustained injuries while employed in interstate commerce. *Hunt v. Illinois S. R. Co.*, 196 Ill. App. 539.

The Federal Employers' Liability Act controls, whether an employer's violation of the Federal Safety Appliance Act or general negligence is charged. *Hunt v. Illinois S. R. Co.*, 196 Ill. App. 539.

##### **How Invoked.**

The Federal Employers' Liability Act may be invoked by the defendant, although not set up in its answer, by a motion for

a directed verdict in an action by a widow in her own name under a state law for the death of her husband. *Hein v. Great N. R. Co.*, — N. D. —, 159 N. W. 14.

#### **Actions in Forma Pauperis.**

The Federal Act of June 25, 1910, ch. 435, 36 U. S. Stat. L. 866, relating to the prosecution of actions in forma pauperis, does not apply to an action in a state court under the Federal Employer's Liability Act. *Going v. Norfolk & W. R. Co.*, — Va. —, 89 S. E. 914.

#### **Federal Decisions Binding on State Courts.**

The Federal decisions furnish the exclusive rules of substantive law applicable to an action based on the Federal Employers' Liability Act. *Manning v. Chicago G. W. R. Co.*, — Minn. —, 160 N. W. 787.

Decisions of the Supreme Court of the United States construing the Federal Employers' Liability Act are binding on state courts. *McBain v. Northern P. R. Co.*, — Mont. —, 160 Pac. 654.

### **2. State or Common Law.**

#### **In General.**

When the facts show that an employee was injured while engaged in interstate commerce there can be no recovery under a state law, since the Federal Employers' Liability Act controls. *Hunt v. Illinois S. R. Co.*, 196 Ill. App. 539; *New Orleans, M. & C. R. Co. v. Jones*, — Miss. —, 72 So. 681.

#### **When Employment in Interstate Commerce Not Shown.**

In an action for injuries to a railway employee there may be a recovery under a count of a petition based on a state law, although another count is based on the Federal Employers' Liability Act, without an affirmative showing that neither he nor the defendant were engaged in interstate commerce at the time the accident occurred. *Louisville & N. R. Co. v. Layton*, 145 Ga. 886, 90 S. E. 53.

#### **When No Surviving Beneficiaries Recognized by Federal Law.**

Adult brothers and sisters of the half blood who were not dependent on a deceased railway employee so as to come within the purview of the Federal Employers' Liability Act, cannot recover under a state law for his death on the theory that persons not belonging to any of the classes designated by the Federal law are within the state law. *New Orleans, M. & C. R. Co. v. Jones*, — Miss. —, 72 So. 681.

#### **State Workmen's Compensation Acts.—In General.**

A state Workmen's Compensation Act does not provide a remedy for injuries sustained by a railway employee as the result of negligence while engaged in interstate commerce, since the Federal Employers' Liability Act gives the exclusive remedy. *Waters v. Guile*, — C. C. A. —, 234 Fed. 532; *Grand Trunk R. Co. v. Knapp*, 147 C. C. A. 624, 233 Fed. 950; *Southern P. Co. v. Industrial Accident Board* (three cases), — Cal. —, 161 Pac. 1139, 1142, 1143.

#### **—Employee of Interstate Carrier Injured While Engaged in Intrastate Commerce.**

Compensation may be awarded under a state Workmen's Compensation Act for injuries sustained by an employee of an interstate railway company arising out of and in the course of the former's employment while not engaged in such commerce. *New York C. R. Co. v. White*, 243 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. 247, affirming 216 N. Y. 653, 110 N. E. 1051, 169 App. Div. 903, 152 N. Y. Sup. 1149; *Raymond v. Chicago, M. & St. P. R. Co.*, 243 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. 268.

Since a night watchman charged with the duty of guarding tools and materials intended for use in the construction of a new station and tracks for an interstate railway company and designed for use in interstate commerce when completed, is not within the Federal Employers' Liability Act, compensation may be awarded under a state Workmen's Compensation Act for accidental injuries received by him arising out of and in the course of his employment and resulting in his death. *New York C. R. Co. v. White*, 243 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. 247, affirming 216 N. Y. 653, 110 N. E. 1051, 169 App. Div. 903, 152 N. Y. Sup. 1149.

#### **—Effect of Abortive Proceedings Under State Law.**

The fact that a person who was injured while in the employ of an interstate railway company that had elected to come within a state Workmen's Compensation Act, gave notice of his injury to his employer and to the State Industrial Board under the state law, does not bar a subsequent action under the Federal Employers' Liability Act where no settlement was made under the local law, although it provided that the filing of a claim thereunder should constitute a release of all demands at law. *Waters v. Guile*, — C. C. A. —, 234 Fed. 532.

#### **—Payment of Medical Expenses Under State Law.**

The fact that a railway company, in



accordance with a state Workmen's Compensation Act by which it had elected to be governed, provided medical and hospital services for an employee who was injured while engaged in intrastate commerce, does not estop the latter, although he made a claim for damages under the state law, from subsequently maintaining an action under the Federal Employers' Liability Act. *Waters v. Guile*, — C. C. A. —, 234 Fed. 532.

### 3. State Laws Relating to Particular Questions.

#### Rules of Procedure.

The rules of procedure applicable to an action under the Federal Employers' Liability Act are those of the forum. *Manning v. Chicago G. W. R. Co.*, — Minn. —, 160 N. W. 787.

#### Safe Place.

A state statute relating to the safe-place doctrine is not applicable to an action predicated on the Federal Employers' Liability Act. *Kolasinski v. Chicago, M. & St. P. R. Co.*, — Wis. —, 159 N. W. 563.

#### Assumed Risk.

A state constitutional requirement for the submission of the question of assumed risk the the jury as a question of fact, does not apply to actions founded on the Federal Employers' Liability Act. *Chicago, R. I. & P. R. Co. v. Jackson*, — Okla. —, 160 Pac. 736.

#### Burden of Proof.

The question of burden of proof in an action under the Federal Employers' Liability Act, is a matter of substantive law which is not governed by the law of the forum. *Manning v. Chicago G. W. R. Co.*, — Minn. —, 160 N. W. 787.

#### Quantity of Proof.

In determining whether the evidence shall be submitted to the jury in an action under the Federal Employers' Liability Act, the scintilla doctrine of the forum may be applied by a state court to the exclusion of the rule adopted by the Federal courts. *Mulligan v. Atlantic C. L. R. Co.*, 104 S. C. 173, 88 S. E. 445, affirmed 242 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. 241.

The "scintilla" rule of evidence of the forum will be followed in an action under the Federal Employers' Liability Act. *Lexington & E. R. Co. v. Smith*, — Ky. —, 188 S. W. 1091.

#### Costs of Printing Record.

A state law relative to the cost of printing the record, etc., on appeal governs an action in a state court under

the Federal Employers' Liability Act. *Going v. Norfolk & W. R. Co.*, — Va. —, 89 S. E. 914.

### E. Jurisdiction of Courts.

#### State Courts.

A state court does not lose jurisdiction of a railway employee's action for personal injuries because it appears that he was injured while engaged in interstate commerce and that the Federal Employers' Liability Act controls. *Bennett v. Great N. R. Co.*, 115 Minn. 128, 131 N. W. 1066.

#### F. Removal of Causes.

#### When Both Federal and State Law Pleaded.

When the Federal Employers' Liability Act controls an action it is not removable from a state to a Federal court, although such act and a state law are pleaded in different counts of the plaintiff's petition. *Jones v. Southern R. Co.*, 236 Fed. 584.

#### G. Election of Remedies.

#### By Resisting Removal to Federal Court.

A railway employee who successfully resists the removal from a state to a Federal court of his action for personal injuries because based on the Federal Employers' Liability Act, thereby elects between a right of action under such statute and at common law and must abide by his election. *Killes v. Great N. R. Co.*, — Wash. —, 161 Pac. 69.

#### Between Federal Act and State Workmen's Compensation Law.

An injured railway employee does not elect to become bound by the provisions of a state Workmen's Compensation Act to the exclusion of the Federal Employers' Liability Act, by reason of the payment by his employer of his physician's and hospital bills as required by the state law. *Grand Trunk R. Co. v. Knapp*, 147 C. C. A. 624, 233 Fed. 950.

### H. Parties.

#### Recovery by Temporary Administrator.

A temporary administrator appointed under Texas R. S., Arts. 3297, 3298, may prosecute an action under the Federal Employers' Liability Act, although the action will necessarily extend beyond the time for the next meeting of the probate court. *Gulf, C. & S. F. R. Co. v. Cooper*, — Tex. Civ. App. —, 191 S. W. 579.

#### Action in Name of Widow.

A widow cannot maintain an action in

her own name under the Federal Employers' Liability Act for the death of her husband. *Hein v. Great N. R. Co.*, — N. D. —, 159 N. W. 14.

#### **When Common-Law Negligence Only Submitted.**

An objection that a personal representative only could maintain an action for the death of a railway employee is without merit when common-law negligence only was submitted to the jury, although the Federal Employers' Liability Act was also pleaded. *Paris & G. N. R. Co. v. Boston*, — Tex. Civ. App. —, 142 S. W. 944, affirmed 231 U. S. 742, 58 L. ed. 462, 34 Sup. Ct. Rep. 318.

### **J. Pleading.**

#### **1. Declaration or Complaint.**

##### **(b) What Must Be Alleged.**

#### **Commencement of Action Within Statutory Period.**

The complaint in an action under the Federal Employers' Liability Act must show that the action was commenced within two years from the day the cause of action accrued. *Corico v. Smith*, 161 N. Y. Supp. 293.

#### **Federal Law.**

In order to invoke the Federal Employers' Liability Act the plaintiff must allege that his case is within such statute, although it need not be specially referred to. *Hogarty v. Philadelphia & R. R. Co.*, — Pa. —, 99 Atl. 741, S. C. 245 Pa. 443, 91 Atl. 854.

The plaintiff may invoke the Federal Employers' Liability Act, although not specifically referred to, where his pleadings show that he was injured while employed in interstate commerce. *Hogarty v. Philadelphia & R. R. Co.*, — Pa. —, 99 Atl. 741, S. C. 245 Pa. 443, 91 Atl. 854.

The plaintiff is not entitled to the benefit of the Federal Employers' Liability Act where a common-law right of action only is alleged without showing that he or the defendant were engaged in interstate commerce at the time of the accident. *Hogarty v. Philadelphia & R. R. Co.*, — Pa. —, 99 Atl. 741, S. C. 245 Pa. 443, 91 Atl. 854.

#### **When Facts Bring Case Within Federal Law.**

The Federal Employers' Liability Act controls an action, although not pleaded, where the Federal Safety Appliance Act alone is declared on and the employment of the injured employee in interstate commerce is shown. *Hunt v. Illinois S. R. Co.*, 196 Ill. App. 539.

If a common-law right of action only is pleaded the plaintiff cannot invoke the aid of the Federal Employers' Liability Act, although the defendant may do so if it appears by its proof or that of the plaintiff that an employee was engaged in interstate commerce at the time of his injury. *Hogarty v. Philadelphia & R. R. Co.*, — Pa. —, 99 Atl. 741, S. C. 245 Pa. 443, 91 Atl. 854.

#### **Employment in Interstate Commerce.**

It is essential to a recovery under the Federal Employers' Liability Act that the plaintiff shall allege and prove that the defendant and the injured employee were both engaged in interstate commerce at the time of the accident. *Norfolk & W. R. Co. v. Short*, 171 Ky. 647, 188 S. W. 786.

The plaintiff must plead his employment in interstate commerce at the time of his injury in order to invoke the protection of the Federal Employers' Liability Act. *McBain v. Northern P. R. Co.*, — Mont. —, 160 Pac. 654.

#### **Curing Defects in Complaint from Allegations of Defendant's Pleadings.**

The failure of the plaintiff to allege the employment of his intestate in interstate commerce, in action under Federal Employers' Liability Act, is cured where the omission is supplied by the defendant's answer. *Nashville, C. & St. L. R. Co. v. Anderson*, 134 Tenn. 666, 185 S. W. 677.

#### **(c) Sufficiency.**

##### **Failure to Demur.**

When the sufficiency of a complaint in an action under the Federal Employers' Liability Act is not tested by demurrer under Act of Ind. Gen. Assembly, 1911, p. 415, there is a waiver of any defects therein. *Cincinnati, H. & D. R. Co. v. Gross*, — Ind. —, 114 N. E. 962, affirming — Ind. App. —, 111 N. E. 653.

#### **Employment in Interstate Commerce.**

The employment of a brakeman in interstate commerce is shown, within the meaning of the Federal Employers' Liability Act, by a complaint alleging in substance that while he was employed on a local freight train which carried interstate freight he was injured while moving on a side track at a station cars that were not alleged to have been employed in such commerce. *Chicago & E. R. Co. v. Feightner*, — Ind. App. —, 114 N. E. 659.

#### **Negligence of Fellow Servant.**

An allegation that an officer, agent or employee of the defendant, while acting within the scope of his employment, negligently pushed or shoved a barrel of oil from a car and upon or against the

plaintiff, a coemployee, sufficiently shows the negligence of the defendant in an action based on the Federal Employers' Liability Act. *Western R. of Ala. v. Mays*, — Ala. —, 72 So. 641.

#### Cars Not in Clear.

The negligence of the defendant is sufficiently shown in an action under the Federal Employers' Liability Act, by averments to the effect that the plaintiff's intestate was struck and killed by a car which to the knowledge of his superiors, whose orders the decedent was obeying, had, without the latter's knowledge, been left in too close proximity to the entrance of a side track. *Chicago & E. R. Co. v. Feightner*, — Ind. App. —, 114 N. E. 659.

#### (d) Pleading Both Federal and State Laws.

##### In General.

A complaint in an action against a railway company and a depot company alleging that their concurrent negligence caused an injury to an employee of the latter company, is good as against a demurrer for misjoinder of causes of action, although the liability of the employer rested on the Federal Employers' Liability Act and that of the railway company on the common law. *Doyle v. St. Paul Union Depot Co.*, — Minn. —, 159 N. W. 1081.

When a petition is so drawn that an ordinary cause of action under a state law for personal injuries is intermingled with a statement of a cause of action under the Federal Employers' Liability Act for a violation of the Safety Appliance Act, to which the defendant does not demur, there may be a recovery under the Federal law. *Christy v. Wabash R. Co.*, — Mo. App. —, 191 S. W. 241.

The defendant in an action for injuries to a railway employee is not bound to object to the declaration because it is based on the common law, a state statute and the Federal law, since the applicable law is not a matter of election but one to be determined from the facts. *Hunt v. Illinois S. R. Co.*, 196 Ill. App. 539.

#### 4. Amendments.

##### In General.

There was no error in an action under the Federal Employers' Liability Act, in permitting the plaintiff at the close of his testimony in response to the defendant's motion to require an election as to which allegation of negligence the plaintiff relied on, to add a paragraph to his complaint to the effect, that all of the acts of negligence alleged, either concurring or singly, were the proximate cause of the death of his intestate, where

it did not appear that the defendant was prejudiced or surprised by the amendment or that all of its witnesses were not available to refute all the allegations of the complaint. *Kansas City S. R. Co. v. Leslie*, — Ark. —, 189 S. W. 171, S. C. 112 Ark. 306, 167 S. W. 83, Ann. Cas. 1915 B. 834, reversed 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844.

#### Setting Up Federal Law.

A railway employee who, within two years from the time he was injured, brings an action therefor under a state law, may, after the expiration of such time, amend his pleadings by invoking the Federal Employers' Liability Act, since a new cause of action was not introduced. *Kinney v. New York C. & H. R. R. Co.*, 162 N. Y. Supp. 42.

The failure of an employee, during the seven years his action was pending, in which three verdicts in his favor were set aside without conflicting with his ultimate right to recover, to amend his complaint by averring the Federal Employers' Liability Act, does not amount to gross laches justifying the denial of his motion to amend. *Kinney v. New York C. & H. R. R. Co.*, 162 N. Y. Supp. 42.

Where, within two years after the death of her husband, a widow brings action against an employer railway company in her own name under a state law, she may be permitted to amend her petition more than two years after her husband's death, by setting up her representative capacity so as to permit a recovery under the Federal Employers' Liability Act, since a new cause of action was not introduced by the amendment. *Lanis v. Illinois C. R. Co.*, — La. —, 72 So. 788, certiorari denied 243 U. S. 647, 61 L. ed. —, 37 Sup. Ct. Rep. 241.

When an employee's common-law right of action was barred by the receipt of benefits from a railway relief department, he cannot, where there was nothing in his original pleadings to show that either he or the defendant were engaged in interstate commerce at the time of the accident, be permitted to amend his pleadings nearly five years after his cause of action arose, by setting up the Federal Employers' Liability Act, notwithstanding that the defendant concedes his employment in such commerce. *Hogarty v. Philadelphia & R. R. Co.*, — Pa. —, 99 Atl. 741; S. C. 245 Pa. 443, 91 Atl. 854.

When the plaintiff's pleadings in an action for personal injuries show a common-law right of action only, without disclosing a liability under the Federal Employers' Liability Act, or that either the plaintiff or defendant were engaged in interstate commerce at the time the former was injured, the plaintiff should not be permitted, nearly five years after his cause

of action arose, to amend his pleadings by invoking the aid of the Federal Act, since a new cause of action would be introduced by such amendment. *Hogarty v. Philadelphia & R. R. Co.*, — Pa. —, 99 Atl. 741, S. C. 245 Pa. 443, 91 Atl. 854.

#### Conforming to Proofs.

Where, in an action based on the Federal Employers' Liability Act, the negligence relied on was an emergency application of the brakes by an engineer in response to a signal for a service application, and the evidence of the defendant tended to show that the accident was due to the negligence of a brakeman in transmitting signals from the injured employee to the engineer, the plaintiff was properly permitted to amend his declaration at the trial to meet such proof. *Waters v. Guile*, — C. C. A. —, 234 Fed. 532.

When, in an action based on the Federal Employers' Liability Act, the plaintiff fails to establish the negligence alleged by him, or when his allegations are met by the defendant's proof, and some new and independent act of negligence is shown, the plaintiff should not be permitted, to the prejudice of the defendant, to amend his complaint to meet such proof. *Scott v. Atlantic C. L. R. Co.*, — S. C. —, 89 S. E. 1038.

### XVII. DAMAGES.

Instructions as to damages, see *infra* XIX, E, 6.

#### B. For Injuries.

##### Injuries Impairing Earning Capacity.

##### — Present Worth of Damages.

In determining the loss to an employee from permanent injuries impairing his earning power, the jury, in an action under the Federal Employers' Liability Act, may reduce the amount of damages to its present cash value. *Louisville & N. R. Co. v. Paschal*, 145 Ga. 251, 89 S. E. 620.

#### C. For Death.

##### Conscious Pain and Suffering.

See also *supra* XIV.

In awarding damages for conscious pain and suffering in an action under the Federal Employers' Liability Act, the deceased employee's age, industry, health, ability to work, earning capacity, usual earnings and probable duration of life cannot be taken into consideration. *Great N. R. Co. v. Capital Trust Co.*, 242 U. S. 144, 61 L. ed. —, 37 Sup. Ct. Rep. 41, reversing 128 Minn. 537, 150 N. W. 1102, and 127 Minn. 144, 149 N. W. 14, 7 N. C. C. A. 154.

Damages may be awarded under the Federal Employers' Liability Act in such sum as the jury finds from the evidence will be a fair and just compensation for

such conscious pain and suffering as a deceased employee endured on account of his injury between the time it occurred and his death. *Kansas City S. R. Co. v. Leslie*, — Ark. —, 189 S. W. 171, S. C. 112 Ark. 306, 167 S. W. 83, Ann. Cas. 1915 B. 834, reversed 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844.

#### Loss Sustained by Minor Children.

The measure of recovery under the Federal Employers' Liability Act for the benefit of an infant child, is such financial assistance as it might reasonably have expected to receive from the decedent had he lived, depending on his earning capacity and consequent ability to supply the child with assistance. *Davis v. Cincinnati, N. O. & T. P. R. Co.*, — Ky. —, 188 S. W. 1061.

In an action under the Federal Employers' Liability Act for the benefit of the infant child of a deceased employee there can be no recovery for the money value of "that care, counsel, training and education" which the former might reasonably have expected to receive from the parent, but for his death, and which could be supplied by the services of others only for compensation. *Davis v. Cincinnati, N. O. & T. P. R. Co.*, — Ky. —, 188 S. W. 1061.

#### F. Reasonableness.

##### 1. For Personal Injuries.

##### Loss of Arm.

A verdict for \$5,000 is not excessive under the Federal Employers' Liability Act for the loss of the right arm of an employee 47 years old, earning \$55 a month, where his injury almost totally incapacitated him from earning a livelihood. *Brightwell v. Lusk*, — Mo. App. —, 189 S. W. 413.

##### Broken Bones.

A verdict for \$15,000 is not excessive in an action under the Federal Employers' Liability Act for injuries to a fireman 40 years old, earning \$110 monthly, resulting in a "T" fracture of the tibia of the right leg, about 3 inches below the knee, and which was split half way to the knee joint, where the break did not unite properly, and he was left permanently deformed, with one leg an inch shorter than the other, with the bone turned outward and the foot turned inward, and which would always cause him pain and incapacitate him from following railroad work. *Manning v. Chicago G. W. R. Co.*, — Minn. —, 160 N. W. 787.

##### 2. For Death.

##### Death of Husband.

An award of \$3,000 for the death of a husband who had a life expectancy of 23

years, and who earned \$45 a month, is not excessive in an action under the Federal Employers' Liability Act. *Lanis v. Illinois C. R. Co.*, — La. —, 72 So. 788, certiorari denied 243 U. S. 647, 61 L. ed. —, 37 Sup. Ct. Rep. 241.

#### Death of Parent.

The award of one dollar to an adult daughter for the death of her father in an action under the Federal Employers' Liability Act for her benefit and that of her mother is, as to the defendant, within the maxim *de minimis non curat lex*, when such award does not even affect the cost of the suit. *Lanis v. Illinois C. R. Co.*, — La. —, 72 So. 788, certiorari denied 243 U. S. 647, 61 L. ed. —, 37 Sup. Ct. Rep. 241.

#### Death of Brother.

An award of \$1,500 under the Federal Employers' Liability Act for the benefit of a sister of the half blood who was able to maintain herself, is excessive where the decedent's total contributions to her support aggregated but \$37. *Smith v. Pryor*, — Mo. App. —, 190 S. W. 69.

### XVIII. EVIDENCE.

#### B. Presumptions.

##### Negligence.

Under the Federal Employers' Liability Act negligence on the part of a railway company is not presumed from the fact of the injury or death of an employee. *Landrum v. Western & A. R. Co.*, — Ga. —, 90 S. E. 710.

In an action under the Federal Employers' Liability Act no presumption of negligence arises from evidence that the plaintiff's injury was due to the running of one of the defendant's trains. *Ivey v. Louisville & N. R. Co.*, — Ga. App. —, 89 S. E. 629.

##### Res Ipsa Loquitur.

The doctrine of *res ipsa loquitur* applies to an action under the Federal Employers' Liability Act, where an employee was injured by the derailment on a curved track of a train running 35 miles an hour at a place where broken rails and rotten ties were found after the accident. *Manning v. Chicago G. W. R. Co.*, — Minn. —, 160 N. W. 787.

The doctrine of *res ipsa loquitur* is not applicable to an action under the Federal Employers' Liability Act for injuries sustained by a fireman who stumbled over a drawbar pin which worked up through the floor of the tender of a switch engine, where no omission of inspection by the defendant was shown, and it could not be charged with notice of the defect. *Toler*

*v. Northern P. R. Co.*, — Wash. —, 162 Pac. 538.

#### C. Burden of Proof.

##### 1. In General.

##### Common-Law Rules.

The common-law rules as to the burden of proof were not altered by the Federal Employers' Liability Act. *Washington-S. R. Co. v. Smith*, — App. D. C. —, 44 Wash. L. R. 338.

##### Applicability of Federal Law.

The plaintiff must prove, in order to bring himself within the Federal Employers' Liability Act, that his case is within such statute, although it need not be specially referred to in his pleadings. *Hogarty v. Philadelphia & R. R. Co.*, — Pa. —, 99 Atl. 741, S. C. 245 Pa. 443, 91 Atl. 854.

##### Employment in Interstate Commerce.

The burden of showing his employment in interstate commerce so as to bring him within the protection of the Federal Employers' Act, rests on the plaintiff. *McBain v. Northern P. R. Co.*, — Mont. —, 160 Pac. 654.

Evidence that an employee was injured while removing a heavy barrel of oil that had come from another state from a train moving both interstate and intrastate freight, is sufficient to discharge the burden resting on the plaintiff in an action under the Federal Employers' Liability Act for his injuries, to show that they were sustained while engaged in interstate commerce. *Western R. of Ala. v. Mays*, — Ala. —, 72 So. 641.

##### Preponderance.

The plaintiff must sustain the essential averments of his petition by a preponderance of the evidence in an action based on the Federal Employers' Liability Act. *Ivey v. Louisville & N. R. Co.*, — Ga. App. —, 89 S. E. 629.

#### D. Admissibility of Evidence.

##### 1. In General.

##### Decree of Divorce.

A decree of divorce requiring a husband to pay his wife a stated sum for the support of their minor child is not admissible in an action for the benefit of the infant under the Federal Employers' Liability Act for the death of the father, as tending to show absence of dependency. *Davis v. Cincinnati, N. O. & T. P. R. Co.*, — Ky. —, 188 S. W. 1061.

##### Size of Family.

An employee cannot, in an action under

the Federal Employers' Liability Act for personal injuries, testify that he has a wife and child. *Macon, D. & S. R. Co. v. Musgrove*, 145 Ga. 647, 89 S. E. 767.

#### Inability to Obtain Employment.

An employee suing under the Federal Employers' Liability Act for the loss of an arm, which loss unfitted him for following his employment, may testify that since the first of December preceding the trial he had no active employment although he attempted to obtain work during that time, as such testimony bears on the question of his loss. *Macon, D. & S. R. Co. v. Musgrove*, 145 Ga. 647, 89 S. E. 767.

### 14. Medical Testimony.

#### In General.

Whether the relation of physician and patient exists between an injured employee and a railway surgeon is a question for the court in an action under the Federal Employers' Liability Act, where the physician seeks to divulge statements made in his presence by the employee. *Cincinnati, H. & D. R. Co. v. Gross*, — Ind. —, 114 N. E. 962, affirming — Ind. App. —, 111 N. E. 653.

A railway physician who attended an injured employee both before and after he was interviewed by representatives of the railway company pertaining to the cause of his injuries, cannot, under Burn's Ind. Stat. 1914, section 520, testify in an action under the Federal Employers' Liability Act as to statements made by the injured employee during such interview. *Cincinnati, H. & D. R. Co. v. Gross*, — Ind. —, 114 N. E. 962, affirming — Ind. App. —, 111 N. E. 653.

### 17. Photographs.

#### X-Ray Photographs.

X-Ray photographs showing the extent of an employee's injuries are admissible in an action founded on the Federal Employers' Liability Act. *Hunt v. Illinois S. R. Co.*, 196 Ill. App. 539.

### 20. Res Gestæ.

#### In General.

A declaration made by a person immediately after he was fatally injured by an explosion of fuel oil, tending to show that it was caused by the carelessness of a foreman, is admissible as part of the res gestæ in an action under the Federal Employers' Liability Act when such declaration was made under great excitement and under circumstances precluding any design to falsify. *Landis v. Illinois C. R. Co.*, — La. —, 72 So. 788, certiorari denied 243 U. S. 647, 61 L. ed. —, 37 Sup. Ct. Rep. 241.

The admissibility as a part of the res gestæ of statements made by employees to each other immediately after an accident as to its cause, is a question for the trial court in an action under the Federal Employers' Liability Act. *Cincinnati, H. & D. Co. v. Gross*, — Ind. —, 114 N. E. 962, affirming — Ind. App. —, 111 N. E. 653.

Where an employee of an express company was injured when he stepped from the door of a car under the impression that a truck was standing beneath it, testimony that another employee, in response to the former's inquiry, immediately after the accident, as to who removed the truck, stated that "your own man did it," is not admissible as a part of the res gestæ in an action based on the Federal Employers' Liability Act. *Chapman v. United States Express Co.*, — Mich. —, 159 N. W. 308.

### 24. Lookout and Warning.

#### Backing Cars.

In an action under the Federal Employers' Liability Act for the death of an employee who was struck by a backing caboose that was moved without a lookout in a busy railway yard, evidence is admissible to show that a large number of persons were employed in the yard and that they were in the habit of walking across the tracks with the knowledge and acquiescence of the defendant, in order to show the duty of the defendant in anticipating their presence and in exercising care in keeping a lookout for them and warning them of danger. *Lexington & E. R. Co. v. Smith*, — Ky. —, 188 S. W. 1091.

### E. Weight and Sufficiency.

#### Sufficiency to Show Particular Facts.

##### — Movement of Car in Interstate Commerce.

A finding that a car was moving in interstate commerce is justified in an action under the Federal Employers' Liability Act, where the plaintiff was injured while placing an empty car into a local train for transportation to a neighboring town for loading on the same day with interstate freight. *Christy v. Wabash R. Co.*, — Mo. App. —, 191 S. W. 241.

##### — Negligence of Fellow Servant.

Where an employee of an express company was injured by stepping from the door of a car under the impression that a truck was standing beneath it, but which, contrary to custom, had been removed without notice to him, and the evidence showed that immediately after the accident another employee stood leaning against the truck in a dazed manner, such

evidence is sufficient to justify an inference of negligence in an action under the Federal Employers' Liability Act. *Chapman v. United States Express Co.*, — Mich. —, 159 N. W. 308.

#### **Sufficiency to Sustain Particular Findings. — Obviousness of Danger.**

The fact that before alighting from a slowly moving train in a railway yard a brakeman might have seen a large piece of slag upon which he jumped and was injured, is not sufficient to permit the jury in an action under the Federal Employers' Liability Act to find that the danger was so open and obvious as to be assumed by the plaintiff, since what he might have known as to the situation bore only on the question of contributory negligence. *Cincinnati, N. O. & T. P. R. Co. v. Thompson*, — C. C. A. —, 236 Fed. 1.

#### **Sufficiency to Sustain Verdict.**

A verdict for the plaintiff in an action under the Federal Employers' Liability Act for the death of a fireman in consequence of the derailing of an engine on a curve, will not be set aside as flagrantly against the evidence where there is conflicting testimony as to the presence of many rotten cross ties in the track at the place where the accident occurred. *Davis v. Cincinnati, N. O. & T. P. R. Co.*, — Ky. —, 188 S. W. 1061.

#### **F. Demurrer to Evidence.**

##### **In General.**

A demurrer to the plaintiff's evidence cannot be sustained in an action under the Federal Employers' Liability Act for injuries caused by a defective car door falling on him, where the defendant negligently sent out the car without inspecting it. *Smith v. St. Louis & S. F. R. Co.*, 95 Kan. 451, 148 Pac. 759.

#### **I. Credibility and Conduct of Witnesses. Inconsistent Statements as to Cause of Injury.**

The fact that the grounds of negligence given an employer by an injured employee differ from those relied on in an action based on the Federal Employers' Liability Act, goes only to the latter's credibility. *Waters v. Guile*, — C. C. A. —, 234 Fed. 532.

### **XIX. TRIAL.**

#### **B. Questions for Court.**

##### **What Law Controls.**

Where it is not disputed that an employee was injured while handling a freight train which contained several cars engaged in interstate commerce, the question whether the Federal Employers' Li-

bility Act controls is one of law. *Hunt v. Illinois S. R. Co.*, 196 Ill. App. 539.

When it conclusively appears that both a carrier and an employee were engaged in interstate commerce at the time the latter was injured, the question of employment need not be submitted to the jury in an action founded on the Federal Employers' Liability Act. *Kansas City, M. & O. R. Co. v. Finke*, — Tex. Civ. App. —, 190 S. W. 1143.

#### **C. Submitting Case or Questions to Jury.**

##### **3. Questions for Jury.**

##### **Employment in Interstate Commerce.**

When there is conflicting evidence as to whether an employee was engaged in interstate or intrastate commerce at the time of his death, the question should be left to the jury under instructions as to the Federal Employers' Liability Act and the local laws as well. *Seyle v. Charleston Terminal Co.*, — S. C. —, 90 S. E. 1016.

Whether a car was intended for interstate use is a question for the jury in an action under the Federal Employers' Liability Act, where the evidence and the admissions of the parties show that the plaintiff was injured while placing an empty car in a local train for transportation to a neighboring town for loading the same day with an interstate shipment. *Christy v. Wabash R. Co.*, — Mo. App. —, 191 S. W. 241.

##### **Negligence.**

Ordinarily the question of negligence is for the jury in an action under the Federal Employers' Liability Act. *Gulf, C. & S. F. R. Co. v. Cooper*, — Tex. Civ. App. —, 191 S. W. 579.

##### **Excessive Speed.**

When there is uncontradicted opinion evidence as to the excessive speed of a train at the time the engine was derailed at a curve and the fireman killed, the question of the defendant's negligence is for the jury in an action under the Federal Employers' Liability Act. *Davis v. Cincinnati, N. O. & T. P. R. Co.*, — Ky. —, 188 S. W. 1061.

##### **Defective Tools.**

The question of the negligence of the defendant in furnishing a defective hammer and old nails for the use of his employees is for the jury in an action based on the Federal Employers' Liability Act for injuries sustained by an employee by a piece of steel which flew from the head of the hammer or from a nail which a coemployee was driving. *Panhandle & S. F. R. Co. v. Fitts*, — Tex. Civ. App. —, 188 S. W. 528.

### Negligence of Fellow Servants.

Where a person working in a cinder pit was killed, as he emerged from a man-hole, by the movement of an engine which was started without warning, whether it was negligence for a coemployee to call the decedent from the pit without ascertaining whether the engine was about to move, is a question for the jury in an action under the Federal Employers' Liability Act. *Grybowski v. Erie R. Co.*, 88 N. J. L. 1, 95 Atl. 764, affirmed — N. J. L. —, 98 Atl. 1085.

The question of the negligence of a freight conductor is for the jury in an action under the Federal Employers' Liability Act for injuries sustained by a coemployee while attempting to lift a heavy barrel of oil from a car, where the conductor pushed or shoved the barrel just as the plaintiff and another employee were about to lift it from the car and caused it to fall on the plaintiff. *Western R. of Ala. v. Mays*, — Ala. —, 72 So. 641.

The question of the defendant's negligence is for the jury, in an action under the Federal Employers' Liability Act for injuries sustained by an employee of an express company by stepping from the door of a car under the impression that a truck was standing beneath it, when, contrary to custom, it had been removed without notice to him, and the evidence showed that immediately after the accident another employee stood leaning against the truck in a dazed manner. *Chapman v. United States Express Co.*, — Mich. —, 159 N. W. 308.

### Violation of Rules.

The question of the defendant's negligence was for the jury in an action under the Federal Employers' Liability Act, where a rule of a carrier required a man to be stationed on the front end of backing cars, and a section foreman who was aware of such a rule, in the performance of his duties in a railway yard, placed himself in front of a long train of empty cars standing without an engine attached, on a track not used for drilling purposes, and was run down and killed when an engine was attached to the far end of the string of cars which were then moved in violation of such rule. *Willever v. Delaware, L. & W. R. Co.*, — N. J. —, 99 Atl. 321, reversing 87 N. J. L. 348, 94 Atl. 959.

The question of the negligence of the defendant is for the jury in an action under the Federal Employers' Liability Act, where a switchman was struck by a train on a track at a station as he stepped from a parallel track to avoid injury from steam emitted by an engine on another track in consequence of the negligence of an engineer in opening the cylinder cocks in violation of the defendant's rules, at a

time when the engineer was aware of the decedent's position, and the latter had no reason to anticipate the opening of the cylinder cocks. *Haas v. Erie R. Co.*, — Pa. —, 98 Atl. 867.

### Defective Tracks.

The question of an employer's negligence is for the jury in an action under the Federal Employers' Liability Act for the death of a fireman as the result of the derailling of a locomotive on a curve, where there is conflicting evidence as to the presence of many rotten cross-ties in the track at the place where the accident occurred, *Davis v. Cincinnati, N. O. & T. P. R. Co.*, — Ky. —, 188 S. W. 1061.

### Assumed Risk.

The question of assumed risk is ordinarily for the jury in an action under the Federal Employers' Liability Act. *Gulf, C. & S. F. R. Co. v. Cooper*, — Tex. Civ. App. —, 191 S. W. 579.

The question of assumed risk is for the jury in an action founded on the Federal Employer's Liability Act for injuries sustained by a brakeman by stepping on a large piece of slag in a railway yard as he alighted from a slowly moving train, where there was conflicting evidence as to there being many similar pieces of slag about the yard. *Cincinnati, N. O. & T. P. R. Co. v. Thompson*, — C. C. A. —, 236 Fed. 1.

A finding by the jury in response to a question submitted by the defendant, that it was customary to leave a main line switch open when engines were taking coal and water on a siding, and that the plaintiff was or should have been aware of such custom, does not submit the issue of assumed risk in an action under the Federal Employers' Liability Act for injuries sustained by a roadmaster when his motor car ran into the open switch. *Kansas City, M. & O. R. Co. v. Finke*, — Tex. Civ. App. —, 190 S. W. 1143.

### Knowledge of Danger.

The question of assumed risk is for the jury in an action under the Federal Employers' Liability Act for injuries sustained by a roadmaster when his motor car was derailed at an open switch when the switch target showed the danger and should have been seen by him had he been looking, where he was not aware that an engine was on a siding taking coal and water. *Kansas City, M. & O. R. Co. v. Finke*, — Tex. Civ. App. —, 190 S. W. 1143.

### Contributory Negligence.

The question of contributory negligence is ordinarily for the jury in an action based on the Federal Employers' Liability Act. *Gulf, C. & S. F. R. Co. v. Cooper*, — Tex. Civ. App. —, 191 S. W. 579.



When the evidence pertaining to the contributory negligence of an injured employee is conflicting it becomes a question for the jury in an action under the Federal Employers' Liability Act. *Louisville & N. R. Co. v. Hall*, 98 C. C. A. 664, 174 Fed. 1021.

The plaintiff was not harmed by the withdrawal from the jury of the question of contributory negligence in an action based on the Federal Employers' Liability Act, where it was not pleaded or asserted by the defendant. *Ivey v. Louisville & N. R. Co.*, — Ga. App. —, 89 S. E. 629.

The submission of the question of contributory negligence to the jury in an action under the Federal Employers' Liability Act, so as to permit the jury the privilege of diminishing damages therefor, is reversible error in the absence of proof tending to show negligence on the part of the injured employee. *Davis v. Cincinnati, N. O. & T. P. R. Co.*, — Ky. —, 188 S. W. 1061.

#### **Child's Expectancy of Pecuniary Assistance from Father.**

The question whether during minority a child may expect pecuniary assistance from its father is not a question for the jury in an action under the Federal Employers' Liability Act, since the father was under a legal obligation to provide it. *Davis v. Cincinnati, N. O. & T. P. R. Co.*, — Ky. —, 188 S. W. 1061.

### **E. Instructions.**

#### **1. In General.**

#### **Both Parties Requesting Instruction on Erroneous Theory.**

When a petition intermingles a cause of action under a state law with one under the Federal Employers' Liability Act for a violation of the Safety Appliance Act, and each party presents instructions applicable to an action under the state law, neither can complain. *Christy v. Wabash R. Co.*, — Mo. App. —, 191 S. W. 241.

#### **Selecting More Dangerous of Two Ways of Boarding Engine.**

In an action under the Federal Employers' Liability Act for personal injuries the court correctly refused to instruct the jury to the effect that if the plaintiff had a choice between two ways of boarding an engine, one safe and the other dangerous, he could not recover if he was injured in consequence of taking the dangerous way, since such instruction ignored the effect of contributory negligence on the plaintiff's right to recover under the Federal law. *Macon, D. & S. R. Co. v. Musgrove*, 145 Ga. 647, 89 S. E. 767.

### **2. Assumed Risk.**

#### **Instruction Not Conforming to Facts.**

An instruction requested by the defendant as to negligence and assumed risk was properly refused in an action under the Federal Employers' Liability Act, where it did not embody all of the facts which the jury was entitled to consider. *Baltimore & O. R. Co. v. Whitacre*, 242 U. S. 169, 61 L. ed. —, 37 Sup. Ct. Rep. 33, affirming 124 Md. 411, 92 Atl. 1060.

#### **Risks of Employment.**

An instruction was correctly given in an action under the Federal Employers' Liability Act for injuries sustained by a brakeman from the fall of a defective car door, to the effect that he assumed the ordinary risks of his employment after the defendant had used reasonable and ordinary care to furnish a reasonably safe place in which to work, together with safe appliances for the plaintiff's use. *Smith v. St. Louis & S. F. R. Co.*, 95 Kan. 451, 148 Pac. 759.

#### **Negligence of Employer.**

When the evidence in an action based on the Federal Employers' Liability Act authorizes an instruction as to assumption of the risk of the master's negligence, it is error to give an unqualified instruction that an employee never assumes any risk or danger growing out of the negligence of the master. *Macon, D. & S. R. Co. v. Musgrove*, 145 Ga. 647, 89 S. E. 767.

#### **Effect of Obeying Orders.**

An instruction that the plaintiff could not recover under the Federal Employers' Liability Act for injuries sustained while assisting in removing a heavy barrel of oil from a car without waiting for assistance, as a bystander had suggested, was properly refused, since it assumed as a matter of law that such warning was sufficient notice to the plaintiff of the danger to cause him to appreciate it, no matter how negligible the source of the warning. *Western R. of Ala. v. Mays*, — Ala. —, 72 So. 641.

### **5. Contributory Negligence.**

#### **In General.**

It was not error in an action under the Federal Employers' Liability Act to fail to state the specific rule for the reduction of damages for contributory negligence, where no instruction on the subject was requested by the defendant. *Smith v. St. Louis & S. F. R. Co.*, 95 Kan. 451, 148 Pac. 759.

#### **When Contributory Negligence Not in Issue.**

The giving of an instruction as to contributory negligence was not injurious to

the plaintiff in an action under the Federal Employers' Liability Act, although such negligence was not pleaded nor asserted by the defendant, when such instruction was expressly withdrawn from the jury. *Ivey v. Louisville & N. R. Co.*, — Ga. App. —, 89 S. E. 629.

#### **Absence of Request for Specific Instruction.**

When the instructions as to diminution of damages for contributory negligence in an action under the Federal Employers' Liability Act, are correct in principle, they will be held sufficient, although incomplete, where the defendant does not request a more specific charge. *Cincinnati, H. & D. R. Co. v. Gross*, — Ind. —, 114 N. E. 962, affirming — Ind. App. —, 111 N. E. 653.

#### **Absence of Evidence of Contributory Negligence.**

It is reversible error to instruct the jury as to contributory negligence in an action under the Federal Employers' Liability Act, and to give the jury the privilege of diminishing the damages therefor, when there is a total absence of proof tending to show negligence on the part of a deceased employee. *Davis v. Cincinnati, N. O. & T. P. R. Co.*, — Ky. —, 188 S. W. 1061.

### **6. Damages.**

#### **Method of Reduction of Damages for Contributory Negligence.**

An instruction that if the plaintiff was guilty of contributory negligence the jury, in an action under the Federal Employers' Liability Act, should diminish the amount he should have received but for his own negligence, in the amount his negligence contributed to his injury, was erroneous. *Dowell v. Wabash R. Co.*, — Mo. App. —, 190 S. W. 939.

#### **Impairment of Earning Power.**

There was no error in instructing the jury, in an action under the Federal Employers' Liability Act, to the effect that there was no fixed rule for estimating and fixing permanent damages for personal injuries causing the impairment of earning power. *Louisville & N. R. Co. v. Paschal*, 145 Ga. 521, 89 S. E. 620.

In an action under the Federal Employers' Liability Act for permanent injuries impairing an employee's earning capacity, the jury should not be instructed to reduce the value of the plaintiff's earning capacity to its present cash value, since it is the plaintiff's loss by reason of his decreased earning capacity that forms the basis for his recovery. *Louisville & N. R. Co. v. Paschal*, 145 Ga. 521, 89 S. E. 620.

#### **For Benefit of Widow and Children.**

The jury was correctly instructed, in an action under the Federal Employers' Liability Act for wrongful death, to the effect that they should assess in a separate verdict the damages awarded for the benefit of a widow and child, at such sum as they should find, from the evidence, would be the present worth of what the decedent would have reasonably contributed to such beneficiaries in a financial way had he lived; limiting the recovery for the benefit of the child to such sum as the jury found would be the present worth of what the decedent would have contributed to the child in a financial way until its majority; and that the recovery for the widow should be such sum as the decedent would have contributed to her in a financial way during his life, had he lived. *Kansas City S. R. Co. v. Leslie*, — Ark. —, 189 S. W. 171, S. C. 112 Ark. 306, 167 S. W. 83, Ann. Cas. 1915 B. 834, reversed 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844.

#### **For Conscious Pain and Suffering.**

An instruction to the effect that the jury should assess in a separate verdict such sum as they might find from the testimony would be a fair and just compensation for the conscious pain and suffering which the decedent endured from the time of his injury until his death, was properly given in an action founded on the Federal Employers' Liability Act. *Kansas City S. R. Co. v. Leslie*, — Ark. —, 189 S. W. 171, S. C. 112 Ark. 306, 167 S. W. 83, Ann. Cas. 1915 B. 834, reversed 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844.

#### **Apportionment.**

In an action under the Federal Employers' Liability Act for the benefit of the widow and child of a deceased employee, the jury was correctly instructed that if they found a lump sum for the plaintiff they should apportion the same between the widow and child, giving the latter such amount as the evidence showed to be the present worth of the sum the decedent should have contributed to the child in a financial way until its majority. *Kansas City S. R. Co. v. Leslie*, — Ark. —, 189 S. W. 171, S. C. 112 Ark. 306, 167 S. W. 83, Ann. Cas. 1915 B. 834, reversed 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844.

### **7. Defective Engines and Cars.**

#### **Defective Car Door.**

In an action under the Federal Employers' Liability Act for injuries sustained by a brakeman from the fall of a defective car door, the jury was correctly instructed that it was negligence for the defendant to send out a car in bad order

without inspecting it. *Smith v. St. Louis & S. F. R. Co.*, 95 Kan. 451, 148 Pac. 759.

## 9. Evidence.

### In General.

When the sufficiency of the complaint in an action under the Federal Employers' Liability Act is not tested by demurrer, there is, under the terms of Act of Ind. Gen. Assembly, 1911, page 415, section 2, a waiver of any defects in such pleading, and the jury was properly instructed that the plaintiff might recover on proving the material averments of his complaint by a fair preponderance of the evidence. *Cincinnati, H. & D. R. Co. v. Gross*, — Ind. —, 114 N. E. 962, affirming — Ind. App. —, 111 N. E. 653.

### Prima Facie Evidence.

The jury was correctly instructed, in an action under the Federal Employers' Liability Act for injuries sustained by an employee from the derailment on a curve of a train running 35 miles an hour, that the facts showed prima facie evidence of negligence when broken rails and rotten ties were found after the accident. *Manning v. Chicago G. W. R. Co.*, — Minn. —, 160 N. W. 787.

Where the jury was instructed, in an action under the Federal Employers' Liability Act, that the fact that a train running 35 miles an hour was derailed on a curve where broken rails and rotten ties were found after the accident, was prima facie evidence of negligence on the part of the defendant, it was improper to further instruct that the burden of disproving negligence shifted to the latter, although the error was harmless, when no exception was taken, and the jury was further charged that the burden of proof rested on the plaintiff throughout the case. *Manning v. Chicago G. W. R. Co.*, — Minn. —, 160 N. W. 787.

## 15. Negligence in General.

### Concurrent Negligence.

The jury was correctly instructed, in an action based on the Federal Employers' Liability Act, to the effect that the plaintiff could recover if he was injured in consequence of the concurrent negligence of himself and the defendant if the negligence of the latter contributed in whole or in part to the injury. *Louisville & N. R. Co. v. Paschal*, 145 Ga. 521, 89 S. E. 620.

## 19. Rules.

### Exception in Rule.

#### — Conductor Riding on Engine.

Where a freight conductor was injured in a collision while riding on the engine of

his train in violation of a rule of his employer forbidding conductors riding elsewhere than in their cabooses, except in case of emergencies, it was error to instruct the jury, in an action based on the Federal Employers' Liability Act, that if the plaintiff rode on the engine in order to save walking from the caboose to facilitate the cutting out a few cars at the next stop an emergency existed within the meaning of such rule. *Louisville & N. R. Co. v. Paschal*, 145 Ga. 521, 89 S. E. 620.

## 20. Safe Places.

### Assumption That Safe Place Provided.

The jury was correctly instructed, in an action under the Federal Employers' Liability Act for injuries sustained by a brakeman from the fall of a defective car door, that the plaintiff could rightfully assume that the defendant had exercised reasonable and ordinary care to provide a reasonably safe place for the plaintiff to work and with reasonably safe appliances. *Smith v. St. Louis & S. F. R. Co.*, 95 Kan. 451, 148 Pac. 759.

## G. Directing Verdict.

### Failure of Proof.

It is only in the absence of any evidence tending to establish the plaintiff's cause of action as averred, that a verdict may be directed for the defendant in an action founded on the Federal Employers' Liability Act, since the court cannot judge of the sufficiency of the evidence nor determine which of two conflicting tendencies of evidence should be accepted. *Western R. of Ala. v. Mays*, — Ala. —, 72 So. 641.

### When Release Obtained by Fraud.

When the testimony relating to whether a release of an employee's cause of action was obtained by the misrepresentations of a railway surgeon as to the extent of the former's injuries and the assurance that he had fully recovered, is susceptible of more than one inference, a verdict cannot be directed for the defendant in an action based on the Federal Employers' Liability Act. *Ballenger v. Southern R. Co.*, — S. C. —, 90 S. E. 1019.

### Nonemployment in Interstate Commerce.

A peremptory instruction should be given for the defendant in an action founded on the Federal Employers' Liability Act when the evidence and all reasonable inferences therefrom fail to show the employment of a servant in interstate commerce at the time of his injury. *Cincinnati, N. O. & T. P. R. Co. v. Hansford*, — Ky. —, 190 S. W. 690.

**Failure to Show Negligence.**

A nonsuit was properly granted in an action based on the Federal Employers' Liability Act when the evidence authorized an inference that an employee was killed by a train in some undisclosed manner, but failed wholly to show negligence on the part of the defendant. *Landrum v. Western & A. R. Co.*, — Ga. —, 90 S. E. 710.

**For Assumed Risk.**

A verdict should be directed for the defendant in an action based on the Federal Employers' Liability Act, where it clearly appears that an employee assumed the risk that caused his injury. *Washington S. R. Co. v. Smith*, — App. D. C. —, 44 Wash. L. R. 338; *Chicago, B. & Q. R. Co. v. Jackson*, — Okla. —, 160 Pac. 736.

**For Contributory Negligence.**

An affirmative charge cannot be given for the defendant in an action based on the Federal Employers' Liability Act, because of the contributory negligence of the plaintiff. *Western R. of Ala. v. Mays*, — Ala. —, 72 So. 641.

**H. Argument to Jury.****Comment on Failure to Call Witnesses.**

The plaintiff's counsel may rightfully comment to the jury, in an action under the Federal Employers' Liability Act, on the failure of the defendant to call witnesses who were competent to testify to statements sought to be elicited from a physician who was an incompetent witness against the plaintiff. *Cincinnati, H. & D. R. Co. v. Gross*, — Ind. —, 114 N. E. 962, affirming — Ind. App. —, 111 N. E. 653.

**M. New Trial.****In General.**

Where, on the trial of an action under the Federal Employers' Liability Act, the plaintiff fails to establish the negligence alleged by him, or where his allegations are met by the defendant's proof, and some new and independent act of negligence appears, to meet which the plaintiff is permitted to amend his complaint, and judgment is rendered in his favor, the defendant is entitled to a new trial. *Scott v. Atlantic C. L. R. Co.*, — S. C. —, 89 S. E. 1038.

**XX. APPEAL AND ERROR.****A. To Federal Supreme Court.****5. From State Courts.****When Federal Questions Involved.**

No Federal question is presented on writ of error to a state court affirming a

ruling of a trial court in an action for the death of an employee, when no claim under the Federal Employers' Liability Act by pleadings or the evidence was asserted until a second trial, when the defendant, after amending its answer by setting up gross and wilful contributory negligence, at the close of the plaintiff's case offered for the first time evidence to show the decedent's employment in interstate commerce, which was rejected on the ground that it was not relevant to any issue made by the pleadings, since there was no denial of any Federal right which was asserted by the defendant at the proper time and in the proper manner either by pleading, motion or other appropriate action under the state system of pleading and practice. *Atlantic C. L. R. Co. v. Mims*, 242 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. 188, affirming 100 S. C. 375, 85 S. E. 372.

**6. Preserving Questions for Review.****In General.**

A judgment for the plaintiff in an action for personal injuries will not be reversed on the ground that he was not engaged in interstate commerce at the time of his injury, where the defendant did not at the trial in any way save the right to deny such employment or to object to the application of the Federal Employers' Liability Act but on the contrary invoked and relied on such law. *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. 170, affirming 126 Minn. 260, 148 N. W. 106, 131 Minn. 181, 496, 154 N. W. 946, 155 N. W. 1103.

**7. What Reviewable.****Employment in Interstate Commerce.**

A holding by a state court that an employee was not, within the meaning of the Federal Employers' Liability Act, engaged in interstate commerce at the time he was injured, will not be disturbed by the Supreme Court of the United States, where, while on his way to obtain orders for future work, a yard conductor was injured as he stepped from a switch engine with which he had just moved both interstate and intrastate cars and placed them on sidings, since the question of the nature of his employment depended upon the application of the facts and not on an interpretation of the Act of Congress. *Erie R. Co. v. Welsh*, 242 U. S. 303, 61 L. ed. —, 37 Sup. Ct. Rep. 116, affirming 89 Ohio 81, 105 N. E. 189.

**8. Affirmance or Reversal.****When Palpable Error Not Shown.**

A unanimous holding by a state court of last resort that an action under the

Federal Employers' Liability Act was properly left to the jury, will not be disturbed by the Supreme Court of the United States where no clear and palpable error appears. *Baltimore & Ohio R. Co. v. Whitacre*, 242 U. S. 169, 61 L. ed. —, 37 Sup. Ct. Rep. 33, affirming 124 Md. 411, 92 Atl. 1061.

#### Harmless Error.

Where, in an action for the death of a railway employee, the defendant did not seek to go to the jury on the question of the decedent's employment in interstate commerce, but merely requested a directed verdict on the ground that, as a matter of law, the decedent was engaged in such commerce, a judgment for the plaintiff will not be reversed, when if such question had been submitted to the jury and the testimony tending to show such employment had not been believed, a verdict for the plaintiff would have had to stand, since the motion was properly denied. *Louisville & N. R. Co. v. Parker*, 242 U. S. 13, 61 L. ed. —, 37 Sup. Ct. Rep. 4, affirming 165 Ky. 658, 177 S. W. 465.

### C. Practice in General.

#### 1. In General.

##### Premature and Fragmentary Appeal.

Where, in an action by an administrator for the death of a minor railway employee while engaged in interstate commerce, the defendant set up a release executed by the guardian of the intestate, and the plaintiff's demurrer thereto on the ground that the guardian could not release either his ward's cause of action or the right of action under the Federal Employers' Liability Act for his wrongful death, was overruled without the entry of a formal judgment or allowance of costs, the plaintiff's appeal therefrom will be dismissed since premature and fragmentary. *Chambers v. Seaboard A. L. R. Co.*, — N. C. —, 90 S. E. 590.

##### Construction of Pleading.

The construction placed by the trial court on the complaint with respect to being based on the Federal Employers' Liability Act, will be adopted by an appellate court when fairly open to the construction given it, even though open to another and equally reasonable interpretation. *Cincinnati, H. & D. R. Co. v. Gross*, — Ind. —, 114 N. E. 962, affirming — Ind. App. —, 111 N. E. 653.

##### Presumptions.

When a general verdict is returned in an action under the Federal Employers' Liability Act and it is impossible to determine with certainty whether the employee was found guilty of contributory

negligence, it will be presumed on appeal that the jury absolved him from such negligence where no special charge on the subject was requested and no complaint was made as to the amount of the recovery. *Gulf, C. & S. F. R. Co. v. Cooper*, — Tex. Civ. App. —, 191 S. W. 579.

### 3. Questions Not Raised Below.

#### Employment in Service of Defendant.

An appellate court will not consider, in an action under the Federal Employers' Liability Act, whether at the time of his injury the plaintiff was an employee of a railway company, where such question was determined in the plaintiff's favor by the jury without such finding being challenged by the defendant on a motion for a new trial. *Salabrim v. Ann Arbor R. Co.*, — Mich. —, 160 N. W. 552.

### 4. Estoppel to Raise Questions.

#### Rulings Obtained by Appellant.

An appellate court will not review a finding that an employee was within the Federal Employers' Liability Act, where such ruling was obtained at the instance of the appellant. *Lanis v. Illinois C. R. Co.*, — La. —, 72 So. 788, certiorari denied 243 U. S. 647, 61 L. ed. —, 37 Sup. Ct. Rep. 241.

The defendant is estopped, in an action based on the Federal Employers' Liability Act, from questioning the correctness of an instruction as to the apportionment of damages for contributory negligence, where such question was submitted to the jury by an instruction requested by the defendant. *Collins v. Michigan C. R. Co.*, — Mich. —, 159 N. W. 535.

### D. Reversible Error.

#### 1. In General.

##### When Assumption of Risk Shown.

Where all of the evidence, including that of the plaintiff, in an action under the Federal Employers' Liability Act, clearly shows assumption of risk, and the case was improperly submitted to the jury, a verdict for the plaintiff cannot be sustained. *Chicago, R. I. & P. R. Co. v. Jackson*, — Okla. —, 160 Pac. 736.

### 2. Admission or Rejection of Testimony.

Admissibility of evidence in general, see supra XVIII.

#### Divorce Decree.

The admission in evidence, in an action under the Federal Employers' Liability Act for the benefit of an infant child, of

a decree of divorce between its parents, requiring the divorced father to pay a stated sum to his wife for the support of the child, as tending to show absence of dependency, is reversible error. *Davis v. Cincinnati, N. O. & T. P. R. Co.*, — Ky. —, 188 S. W. 1061.

#### **Negligence Not Alleged.**

In an action under the Federal Employers' Liability Act for injuries sustained by a switchman as the alleged result of the instantaneous release of the air by an engineer, which the latter denied, and there was evidence tending to show that the air was not released, it was reversible error for the plaintiff to testify that the accident might have been caused by a leaky throttle, which was not alleged as negligence. *Aldread v. Northern P. R. Co.*, — Wash. —, 160 Pac. 429.

#### **Noncontributing Negligence.**

The admission of evidence of a rule and a custom of a carrier requiring the display of markers on the rear of trains, and of the nonobservance thereof on the occasion of a switchman's injury, is reversible error in an action under the Federal Employers' Liability Act, where the violation of such custom and rule was not a contributing cause of his injury. *Aldread v. Northern P. R. Co.*, — Wash. —, 160 Pac. 429.

#### **4. Instructions.**

Correctness of instructions in general, see supra XIX, E.

#### **When Instruction Given Substantially Same as Requested by Appellant.**

The defendant cannot complain on appeal that the instructions as to the measure of damages in an action under the Federal Employers' Liability Act, did not limit the recovery for the benefit of surviving parents to the present value of the future contributions of their deceased son,

where such instructions were substantially the same as those requested by the defendant. *Louisville & N. R. Co. v. Thomas*, 171 Ky. 476, 188 S. W. 463, S. C. 170 Ky. 145, 185 S. W. 840.

#### **6. Amount of Verdict.**

#### **Refusal of New Trial for Excessive Damages.**

The refusal of a trial court to grant a new trial in an action based on the Federal Employers' Liability Act for excessiveness of the damages, is a discretionary matter that is not subject to review by an appellate court. *Southern R. Co. v. White*, 146 C. C. A. 336, 232 Fed. 144.

#### **7. Harmless Error.**

#### **Submission to Jury of Conceded Questions.**

The submission to the jury in an action under the Federal Employers' Liability Act, of the question of the employment of the defendant and a deceased employee in interstate commerce, is harmless error where such employment was admitted by the defendant. *Davis v. Cincinnati, N. O. & T. P. R. Co.*, — Ky. —, 188 S. W. 1061.

#### **Questions Not Requested to Be Submitted to Jury.**

A judgment for the plaintiff will not be disturbed in an action under the Federal Employers' Liability Act because of assumed risk, when the appellant did not request the submission of such question to the jury, and there was evidence sufficient to sustain the verdict, since, under *Vernons' Sayles' Tex. Statutes*, Art. 1985, on appeal issues not submitted or requested will be deemed to be as found, so as to support the judgment, if there is sufficient evidence to sustain the finding. *Kansas City, M. & O. R. Co. v. Finke*, — Tex. Civ. App. —, 190 S. W. 1143.

# HOURS OF LABOR ACT\*

## FEDERAL

(See also Vol. I, No. 2.)

- I. VALIDITY AND CONSTRUCTION.
    - A. Validity.
    - C. Effect on State Laws.
  - VI. ACTIONS FOR VIOLATIONS.
    - A. Civil.
      - 1. Personal Injuries.
    - B. Criminal.
- (Will be covered in No. 4, Vol. I.)

### I. VALIDITY AND CONSTRUCTION.

#### A. Validity.

##### "Adamson" Eight-Hour Act.

The so-called "Adamson Law" (Act of Congress, Sept. 3, 5, 1916, c. 436, 39 Stat. at Large 721†) establishing an eight-hour workday for employees engaged in interstate and foreign commerce by rail, and fixing the measure of their compensation, is a valid enactment and within the powers of Congress. *Wilson v. Missouri, O. & G. R. Co.*, 243 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. — (decided March 19, 1917).

#### C. Effect on State Laws.

##### During Interim Between Adoption and Time of Taking Effect.

A state statute prohibiting the employment of crews on interstate trains for more than 16 consecutive hours was in force in the interim between the passage of the Federal Hours of Service Act and the time it became effective, and an employee may recover for injuries sustained as the result of a violation of

\*For text of Act see Vol. 1, No. 2, p. 396.

†See Appendix for text of this Act.

the state law. *Lloyd v. North Carolina R. Co.*, 151 N. C. 536, 66 S. E. 604.

### IV. ACTIONS FOR VIOLATIONS.

#### A. Civil.

##### 1. Personal Injuries.

##### Working Overtime as Negligence.

A carrier is answerable to an employee for injuries sustained in consequence of his working for more than 16 hours in violation of the Hours of Service Act, although the accident did not occur during such violation, but 14 hours thereafter. *Baltimore & O. R. Co. v. Wilson*, 242 U. S. 295, 61 L. ed. —, 37 Sup. Ct. Rep. 123, affirming 194 Ill. App. 491.

##### Assumed Risk.

An employee does not, under the Federal Employers' Liability Act, assume the risk of injuries proximately resulting from being compelled to work for more than 16 hours in violation of the Hours of Service Act, although the accident occurred 14 hours after such violation. *Baltimore & O. R. Co. v. Wilson*, 242 U. S. 295, 61 L. ed. —, 37 Sup. Ct. Rep. 123, affirming 194 Ill. App. 491.

##### Contributory Negligence.

Contributory negligence is not a defense to an action based on the Federal Employers' Liability Act for injuries proximately resulting from an employee being required to work for 16 hours in violation of the Hours of Service Act, although his injury was sustained 14 hours after such violation. *Baltimore & O. R. Co. v. Wilson*, 242 U. S. 295, 61 L. ed. —, 37 Sup. Ct. Rep. 123, affirming 194 Ill. App. 491.

## LIVE STOCK,

See Interstate Carriers of Freight and Express, VII.

# SAFETY APPLIANCE ACT.\*

## FEDERAL.

(See Also No. 2, Vol I.)

- II. NATURE AND CONSTRUCTION.
  - D. Effect on State Laws.
- III. DUTY IMPOSED.
  - B. Coupling Apparatus.
  - D. Power Brakes.
- VI. WHAT VEHICLES AND MOVEMENTS OF CARS WITHIN ACT.
  - A. In General.
  - H. Switching and Making Up Trains.
- VII. LIABILITY FOR PERSONAL INJURIES.
  - A. In General.
  - B. Injuries Due to Defective Coupling Apparatus.
  - C. Defective Grabirons, Handholds, Ladders and Running Boards.
  - D. Absence of or Defects in Power Brakes.
  - F. Going Between Cars.
  - G. Assumed Risk.
  - H. Contributory Negligence.
- VIII. ACTIONS.
  - A. In General.
  - E. Pleading.
  - F. Evidence.
    - 1. Judicial Notice.
    - 3. Burden of Proof.
    - 4. Admissibility.
  - I. Questions of Law and Fact.
  - L. Verdict.
  - N. Appeal and Error.

## II. NATURE AND CONSTRUCTION.

### D. Effect on State Laws.

#### Application of State Laws.

#### — Cars Employed in Interstate Commerce.

The failure of a carrier to equip a car employed in interstate commerce with safety appliances is not a violation of a state law, since the Federal law alone controls. *Hunt v. Illinois S. R. Co.*, 196 Ill. App. 539.

There cannot be a recovery under a state law for injuries sustained by a railway employee from defective safety appliances on a car engaged in interstate commerce, since the Federal law alone controls. *Hunt v. Illinois S. R. Co.*, 196 Ill. App. 539.

#### — Intrastate Traffic of Interstate Carriers.

A state statute requiring secure hand-

holds and grabirons on the ends and sides of cars is invalid when applied to cars moved by an interstate railway company between points wholly within one state, since it was superseded by the Federal Safety Appliance Act, by which Congress took possession of the entire field of legislation relating to safety appliances on the lines of interstate carriers. *Southern R. Co. v. Railroad Commission of Indiana*, 236 U. S. 439, 59 L. ed. 661, 35 Sup. Ct. Rep. 304, reversing 179 Ind. 23, 100 N. E. 337.

## III. DUTY IMPOSED.

### B. Coupling Apparatus.

#### In General.

The requirements of the Federal Safety Appliance Act are satisfied only by a coupler that will, when operated in the usual manner, perform its functions automatically under all ordinary conditions under which cars are coupled and uncoupled. *Davis v. Minneapolis & St. L. R. Co.*, — Minn. —, 159 N. W. 802, certiorari denied 242 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. 243.

#### Inability to Open Coupler From Side of Car to Make Flying Switch.

The Safety Appliance Act is violated where cars cannot be uncoupled in order to make a flying switch without a switchman going between them to pull the coupling pin by hand. *Christy v. Wabash R. Co.*, — Mo. App. —, 191 S. W. 241.

### D. Power Brakes.

#### In General.

The Federal Safety Appliance Act imposed a duty on every carrier engaged in interstate commerce by rail to equip its cars with brakes, etc., as required by such act. *Louisville & N. R. Co. v. Layton*, 145 Ga. 886, 90 S. E. 53.

## VI. WHAT VEHICLES AND MOVEMENTS OF CARS WITHIN ACT.

### A. In General.

#### Intrastate Cars.

The requirements of the Federal Safety Appliance Act that common carriers by rail engaged in interstate commerce shall equip their cars with brakes and other

\*For text of Act see Vol. I, No. 2, p. 397.



safety devices, include cars used for transporting intrastate freight. *Louisville & N. R. Co. v. Layton*, 145 Ga. 886, 90 S. E. 53.

#### H. Switching and Making Up Trains.

##### Placing Cars for Loading.

A car that had come from an interstate trip, and which was being placed on a siding for loading with interstate freight, was not in use in interstate commerce within the meaning of section 4 of the Safety Appliance Act relative to grabirons and handholds on the ends and sides of cars. *Campbell v. Chicago, R. I. & P. R. Co.*, 149 Ill. App. 120, affirmed on other grounds 243 Ill. 620, 90 N. E. 1106.

### VII. LIABILITY FOR PERSONAL INJURIES.

#### A. In General.

##### Effect on Liability of Extension of Time for Equipping Cars.

Since the requirements of section 2 of the Safety Appliance Act, as amended April 14, 1910, as to secure handholds and grabirons on the roofs of cars having ladders, was not suspended by an order of the Interstate Commerce Commission, made pursuant to section 3 of the act, extending for 5 years from July 1, 1911, the time for equipping cars with safety devices of a standard fixed by the Commission, a carrier is not relieved from liability for injuries sustained during such period by an employee in consequence of a defective handhold on the roof of a car. *Illinois C. R. Co. v. Williams*, 242 U. S. 462, 61 L. ed. —, 37 Sup. Ct. Rep. 128, affirming — *Miss.* —, 72 So. 158.

#### B. Injuries Due to Defective Coupling Apparatus.

##### Failure to Operate as Negligence.

A violation of the Federal Safety Appliance Act may be established by proof that repeated efforts of a switchman in railroad operations to work the lever of an automatic coupler, in the manner it was designed to be worked, failed to lift the coupling pin. *Davis v. Minneapolis & St. L. R. Co.*, — Minn. —, 159 N. W. 802, certiorari denied 242 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. 243.

##### Coupler That Does Not Operate Automatically With Similar Type.

The fact that a carrier used a coupler of a type that would not couple automatically with one of its own kind, although it would operate properly with couplers of other styles, does not show negligence

sufficient to render the carrier answerable under the Federal Safety Appliance Act for injuries sustained by an employee while adjusting another coupler to engage with such imperfect coupler which was reasonably safe for the use to which it was put. *Shohoney v. Quincy, O. & K. C. R. Co.*, 223 Mo. 649, 122 S. W. 1025.

##### Failure to Operate on Curved Track.

A carrier is answerable under the Federal Safety Appliance Act for injuries sustained by a brakeman when he reached between cars to operate a coupler that would not, because of a curve in the track, work automatically by impact. *Parker v. Atlantic C. R. Co.*, 87 N. J. L. 148, 93 Atl. 574, affirmed 242 U. S. 56, 61 L. ed. —, 37 Sup. Ct. Rep. 69.

#### Injuries Due to Minor Defects.

A carrier is not answerable for injuries sustained by an employee in consequence of a slight defect in an automatic coupler which was first discovered while switching, since a violation of the safety Appliance Act cannot be predicated on the failure of the carrier to make repairs before moving the car. *Norman v. Southern R. Co.*, 119 Tenn. 401, 104 S. W. 1088.

#### C. Defective Grabirons, Handholds, Ladders and Running Boards.

##### Grabirons and Handholds.

A carrier is answerable under the Safety Appliance Act for injuries sustained by an employee in consequence of a defective handhold or grabiron on the roof of a car. *Illinois C. R. Co. v. Williams*, 242 U. S. 462, 61 L. ed. —, 37 Sup. Ct. Rep. 128, affirming — *Miss.* —, 72 So. 158.

#### D. Absence of or Defects in Power Brakes.

##### Failure to Connect Brakes.

Where an employee was killed by the derailment of an engine when it struck a cow that suddenly ran onto the track, and the engineer, although aware of the presence of the cow near the track, took no precautions to avert the accident, the negligence of the engineer and not the failure to have the air brakes connected, as required by the Federal law, so as to permit the stopping of the train, was the proximate cause of the accident. *Snyder v. Pennsylvania R. Co.*, 11 Pa. Dist. Ct. 609.

#### F. Going Between Cars.

##### To Make Flying Switch.

Where it was necessary for a switchman to go between cars and uncouple them by hand in order to make a flying

switch, there was a violation of the Safety Appliance Act, for which an employer is answerable for the former's death, although in ordinary use the coupling apparatus could be operated from the side of the car. *Christy v. Wabash R. Co.*, — Mo. App. —, 191 S. W. 241.

It does not follow from the fact that the Safety Appliance Act permits the use of footboards on switch engines that a carrier is relieved from liability for the death of a switchman who was compelled to stand on such a footboard and uncouple a car by hand in order to make a flying switch, since the footboard was not intended to be used for such purposes. *Christy v. Wabash R. Co.*, — Mo. App. —, 191 S. W. 241.

The fact that the Safety Appliance Act and the Orders of the Interstate Commerce Commission require ladders on the ends and sides of freight cars does not imply that an employee may, without the carrier being answerable for resulting injuries, be required to stand on such appliances and lean part of his body between cars and uncouple them by hand in order to make a running switch, which he could not do from the side of the cars. *Christy v. Wabash R. Co.*, — Mo. App. —, 191 S. W. 241.

Where a switchman was killed when he was compelled to go between cars and uncouple them by hand in order to make a flying switch, although for ordinary purposes the apparatus could be operated from the side of the cars, it is immaterial, in an action under the Federal Employers' Liability Act for a violation of the Safety Appliance Act, whether the accident occurred when the decedent was in the act of pulling the coupling pin or before he attempted to do so. *Christy v. Wabash R. Co.*, — Mo. App. —, 191 S. W. 241.

#### **Catching Foot in Frog or Guardrail.**

Where a switchman was compelled to go between cars to adjust a defective coupler and he was injured when his foot was caught in an unblocked switch, the defective coupler was the proximate cause of his injury. *St. Louis Merchants B. T. R. Co. v. Schuerman*, — C. C. A. —, 237 Fed. 1.

Where the plaintiff alleges that in consequence of a defective coupling rod he was compelled to step between moving cars to uncouple them and that he was injured when his foot caught in an unblocked frog or guardrail which the defendant negligently failed to block, negligence of the carrier with respect to the coupling apparatus does not appear so as to invoke the Federal Safety Appliance Act. *Wabash R. Co. v. Kitcart*, 79 C. C. A. 160, 149 Fed. 108, 9 Ann. Cas. 497.

### **G. Assumed Risk.**

#### **Violation of Safety Appliance Act.**

Assumed risk is no defense to an action under the Federal Employers' Liability Act where the violation by a carrier of the Safety Appliance Act causes or contributes to the death or injury of an employee. *Washington-S. R. Co. v. Smith*, — App. D. C. —, 44 Wash. L. R. 338; *Christy v. Wabash R. Co.*, — Mo. App. —, 191 S. W. 241.

Assumed risk is no defense where in consequence of a defective coupler a switchman was compelled to go between cars to adjust a defective coupler and was injured by his foot catching in an unblocked switch. *St. Louis Merchants B. T. R. Co. v. Schuerman*, — C. C. A. —, 237 Fed. 1.

### **H. Contributory Negligence.**

#### **In General.**

Contributory negligence is not in issue in an action under the Federal Employers' Liability Act for injuries sustained by an employee in consequence of an employers' violation of the Safety Appliance Act. *Christy v. Wabash R. Co.*, — Mo. App. —, 191 S. W. 241.

#### **Going Between Cars.**

##### **— Unblocked Guardrail.**

Contributory negligence is no defense where a switchman was injured by his foot catching in an unblocked switch when he was compelled to go between cars to adjust a defective coupler. *St. Louis Merchants B. T. R. Co. v. Schuerman*, — C. C. A. —, 237 Fed. 1.

An experienced brakeman cannot, because of his contributory negligence, recover for injuries sustained from his foot catching in an unblocked guardrail, when, after opening a coupler with the lift lever and then being unable to recouple it in the same manner, he went between moving cars and, without necessity, attempted with his hands to drop the lock pin of a coupler which fully complied with the requirements of the Federal Safety Appliance Act, and which would have operated properly by impact. *Swasey v. Maine C. R. Co.*, — Me. —, 98 Atl. 706.

## **VIII. ACTIONS.**

### **A. In General.**

#### **Jurisdiction of State Courts.**

##### **— Dismissal of Action Under Federal Law.**

Where an action under the Federal Safety Appliance Act for injuries to an employee was removed by the defendant

from a state to a Federal court, and on the denial of the plaintiff's motion to remand, he dismissed his action and subsequently began a new suit in the state court based on common-law negligence, the denial of the motion to remand was not res judicata on the question of the jurisdiction of the state court. *Shohoney v. Quincy, O. & K. C. R. Co.*, 223 Mo. 649, 122 S. W. 1025.

#### **Submission Under State Law.**

##### **— When Employment in Interstate Commerce Not Shown.**

When the evidence in an action by a railway employee fails to show his employment in interstate commerce at the time he was injured, he may recover under a state law, although a violation of the Federal Safety Appliance Act was also averred. *Stoker v. Philadelphia & R. R. Co.*, — Pa. —, 99 Atl. 28.

Where, in an action for injuries sustained by a railway employee, the plaintiff alleged a violation by the defendant of the Safety Appliance Act with reference to the connection of air brakes on cars, and also set up negligence under a state law, and at the trial the evidence did not show that at the time of his injury the plaintiff was in any way engaged in interstate commerce, he may abandon his claim under the Federal law and recover under the common law, even though the averments of his statement of claim were not separated into formal counts. *Stoker v. Philadelphia & R. R. Co.*, — Pa. —, 99 Atl. 28.

#### **E. Pleading.**

##### **Sufficiency of Complaint or Declaration.**

##### **— Failure to Allege Employment in Interstate Commerce.**

A cause of action under the original Safety Appliance Act is not shown by a declaration alleging the injury of an employee in consequence of a defective coupler, where neither the employment of the car nor of the defendant in interstate commerce was alleged. *Norman v. Southern R. Co.*, 119 Tenn. 401, 104 S. W. 1088.

##### **Alleging Federal and State Law in Same Count.**

##### **— Waiver by Pleading to Merits.**

Where, in an action for injuries to a railway employee, the plaintiff alleged a violation by the defendant of the Safety Appliance Act with respect to the connection of the brakes on cars, and also set up negligence under a state law, the fact that the two causes of action were not stated in separate counts was waived by the defendant pleading to the merits. *Stoker v. Philadelphia & R. R. Co.*, — Pa. —, 99 Atl. 28.

#### **F. Evidence.**

##### **1. Judicial Notice.**

##### **Orders of Interstate Commerce Commission Respecting Safety Appliances.**

The orders of the Interstate Commerce Commission relating to the placing of safety devices on cars, will not be judicially noticed by a state court. *Christy v. Wabash R. Co.*, — Mo. App. —, 191 S. W. 241.

##### **3. Burden of Proof.**

##### **Violation of Federal Law.**

The burden is on the plaintiff, in an action for injuries sustained in consequence of the failure of an automatic coupler to work, to prove the negligence of the defendant carrier by showing that the car was not equipped with such a coupler as the Federal Safety Appliance Act requires, and that the violation of that law was the proximate cause of his injury. *Davis v. Minneapolis & St. L. R. Co.*, — Minn. —, 159 N. W. 802, certiorari denied 242 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. 243.

##### **4. Admissibility.**

##### **State Safety Appliance Law.**

Evidence of a state Safety Appliance Act is not admissible in an action for injuries received from defective appliances of that nature on a car employed in interstate commerce. *Hunt v. Illinois S. R. Co.*, 196 Ill. App. 539.

##### **Order of Interstate Commerce Commission.**

Under section 14 of the Act to Regulate Commerce an order of the Interstate Commerce Commission, signed by the Secretary, containing an order extending the time for compliance with the Federal Safety Appliance Act, is admissible in an employee's action for injuries sustained while coupling cars not equipped with safety devices, to show that the defendant was not subject to the provisions of the Federal law. *Nichols v. Chicago & W. M. R. Co.*, 125 Mich. 394, 84 N. W. 470.

##### **Rule Requiring Connection of Train Pipes.**

In an action under the Federal Employers' Liability Act it was reversible error to admit in evidence a rule of the defendant requiring the connection of train pipes where its nonobservance was admitted, and the only question was whether that was the cause of the plaintiff's injury. *Aldread v. Northern P. R. Co.*, — Wash. —, 160 Pac. 429.

##### **Subsequently Issued Train Bulletin.**

In an action based on the Federal Em-

ployers' Liability Act, for injuries sustained by a switchman while moving cars without the air being connected, it was reversible error to admit in evidence a train bulletin subsequently issued for another division, requiring the connection of the air on switched cars. *Aldread v. Northern P. R. Co.*, — Wash. —, 160 Pac. 429.

### I. Questions of Law and Fact.

#### Violation of Safety Appliance Act.

Where an employee was injured when he attempted, on the failure of a coupler to operate by impact, to push a drawhead into line so as to make a coupling on a slightly curved track, the question of the carrier's violation of the Federal Safety Appliance Act is for the jury, since they were justified in finding that the coupler had so much lateral play as, in the absence of an explanation, to show a failure to comply with such law. *Atlantic C. R. Co. v. Parker*, 242 U. S. 66, 61 L. ed. —, 37 Sup. Ct. Rep. 69, affirming 87 N. J. L. 148, 93 Atl. 574.

The fact that a coupler worked properly and that no defect was found therein thirty minutes after a switchman was injured, is not sufficient to take from the jury the question of the violation of the Federal Safety Appliance Act, where the accident occurred while the plaintiff was between slowly moving cars uncoupling them by hand after several futile efforts to operate the coupler from the side of the car. *Davis v. Minneapolis & St. L. R. Co.*, — Minn. —, 159 N. W. 802, certiorari denied 242 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. 243.

#### Necessity for Connecting Air Brakes.

Where, on the stopping of a switch engine while moving cars without having the air brakes connected, a switchman was injured in consequence of the alleged negligence of the engineer in instantly re-

leasing the air so that the momentum of the cars shoved the engine several feet forward, the question whether due and reasonable care demanded the coupling of the air is for the jury in an action founded on the Federal Employers' Liability Act. *Aldread v. Northern P. R. Co.*, — Wash. —, 160 Pac. 429.

### L. Verdict.

#### Directing Verdict.

#### — When Violation of Safety Appliance Act Shown.

A peremptory instruction cannot be given for the defendant when the evidence shows that an employee was injured in consequence of defective safety devices on an interstate train. *Hunt v. Illinois S. R. Co.*, 196 Ill. App. 539.

### N. Appeal and Error.

#### Erroneous Application of Federal Law.

When the removal of a common-law action for injuries to an employee from a state to a Federal court was denied on the defendant's petition, alleging that the plaintiff's cause of action was based on the Federal Safety Appliance Act, although the defendant did not frame a defense thereunder, and at the trial the plaintiff was allowed the benefit of such act either in his evidence, instructions or argument, the error does not go to the jurisdiction of the state court, but may be corrected on appeal. *Shohoney v. Quincy, O. & K. C. R. Co.*, 223 Mo. 649, 122 S. W. 1025.

#### Questions Not Raised Below.

That the safety devices on a car complied with the requirements of the Interstate Commerce Commission cannot be shown for the first time on the appeal of an action for the death of an employee. *Christy v. Wabash R. Co.*, — Mo. App. —, 191 S. W. 241.

## APPENDIX

### BOILER INSPECTION ACT.

For text of Act see Vol. I, No. 2, page 392

### CARMACK AMENDMENT.

For text of Act see Vol. I, No. 2, page 394.

### CUMMINS AMENDMENT.

For text of Act see Vol. I, No. 2, page 394.

### EMPLOYERS' LIABILITY ACT.

For text of Act see Vol. I, No. 2, page 395.

### HOURS OF LABOR ACT.

For text of Sixteen-Hour Law see Vol. I, No. 2, page 396.

### ADAMSON LAW.

AN ACT to establish an eight-hour day for employes of carriers engaged in interstate and foreign commerce, and for other purposes\*.

Sec. 1. Beginning January first, nineteen hundred and seventeen, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employes who are now or may hereafter be employed by any common carrier by railroad, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, which is subject to the provisions of the Act of February fourth, eighteen hundred and eighty-seven, entitled "An Act to regulate commerce," as amended, and who are now or who may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, from any State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States; Provided, That the above exceptions shall not apply to railroads though less than one hundred miles in length whose principal business

is leasing or furnishing terminal or transfer facilities to other railroads, or are themselves engaged in transfers of freight between railroads or between railroads and industrial plants.

Sec. 2. The President shall appoint a commission of three, which shall observe the operation and effect of the institution of the eight-hour standard workday as above defined and the facts and conditions affecting the relations between such common carriers and employes during the period of not less than six months nor more than nine months, in the discretion of the commission, and within thirty days thereafter such commission shall report its findings to the President and Congress; that each member of the commission created under the provisions of this Act shall receive such compensation as may be fixed by the President. That the sum of \$25,000, or so much thereof as may be necessary, be, and hereby is, appropriated, out of any money in the United States Treasury not otherwise appropriated, for the necessary and proper expenses incurred in connection with the work of such commission, including salaries, per diem, traveling expenses of members and employes, and rent, furniture, office fixtures and supplies, books, salaries, and other necessary expenses, the same to be approved by the chairman of said commission and audited by the proper accounting officers of the treasury.

Sec. 3. Pending the report of the investigation of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employes subject to this Act for a standard eight-hour workday shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employes shall be paid at a rate not less than the pro rata rate for such standard eight-hour workday.

Sec. 4. Any person violating any provision of this Act shall be guilty of a misdemeanor and upon conviction shall be fined not less than \$100 nor more than \$1,000, or imprisoned not to exceed one year, or both.

### INTERSTATE COMMERCE ACT.

#### As amended.\*

Sec. 1. (As amended June 20, 1906, April 13, 1908, and June 18, 1910.) That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commod-

\*Act of Sept. 3, 5, 1916, c. 436, 39 stat. 721, 8 U. S. Comp. Stats., 1916 §§ 8680a—8680d.

\*See 8 U. S. Comp. Stats., 1916 ed., §§8563 et seq.

ity except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one state, territory, or district of the United States, to any other state, territory, or district of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one state or territory of the United States or the District of Columbia, to any other state or territory of the United States or the District of Columbia, or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: Provided, however, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one state and not transmitted to or from a foreign country from or to any state or territory as aforesaid.

The term "common carrier" as used in this Act shall include express companies and sleeping car companies. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all serv-

ices in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.

All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, That messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeat, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: And provided further, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services.

And it is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the states and with foreign countries is prohibited and declared to be unlawful.

No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free

ticket, free pass, or free transportation for passengers, except to its employes and their families, its omcers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary care takers of live stock, poultry, milk and fruit; to employes on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employes, postoffice inspectors, custom inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employes of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: And provided further, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employes, and their families of such telegraph, telephone, and cable lines and the officers, agents, employes and their families of other common carriers subject to the provisions of this Act: Provided further, That the term "employes" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation

shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled, "An Act to further regulate commerce with foreign nations and among the states," approved February nineteenth, nineteen hundred and three, and any amendment thereof. (See section 22.)

From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any state, territory, or the District of Columbia, to any other state, territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

Sec. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act,

than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

Sec. 4. (As amended June 18, 1910.) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: Provided, however, That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: Provided further, That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where appli-

cation shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

Sec. 5. (As amended August 24, 1912.) That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The Commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein



provided. In all such cases the order of said Commission shall be final.

If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation; Provided, Any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not heard and disposed of before said date, may be considered and granted thereafter.

Sec. 6. (Amended March 2, 1889. Following section substituted June 29, 1906. Amended June 18, 1910, and August 24, 1912.) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all rates, fares, and charges for transportation between different points on its own route and between points on its own routes and points on the route of any other carried by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot,

station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: Provided, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

The Commission may determine and pre-

scribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: Provided, That wherever the word "carrier" occurs in this Act it shall be held to mean "common carrier."

That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given, over all other traffic, to the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic.

The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Commission shall be void and its use shall be unlawful.

In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with the terms of any regulation adopted and promulgated or any order made by the Commission under the provisions of this section, such carrier, receiver, or trustee shall be liable to a penalty of five hundred dollars for each such offense, and twenty-five dollars for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

If any common carrier subject to the provisions of this Act, after written request made upon the agent of such carrier hereinafter in this section referred to, by any person or company for a written statement of the rate or charge applicable to a described shipment between stated places under the schedules or tariffs to which such carrier is a party, shall refuse or omit to give such written statement within a reasonable time, or shall misstate

in writing the applicable rate, and if the person or company making such request suffers damage in consequence of such refusal or omission or in consequence of the misstatement of the rate, either through making the shipment over a line or route for which the proper rate is higher than the rate over another available line or route, or through entering into any sale or other contract whereunder such person or company obligates himself or itself to make such shipment of freight at his or its cost, then the said carrier shall be liable to a penalty of two hundred and fifty dollars, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

It shall be the duty of every carrier by railroad to keep at all times conspicuously posted in every station where freight is received for transportation the name of an agent resident in the city, village, or town where such station is located, to whom application may be made for the information by this section required to be furnished on written request; and in case any carrier shall fail at any time to have such name so posted in any station, it shall be sufficient to address such request in substantially the following form: "The Station Agent of the ..... Company at ..... Station," together with the name of the proper post office, inserting the name of the carrier company and of the station in the blanks, and to serve the same by depositing the request so addressed, with postage thereon prepaid, in any post office.

When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single state, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to Regulate Commerce, as amended June 18, 1910:

(a) To establish physical connection between the lines of the rail carrier and the dock of the water carrier by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of its right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a spur track or tracks to the dock. This provision shall only apply where such connection is reasonably practicable, can be made with safety to the public, and

where the amount of business to be handled is sufficient to justify the outlay.

The Commission shall have full authority to determine the terms and conditions upon which these connecting tracks, when constructed, shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier. The provisions of this paragraph shall extend to cases where the dock is owned by other parties than the carrier involved.

(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

(c) To establish maximum proportional rates by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

(d) If any rail carrier subject to the Act to Regulate Commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

The orders of the Interstate Commerce Commission relating to this section shall only be made upon formal complaint or in proceedings instituted by the Commission of its own motion and after full hearing. The orders provided for in the two amendments to the Act to Regulate Commerce enacted in this section shall be served in the same manner and enforced by the same penalties and proceedings as are the orders of the Commission made under the provisions of section 15 of the Act to Regulate Commerce, as amended June 18, 1910, and they may be conditioned for the payment of any sum or the giving of security for the payment of any sum or the discharge of any obligation which may be required by the terms of said order.

Sec. 7. That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time

schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act.

Sec. 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Sec. 10 (as amended March 2, 1889, and June 18, 1910.) That any common carrier subject to the provisions of this Act, or,

whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any District Court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: Provided, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this Act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and will-

fully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates than established and in force on the line of transportation; or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court: Provided, That the penalty of imprisonment shall not apply to artificial persons.

If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this Act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or im-

prisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

Sec. 11. (Appointment and term of commissioners.)

Sec. 12 (as amended March 2, 1889, and February 10, 1891.) That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this Act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this Act, or other person, issue an order requiring such common carrier or other person to appear

before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

Witnesses whose depositions are taken pursuant to this Act, and the magistrate or other officer taking the same, shall sev-

erally be entitled to the same fees as are paid for like services in the courts of the United States.

Sec. 13 (as amended June 18, 1910.) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any state or territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Sec. 14 (amended March 2, 1889, and June 29, 1906.) That whenever an investigation shall be made by said Commis-

sion, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several states without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports.

Sec. 15 (as amended June 29, 1906, and June 18, 1910.) That whenever, after full hearing upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this Act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this Act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this Act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the

classification and shall conform to and observe the regulation or practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof the Commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective: Provided, That if any such hearing can not be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate increased after January

1, 1910, or of a rate sought to be increased after the passage of this Act, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line. The Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, nor shall the Commission have the right to establish any route, classification, rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

And in establishing such through route, the Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writ-

ing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: Provided, however, That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported.

It shall be unlawful for any common carrier subject to the provisions of this Act, or any officer, agent, or employee of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used: Provided, That nothing in this Act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any state or Federal court, or to any officer or agent of the Government of the United States, or of any state or territory, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime; or information given by a common carrier to another carrier or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

Any person, corporation, or association violating any of the provisions of the next preceding paragraph of this section shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not more than one thousand dollars.

If the owner of property transported

under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act.

Sec. 16 (amended March 2, 1889, June 29, 1906, and June 18, 1910). That if, after hearing on a complaint made as provided in section 13 of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the Circuit Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the Circuit Court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the Circuit Court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court or State Court within one year from the date of the order, and not after.



In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

Every order of the Commission shall be forthwith served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law.

The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section 15 of this Act shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work or for proper representation of the public interests in investigations made by it or cases or proceedings pending before

it, whether at the Commission's own instance or upon complaint, or to appear for and represent the Commission in any case pending in the Commerce Court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the Commerce Court for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

The copies of schedules and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the Commission as required under the provisions of this Act shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the Commission's seal, shall be received in evidence with like effect as the originals.

Sec. 16a. (Added June 29, 1906.) That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as

may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

Sec. 17 (As amended March 2, 1889.) That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpoenas.

Sec. 18. (Compensation of Commissioners.)

Sec. 19. (Principal office of Commission to be in Washington, D. C.)

Sec. 19a. (Valuation of all railroad property by Commission.)

Sec. 20. (Carmack Amendment.\* Annual reports of common carriers to Commission.) \* \* \* No suit brought in any State court of competent jurisdiction against a railroad company, or other corporation, or person, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section 20 of the Act to Regulate Commerce, approved February 4, 1887, as amended June 29, 1906, April 13, 1908, February 25, 1909, and June 18, 1910, shall be removed to any court of the United States where the matter in controversy

does not exceed, exclusive of interest and costs, the sum or value of \$3,000.

Sec. 21. (As amended March 2, 1889.) (Annual reports of Commission.)

Sec. 22. (As amended March 2, 1889, and February 8, 1895.) [See section 1, 5th par.] That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officer of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies: Provided, That no pending litigation shall in any way be affected by this Act: Provided further, That nothing in this Act shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this Act, shall issue any joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section 6 of this Act; and all the provisions of said section 6 relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as

\*For text of Act see Vol. I, No. 2, p. 394.

fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section 6. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section 10 of this Act shall apply to any violation of the requirements of this proviso.

Sec. 23. (Added March 2, 1889.) That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the Act to which this is a supplement and all Acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: Provided, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: Provided, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this Act or the Act to which it is a supplement.

Sec. 24. (Added June 29, 1906.) (Increasing membership of Commission.)

(Additional provisions in Act of June 29, 1906.) (Sec. 9.) That all existing laws relating to the attendance of witnesses and the production of evidence and the compelling of testimony under the Act to Regulate Commerce and all Acts amendatory thereof shall apply to any and all proceedings and hearings under this Act.

(Sec. 10.) That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed; but the amend-

ments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.

(Sec. 11.) That this Act shall take effect and be in force from and after its passage.

Joint resolution of June 30, 1906, provides: "That the Act entitled 'An Act to Amend an Act entitled "An Act to Regulate Commerce," approved February 4, 1887, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission,' shall take effect and be in force sixty days after its approval by the President of the United States."

(Additional provisions in Act of June 18, 1910.) (Sec. 6, par. 2.) It shall be the duty of every common carrier subject to the provisions of this Act, within sixty days after the taking effect of this Act, to designate in writing an agent in the city of Washington, District of Columbia, upon whom service of all notices and processes may be made for and on behalf of said common carrier in any proceeding or suit pending before the Interstate Commerce Commission or before said Commerce Court, and to file such designation in the office of the secretary of the Interstate Commerce Commission, which designation may from time to time be changed by like writing similarly filed; and thereupon service of all notices and processes may be made upon such common carrier by leaving a copy thereof with such designated agent at his office or usual place of residence in the city of Washington, with like effect as if made personally upon such common carrier, and in default of such designation of such agent, service of any notice or other process in any proceeding before said Interstate Commerce Commission or Commerce Court may be made by posting such notice or process in the office of the secretary of the Interstate Commerce Commission.

(Sec. 15.) That nothing in this Act contained shall undo or impair any proceedings heretofore taken by or before the Interstate Commerce Commission or any of the acts of said Commission; and in any cases, proceedings, or matters now pending before it, the Commission may exercise any of the powers hereby conferred upon it, as would be proper in cases, proceedings, or matters hereafter initiated and nothing in this Act contained shall operate to release or affect any obligation, liability, penalty, or forfeiture heretofore existing against or incurred by any person, corporation, or association.

(Sec. 18.) That this Act shall take effect and be in force from and after the

expiration of sixty days after its passage, except as to sections 12 and 16, which sections shall take effect and be in force immediately.

### ELKINS ACT.\*

An Act to further regulate commerce with foreign nations and among the States.

Section 1. (As amended June 29, 1906.) That any thing done or omitted to be done by a corporation common carrier, subject to the Act to Regulate Commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to Regulate Commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to Regulate Commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: Provided, That any person,

or any officer or director of any corporation subject to the provisions of this Act, or the Act to Regulate Commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to Regulate Commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act forfeit to the United States a sum of money three

\*See Act Feb. 4, 1887, as amended June 29, 1906, c. 3591, § 8, Fed Stats. Anno. Supp. 1909 p. 262, Supp. 1912, p. 117, U. S. Comp. Stats. 1913, §§ 8596, 8598, 8599.

times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

Sec. 2. That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

Sec. 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the alle-

gations of said petition said court shall enforce an observance of the published tariffs, or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February 4, 1887, entitled "An Act to Regulate Commerce" and the Acts amendatory thereof. And in proceedings under this Act and the Acts to Regulate Commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: Provided, That the provisions of an Act entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to Regulate Commerce,' approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted, approved February 11, 1903," shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission.

Sec. 4. That all Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed, but such repeal shall not affect causes now pending nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law and as modified by the provisions of this Act.

Sec. 5. That this Act shall take effect from its passage.

**LIVE STOCK ACT.\*****Federal.****An Act to Prevent Cruelty to Animals.\***

Section 1. No railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one state to another, shall confine the same in cars, boats, or vessels of any description, for a longer period than 28 consecutive hours, without unloading the same for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included, it being the intent of this section to prohibit their continuous confinement beyond the period of 28 hours, except upon contingencies hereinbefore stated.

Sec. 2. Animals so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad company or owners or masters of boats and vessels transporting the same at the expense of the owner or person in custody thereof; and such company, owners, or masters shall in such case have a lien upon such animals for food, care, and custody furnished, and shall not be liable for any detention of such animals.

Sec. 3. Any company, owner, or custodian of such animals who knowingly and willingly fails to comply with the provisions of the two preceding sections, shall, for every such failure, be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars. But when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply.

Sec. 4. The penalty created by the preceding sections shall be recovered by civil action in the name of the United States, in the circuit or district court of the United States, holden within the district where the violation may have been committed, or the person or the corporation resides or carries on its business; and it shall be the duty of all United States marshals,

\*Act March 3, 1873, 17 Stats. 584, 1 Fed. Stats. Anno. p. 444.

their deputies and subordinates, to prosecute all violations which come to their notice or knowledge.

Sec. 5. Any person or corporation entitled to a lien under section 4387 (section 3 supra) may enforce the same by a petition filed in the district court holden within the district where the food, care, and custody have been furnished, or the owner or custodian of the property resides; and the court shall have power to issue all suitable process for the enforcement of such lien by sale or otherwise, and to compel the payment of all costs, penalties, charges, and expenses of proceedings under the provisions of this and the preceding sections.

**An Act to Prevent Cruelty to Animals.\***

Section 1. That no railroad, express company, car company, common carrier other by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one state or territory or the District of Columbia into or through another state or territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one state or territory or the District of Columbia into or through another state or territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than 28 consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight: Provided, That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to 36 hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included; it being the intent of this Act to prohibit their continuous confinement beyond the period

\*Act of June 29, 1906, c. 3594, 34 St. at Large p. 607, Comp. Stats. U. S. 1913, section 8653 et seq., 1 Fed. Stats. Anno. Supp. 1909, p. 42, 1 Fed. Stats. Anno 2 ed. p. 377, U. S. Comp. Stats. 1916, section 8651 et seq.

of 28 hours, except upon the contingencies hereinbefore stated: Provided, That it shall not be required that sheep be unloaded in the night time, but where the time expires in the night time in case of sheep, then same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of 36 hours.

Sec. 2. That animals so unloaded shall be properly fed, and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section 1 of this Act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

Sec. 3. Any railroad, express company, car company, common carrier other than

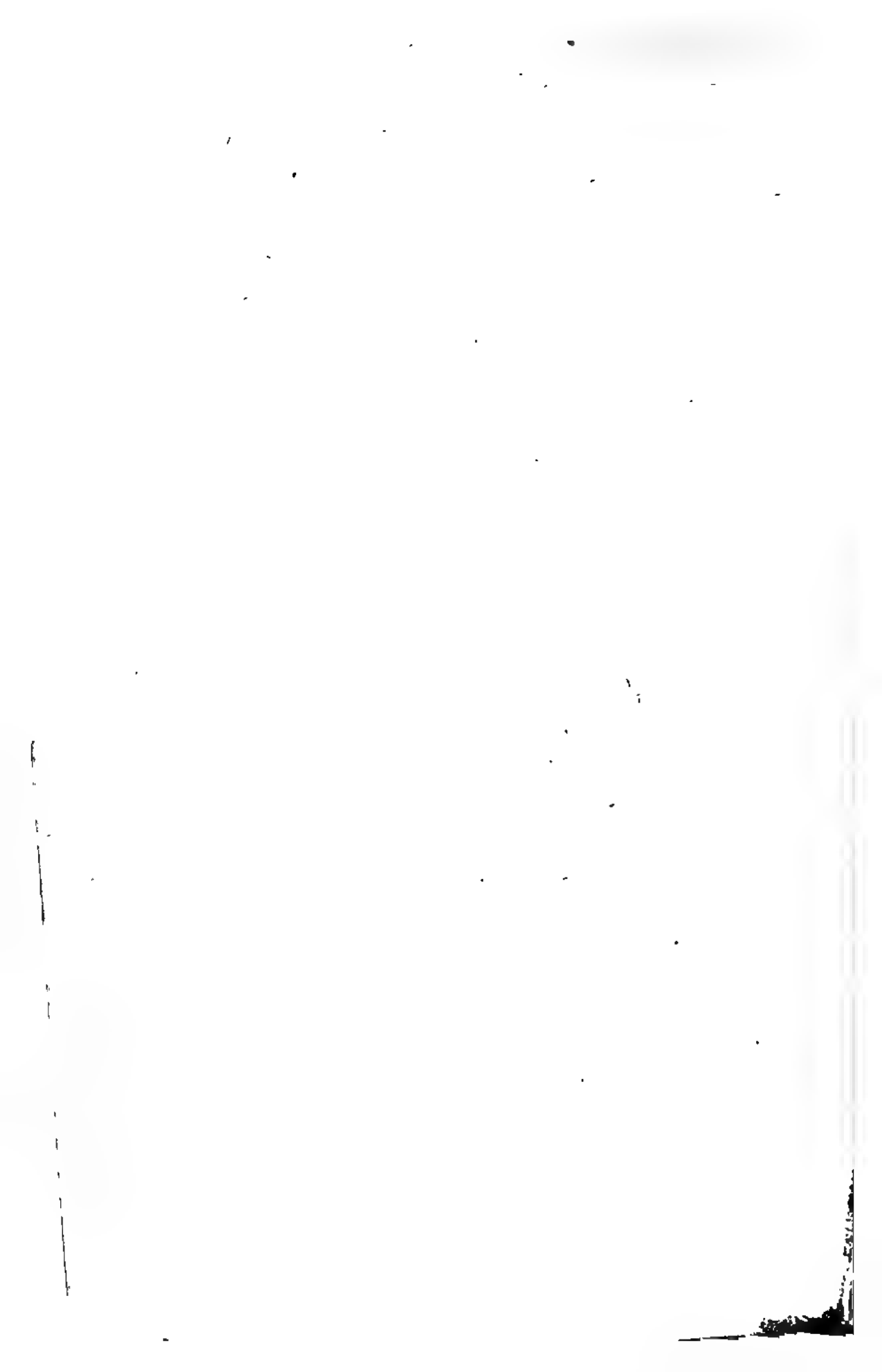
by water, or the receiver, trustee or lessee of any of them, or the master or owner of any steam, sailing or other vessel who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars: Provided, That when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space and opportunity to rest, the provisions in regard to their being unloaded shall not apply.

Sec. 4. That the penalty created by the preceding sections shall be recovered by civil action in the name of the United States in the circuit or district court holden within the district where the violation may have been committed or the person or corporation resides or carries on business; and it shall be the duty of United States attorneys to prosecute all violations of this Act reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means.

Sec. 5. That sections 4386, 4387, 4388, 4389, and 4390 of the Revised Statutes of the United States be, and the same are hereby, repealed.

#### **SAFETY APPLIANCE ACT.**

For text of Act see Vol. I, No. 2, page 397.











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**In addition to digesting all cases reported to April 1, 1917, under the various Acts of Congress which impose civil liability on carriers by rail, No. 4 of Vol. I of the Federal Railway Digest will also include the criminal liability of such carriers under all Federal laws**

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**VOL. I**

**APRIL, 1917**

**NO. 4**

# **THE FEDERAL RAILWAY DIGEST**

**Covering Every Feature of  
THE CIVIL AND CRIMINAL  
LIABILITY  
OF  
INTERSTATE CARRIERS BY RAIL  
UNDER ALL ACTS OF CONGRESS**

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THE  
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A Cumulative Quarterly

**Digesting All Decisions**

Both State and Federal

Pertaining to the Civil and  
Criminal Liability of

**Interstate Carriers by Rail**

Under All Acts of Congress

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*WILLIAM J. INGERSOLL, Editor*

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# *Announcement*

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**T**HIS number of the Federal Railway Digest completes Volume I. It should be used in connection with Nos. 2 and 3 of Volume I. This Quarterly digests all decisions reported to April 1, 1917, as decided by both the State and Federal courts under all Acts of Congress which impose either civil or criminal liability on carriers by rail.

Volume II will keep every feature of this field of railway law constantly down to date.

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THE FEDERAL LAW BOOK CO.

# THE FEDERAL RAILWAY DIGEST

*A Cumulative Quarterly*

Entered as second-class matter July 10, 1916, at the Postoffice at Chicago, Ill. under the act of March 3, 1879

Vol. 1

APRIL, 1917

No. 4

## ANIMALS

See Carriers of Interstate Freight and Express, VII

## BOILER INSPECTION ACT

FEDERAL

(No new decisions. See October, 1916, Quarterly)

## CARRIAGE OF PERSONS

- I. IN GENERAL.
- II. FARES AND TICKETS.
- III. PASSES.
- IV. OBTAINING TRANSPORTATION IN VIOLATION OF LAW.

See also No. 3, Vol. I, Federal Ry. Digest, pp. 7-11.

### II. FARES AND TICKETS.

See same section No. 3, Vol. I, Federal Ry. Digest, p. 7.

### III. PASSES.

See same section No. 3, Vol. I, Federal Ry. Digest, p. 8-9.

**To Whom Pass May Be Issued.**  
—Employees of Foreign Railways.

Section 1 of the Act Regulating Com-

merce relating to the interchange of passes between the officers, agents and employees of common carriers and their families, permits a railway company to issue passes to the officers, agents and employees of an English railway company, since the right to interchange passes given by such section is not restricted to carriers who are subject to such act. *United States v. Erie R. Co.*, 236 U. S. 259, 59 L. ed. 567, 35 Sup. Ct. Rep. 396, affirming 213 Fed. 391.

—Employee of Trans-Atlantic Navigation Companies.

Section 1 of the Act Regulating Commerce relating to the interchange of passes between the officers, agents and employees of common carriers and their families, extends to the officers, agents and employees of a Trans-Atlantic steamship line. *United States v. Erie R. Co.*, 236 U. S. 259, 59 L. ed. 567, 35 Sup. Ct. Rep. 396, affirming 213 Fed. 391.

**Payment for Transportation With Advertising.**

A state statute, under which a railway is incorporated, permitting it to issue transportation in payment for printing and advertising, does not apply to interstate transportation; and a contract providing for the issuance of such transportation in exchange for advertising space is void under the Act Regulating Commerce, as amended, which prohibits the furnishing of transportation at rates less than or different from those contemporaneously exacted from the general public under similar conditions and circumstances. *Chicago, I. & L. R. Co. v. United States*, 219 U. S. 486, 55 L. ed. 305, 31 Sup. Ct. Rep. 272, affirming 163 Fed. 114.

**Criminal Liability for Illegally Issuing Passes.**

The acceptance by a railway company, under a contract with a publisher of a periodical of advertising space in lieu of money in payment for interstate transportation of the publisher, his employees and the members of his or their immediate families, violates the Act Regulating Commerce, as amended, by furnishing interstate transportation at rates less than and different from those contemporaneously exacted from the general public under similar circumstances and conditions. *Chicago, I. &*

*L. R. Co. v. United States*, 219 U. S. 486, 55 L. ed. 305, 31 Sup. Ct. Rep. 272, affirming 163 Fed. 114.

The Act Regulating Commerce is violated where a free pass for interstate transportation is given to a person who is not, under such act, entitled to use it. In *re Charge to Grand Jury*, 66 Fed. 146.

The mere issuance of a free pass in violation of the Act Regulating Commerce to one who is not entitled to use it, is not a violation of such law unless the pass is actually used for interstate transportation. In *re Huntington*, 68 Fed. 881.

One who having possession of a free ticket or pass issued by a carrier to a third person for interstate transportation, may be punished under section 1 of the Act Regulating Commerce for unlawfully delivering such ticket or pass to a stranger for the purpose of enabling him to use it in violation of such act. *United States v. Martin*, 176 Fed. 110.

**Indictment.**

An indictment charging the issuance of a free pass to a person who was not entitled thereto under the Act Regulating Commerce, is fatally defective where it does not allege that any use was ever made of such pass, or that any transportation was ever furnished under it. In *re Huntington*, 68 Fed. 881.

## CARRIERS OF INTERSTATE FREIGHT AND EXPRESS\*

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| <p>I. IN GENERAL.</p> <p style="padding-left: 20px;">A. Validity of Federal Laws.</p> <p style="padding-left: 20px;">B. Operation.</p> <p style="padding-left: 20px;">C. What Carriers Within Federal Laws.</p> <p style="padding-left: 20px;">D. What Shipments Are Interstate.</p> <p>II. WHAT LAWS GOVERN.</p> <p>III. INTERSTATE COMMERCE COMMISSION.</p> <p>IV. RATES AND CHARGES.</p> <p style="padding-left: 20px;">A. In General.</p> <p style="padding-left: 20px;">B. Establishment.</p> <p style="padding-left: 20px;">C. Reasonableness.</p> <p style="padding-left: 20px;">D. Binding Effect of Established Rates.</p> <p style="padding-left: 20px;">E. Construction of Schedules and Tariffs.</p> <p style="padding-left: 20px;">F. Particular Charges and Rates.</p> <p style="padding-left: 20px;">I. Recovery of Undercharges.</p> <p style="padding-left: 20px;">J. Recovery of Overcharges.</p> <p style="padding-left: 20px;">N. Pooling.</p> <p>V. ALLOWANCES, DISCRIMINATIONS, PREFERENCES AND REBATES.</p> <p style="padding-left: 20px;">A. In General.</p> <p style="padding-left: 20px;">C. Allowances for Services in Connection With Shipment.</p> <p style="padding-left: 20px;">D. Discriminations and Preferences.</p> <p style="padding-left: 20px;">E. Rebates.</p> <p>VI. CONTRACTS PERTAINING TO SHIPMENTS.</p> <p style="padding-left: 20px;">A. In General.</p> <p style="padding-left: 20px;">C. Transportation.</p> <p style="padding-left: 20px;">E. Rates.</p> <p style="padding-left: 20px;">H. Contracts for Allowances, Rebates, Discriminations and Preferences.</p> <p>VII. CARRIERS OF LIVE STOCK.</p> <p style="padding-left: 20px;">A. In General.</p> <p style="padding-left: 40px;">1. Validity and Construction of the 28 Hour Act.</p> <p style="padding-left: 40px;">2. What Carriers Within 28 Hour Act.</p> <p style="padding-left: 40px;">3. What Shipments Within 28 Hour Act.</p> <p style="padding-left: 20px;">F. Duty to Unload for Feed, Water and Rest.</p> <p style="padding-left: 40px;">3. Facilities for Feeding, Watering and Resting Stock.</p> <p style="padding-left: 40px;">4. Defective and Insufficient Pens.</p> <p style="padding-left: 40px;">5. When Facilities for Feeding, Watering and Resting in Car.</p> <p style="padding-left: 40px;">6. Consent to Confinement Beyond 28 Hours.</p> <p style="padding-left: 40px;">7. Computing Period of Confinement.</p> | <p style="padding-left: 20px;">8. Unloading Sheep at Night.</p> <p style="padding-left: 20px;">9. Liability for Failure to Unload.</p> <p style="padding-left: 40px;">(a) In General.</p> <p style="padding-left: 40px;">(b) Knowledge and Willfulness of Carrier.</p> <p style="padding-left: 40px;">(c) Stock Received from Connecting Carrier.</p> <p style="padding-left: 40px;">(d) Liability of Carrier for Damages.</p> <p style="padding-left: 40px;">(e) Justification and Excuse.</p> <p style="padding-left: 20px;">10. Failure to Allow 5 Hours Rest.</p> <p style="padding-left: 20px;">11. Failure of Caretaker or Owner to Unload.</p> <p style="padding-left: 20px;">12. Termination of Liability.</p> <p>G. TRANSPORTATION OF INFECTED ANIMALS.</p> <p>H. PENALTIES.</p> <p style="padding-left: 20px;">1. In General.</p> <p style="padding-left: 20px;">2. Actions for Penalties.</p> <p style="padding-left: 40px;">(a) Nature.</p> <p style="padding-left: 40px;">(b) Jurisdiction.</p> <p style="padding-left: 40px;">(c) Pleading.</p> <p style="padding-left: 40px;">(d) Evidence.</p> <p style="padding-left: 40px;">(e) Instructions.</p> <p style="padding-left: 40px;">(f) Questions of Law and Fact.</p> <p style="padding-left: 40px;">(g) Verdict, Judgment and Costs.</p> <p style="padding-left: 20px;">3. Appeal and Error.</p> <p>VIII. LIABILITY OF CARRIER FOR LOSS OF OR INJURY TO SHIPMENTS.</p> <p>IX. TRANSPORTATION OF NURSERY STOCK.</p> <p>X. INTEREST OF CARRIER IN COMMODITIES TRANSPORTED.</p> <p>XI. CARMACK AMENDMENT.</p> <p style="padding-left: 20px;">D. Effect.</p> <p style="padding-left: 40px;">I. Contracts Limiting Liability of Carrier.</p> <p style="padding-left: 40px;">J. Notice of Claims for Loss or Damage.</p> <p style="padding-left: 40px;">K. Limitation of Time for Action.</p> <p style="padding-left: 40px;">M. Liability of Connecting and Terminal Carriers.</p> <p>XII. CUMMINS AMENDMENT.</p> <p>XIII. ACTIONS.</p> <p style="padding-left: 20px;">A. In General.</p> <p style="padding-left: 20px;">B. Jurisdiction.</p> <p style="padding-left: 20px;">E. Pleading.</p> <p style="padding-left: 20px;">F. Damages.</p> <p style="padding-left: 20px;">G. Evidence.</p> <p style="padding-left: 20px;">H. Instructions.</p> <p style="padding-left: 20px;">M. Appeal and Error.</p> <p>XIV. CRIMINAL PROSECUTIONS.</p> <p style="padding-left: 20px;">A. In General.</p> <p style="padding-left: 20px;">B. Jurisdiction.</p> <p style="padding-left: 20px;">C. Limitations.</p> <p style="padding-left: 20px;">D. Parties.</p> <p style="padding-left: 20px;">E. Indictment.</p> <p style="padding-left: 20px;">F. Evidence.</p> |
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\*For text of Interstate Commerce Act see No. 3, Vol. I, Federal Ry. Digest, p. 167.

- G. Instructions.
- H. Variance and Failure of Proof.
- I. Questions of Law and Fact.
- J. Verdict, Judgment and Penalties.
- K. Appeal and Error.

See also No. 3, Vol. I, Federal Ry. Digest, pp. 12-127.

## I. IN GENERAL.

### A. Validity of Federal Laws.

#### In General.

The Act Regulating Commerce is not rendered unconstitutional by the fact that it confers authority on the Interstate Commerce Commission to regulate commerce between a state and a territory of the United States. *Galveston, H. & S. A. R. Co. v. Wood*, 105 Tex. 178, 146 S. W. 538, reversing—*Tex. Civ. App.*—, 130 S. W. 857.

#### Elkins Act.

Carriers are not unconstitutionally deprived of their property without due process of law, or of the presumption of innocence, by the provisions of the Elkins Act making the act, omission or failure of any officer, agent or other person acting within the scope of his employment for or employed by any common carrier, the act, omission or failure of the carrier, and rendering the latter criminally answerable therefor. *New York C. & H. R. R. Co. v. United States*, 212 U. S. 481, 53 L. ed. 613, 29 Sup. Ct. Rep. 304, affirming 146 Fed. 298.

The fact that the provisions of the Elkins Act making common carriers answerable criminally for the acts, omissions and failures of their officers, agents and employees, may be invalid as to individuals who may be engaged in interstate transportation as carriers, does not invalidate the act as to corporate carriers. *New York C. & H. R. R. Co. v. United States*, 212 U. S. 481, 53 L. ed. 613, 29 Sup. Ct. Rep. 304, affirming 146 Fed. 298.

The Elkins Act does not unconstitutionally take the property of a carrier without due process of law. *United States v. Great N. R. Co.*, 157 Fed. 288.

#### Hepburn Act.

A carrier is not deprived of its property without due process of law by the commodities clause of the Hepburn Act, prohibiting the interstate transportation of articles or commodities manufactured, mined or produced by a carrier, or in which it has a direct or indirect interest. *United States v. Delaware & H. R. Co.*, 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527, reversing 164 Fed. 215.

The prohibition of the commodities clause of the Hepburn Act against the interstate transportation by a carrier of any article or commodity manufactured, mined, or produced by it, or in which it has a direct or indirect interest, is a valid regulation of commerce, notwithstanding the exclusion of lumber and manufactured products from the terms of the act. *United States v. Delaware & H. R. Co.*, 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527, reversing 164 Fed. 215.

The commodities clause of the Hepburn Act forbidding the transportation by interstate carriers of any articles they may own or have any interest in, except such as may be necessary for use in their business as common carriers, does not violate the Fifth Amendment to the Federal Constitution nor unconstitutionally deprive an interstate railway company of its property in violation of law, nor prevent it carrying its own property needed in legitimate intrastate business, when applied to hay moved in interstate commerce and intended for feeding animals used in and about a coal mine owned by the carrier, 75% of the output from which was sold to the public and the remainder of an inferior quality, being used in the locomotives of the carrier. *Delaware, L. & W. R. Co. v. United States*, 231 U. S. 363, 58 L. ed. 269, 34 Sup. Ct. Rep. 65.

The constitutionality of the penalty clause of the Hepburn Act will not be determined in an action to enforce the provisions of the commodities clause by injunction and mandamus, in which no penalty is sought, since the penalty clause, if invalid, is separable from the remainder of the act. *United States v. Delaware & H. R. Co.*, 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527, reversing 164 Fed. 215.

### B. Operation.

#### Retrospective Operation.

The amendment of June 29, 1906, to the Elkins Act, providing a term of imprisonment for the violation thereof, is not retrospective in its operation. *United States v. New York C. & H. R. R. Co.*, 146 Fed. 298, affirmed on other grounds 212 U. S. 481, 53 L. ed. 613, 29 Sup. Ct. Rep. 304.

### C. What Carriers Within Federal Laws. Express Companies.

Since section 1 of the Act Regulating Commerce declares that the term "common carrier" shall include express companies, a joint stock association created under the laws of a state and engaged in the express business, which filed interstate schedules and tariffs with the Interstate Commerce Commission, is liable to punishment under section 10 of the act for violating section 6 by demanding and receiving sums in excess of its established

interstate tariff rates. *United States v. Adams Express Co.*, 229 U. S. 381, 57 L. ed. 1237, 33 Sup. Ct. Rep. 878.

A joint stock company organized under the state common law and engaged in interstate express business is punishable for a violation of the Act Regulating Commerce by knowingly and willfully charging and receiving greater compensation for interstate transportation than the rates named in its schedules and tariffs filed with the Interstate Commerce Commission. *United States v. American Express Co.*, 199 Fed. 321.

The Hepburn Act makes express companies subject to all the provisions of the Act Regulating Commerce with respect to the interstate transportation of property. *United States v. Wells Fargo Express Co.*, 161 Fed. 606, affirmed 212 U. S. 522, 53 L. ed. 635, 29 Sup. Ct. Rep. 315.

An express company which does not operate a railway line was not within the Act Regulating Commerce as originally enacted. *Southern Ind. Express Co. v. U. S. Express Co.*, 88 Fed. 659, affirmed 35 C. C. A. 172, 92 Fed. 1022; *United States v. Morsman*, 42 Fed. 448.

An independent express company was not brought within the original Interstate Commerce Act as an adjunct or bureau of a railway or combination of railways, by an indictment charging that it is a common carrier engaged in the interstate transportation of property wholly by railroad. *United States v. Morsman*, 42 Fed. 448.

#### **D. What Shipments Are Interstate. In General.**

Freight received by a carrier in one state for transportation over its own line and that of a connecting carrier on a through bill of lading to a point beyond the state, is an interstate shipment. *Missouri, K. & T. R. Co. v. New Era Milling Co.*, 80 Kan. 141, 101 Pac. 1011.

A shipment is interstate where an intrastate carrier accepts a carload shipment for a point beyond its own line in another state and transports the car to a junction point from whence another carrier moves it to its destination. *Baldwin Sheep & L. Co. v. Columbia S. R. Co.*, 58 Oreg. 285, 114 Pac. 469.

A shipment of freight from one state to another is, as a matter of law, interstate. *Bass v. Erie R. Co.*, 195 Ill. App. 508.

Shipments of cotton to an intrastate point where it was compressed and re-shipped to a point in another state, are "interstate" shipments when they are all part of one transaction. *Alabama G. S. R. Co. v. McFadden*, 232 Fed. 1000.

Where an importer of bananas from a foreign country had a contract with a third

person whereby all fruit that was ripe or turning ripe in each shipment became the property of the latter, and on the arrival of vessels at a wharf such fruit was placed in cars, and, for the sole convenience of such purchaser, was moved by a carrier to nearby team tracks where most of the fruit was sold from the cars to local buyers, although a small percentage was shipped to points within and without the state, the movement of the cars from the wharf to such team tracks was interstate within the meaning of the Act Regulating Commerce, for which the carrier must collect the switching charges specified in the tariffs and schedules filed with the Commission. *United States v. Illinois C. R. Co.*, 230 Fed. 940.

The sale and delivery of coal f. o. b. at the mines for transportation to purchasers in other states, was held interstate commerce in an action by a miner for unjust discriminations against him in violation of the Act Regulating Commerce, by a carrier in the distribution of coal cars. *Pennsylvania R. Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120, 61 L. ed.—, 37 Sup. Ct. Rep. 46, affirming 241 Pa. 487, 88 Atl. 746.

#### **Shipments on Local Bills of Lading to Seaboard.**

Lumber shipped in name of the seller on local bills of lading to an intrastate seaport and delivered to the purchaser on docks and by him immediately transported by water to a foreign country under contracts in force at the time the lumber was purchased by him, was moved in foreign commerce, and is governed by tariffs filed by the carrier with the Interstate Commerce Commission instead of the local intrastate tariffs. *Texas & N. O. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 239, reversing — *Tex. Civ. App.*—, 121 S. W. 256.

#### **Domestic Shipments to or Through Foreign Countries.**

While imports from a foreign country into the United States are not within the terms of the Act Regulating Commerce, commerce of a domestic origin, although transported into or through a foreign country, is within the provisions of the act. *United States v. Grand Trunk R. Co.*, 225 Fed. 283.

#### **Foreign Shipment in Bond Through United States.**

The Elkins Act is not violated where a shipment originating in a foreign country is transported in bond by rail through the United States to ultimate destination in Canada at less than the domestic freight rate. *United States v. Philadelphia & R. R. Co.*, 188 Fed. 484.

#### **Intrastate Shipments Passing Through Adjoining State.**

When an intrastate shipment in transit

passes through a portion of an adjoining state it becomes an interstate shipment. *Hanley v. Kansas City S. R. Co.*, 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214, affirming 106 Fed. 353; *United States v. Erie R. Co.*, 166 Fed. 352; *Crescent Brewing Co. v. Oregon S. L. R. Co.*, 24 Idaho, 106, 132 Pac. 975; *Louisville & N. R. Co. v. Allen*, 152 Ky. 145, 153 S. W. 198; *Howard v. Chicago, R. I. & P. R. Co.*—Mo. App.—, 184 S. W. 906; *Potter v. Kansas City S. R. Co.*, 187 Mo. App. 1153; *Lynch v. New York C. & H. R. R. Co.*, 89 Misc. 472, 153 N. Y. Supp. 633, affirmed 156 N. Y. Supp. 1131; *Shelby Ice & F. Co. v. Southern R. Co.*, 147 N. C. 61, 60 S. E. 723; *Traynham v. Charleston & W. C. R. Co.*—S. C.—, 71 S. E. 813, S. C. 92 S. C. 643, 75 S. E. 381; *Contra, Seawell v. Kansas C. F. S. & M. R. Co.*, 119 Mo. 222, 24 S. W. 1002.

A shipment of freight between intrastate points is interstate and within the prohibition of the Elkins Act with respect to rebating, where the shipment in transit passes through two other states. *United States v. Delaware, L. & W. R. Co.*, 152 Fed. 269.

A shipment of grain between intrastate points is not interstate although it passes through two adjoining states in transit, and notwithstanding that the grain came originally from a foreign state but on local bills of lading, and was stored in an elevator by the shipper until its subsequent sale. *United States v. Lehigh V. R. Co.*, 115 Fed. 373.

#### **Interstate Shipment Diverted to Intrastate Point.**

A shipment consigned to a point in another state is an interstate shipment, although delivery is in fact made before the state line is crossed. *Stockton E. & S. Ass'n. v. Missouri P. R. Co.*, 97 Kan. 235, 154 Pac. 1126.

## **II. WHAT LAWS GOVERN.**

See same section, No. 3, Vol. I, Federal Ry. Digest, p. 16.

## **III. INTERSTATE COMMERCE COMMISSION.**

See same section, No. 3, Vol. I, Federal Ry. Digest, pp. 17-20.

## **IV. RATES AND CHARGES.**

See also No. 3, Vol. I, Federal Ry. Digest, pp. 23-41.

### **A. In General.**

#### **Definition of "Rate."**

The word "rate," as used in the Act Regulating Commerce, means the net cost to

the shipper of the transportation of his property. *United States v. Chicago & A. R. Co.*, 148 Fed. 646, affirmed 84 C. C. A. 324, 156 Fed. 558, affirmed 212 U. S. 563, 53 L. ed. 653, 29 Sup. Ct. Rep. 689.

#### **What May Be Accepted in Payment of Rates.**

The prohibition of section 6 of the Act to Regulate Commerce, as amended June 29, 1906, against carriers demanding, collecting or receiving greater, less or different compensation for the interstate transportation of persons or property than that specified in its published tariffs, precludes the charging, collecting or receiving of anything but money for interstate transportation. *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 31 Sup. Ct. Rep. 265, 34 L. R. A. (N. S.) 671, reversing 133 Ky. 652, 118 S. W. 982. See also 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42, reversing 150 Fed. 406.

#### **Free Transportation of Express.**

The Elkins Act and the Hepburn Act, as amended, preclude express companies from giving free transportation of personal packages to their officers and employees and the members of their families, and to the officers of other railway or express companies and their employees and members of their families, in exchange for passes or franks issued by the latter companies to the officers of the former companies. *American Express Co. v. United States*, 212 U. S. 522, 53 L. ed. 635, 29 Sup. Ct. Rep. 315, affirming 161 Fed. 606.

### **B. Establishment.**

See also same section No. 3, Vol. I, Federal Ry. Digest, p. 23.

#### **Filing With Interstate Commerce Commission.**

The Act Regulating Commerce requires each of the several carriers whose lines form a through interstate route, to file with the Interstate Commerce Commission copies of the joint through tariff. *United States v. New York C. & H. R. R. Co.*, 153 Fed. 630, reversed on other grounds 92 C. C. A. 331, 166 Fed. 267.

The Act Regulating Commerce requires that tariffs showing the demurrage charges of an interstate carrier shall be filed with the Interstate Commerce Commission. *Lehigh V. R. Co. v. United States*, 110 C. C. A. 513, 188 Fed. 879, affirming 184 Fed. 543, 546.

#### **Approval of Through Rate by Joint Carriers.**

The fact that schedules of joint rates for interstate shipments are not shown to have been sanctioned by all of the interested carriers is immaterial, where the

shipment in question was not made from a point covered by such joint rates. *Kansas City S. R. Co. v. Albers Comm. Co.*, 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316, reversing 79 Kan. 59, 99 Pac. 819.

#### **Filing by Initial Carrier Only.**

A terminal carrier may be convicted of a violation of the Elkins Act by giving rebates from the interstate freight rates established by a through joint tariff which was filed with the Interstate Commerce Commission by the initial carrier only. *United States v. New York C. & H. R. R. Co.*, 212 U. S. 509, 53 L. ed. 629, 29 Sup. Ct. Rep. 313, affirming 157 Fed. 293.

#### **Publication.**

Section 6 of the Act Regulating Commerce requires the publication of the tariffs of passenger fares as well as of freight rates for transportation from the United States through a foreign country to any other place within the United States. *United States v. Grand Trunk R. Co.*, 225 U. S. 283.

#### **Moving Interstate Shipment in Absence of Established Rate.**

By the amendment of June 29, 1906, c. 3591, U. S. Comp. Stats. Supp. 1907, p. 892, transportation of property in interstate commerce by a carrier by rail which has not filed its rates for such service with the Interstate Commerce Commission, is a misdemeanor. *United States v. Illinois T. R. Co.*, 168 Fed. 546.

A switching railway lying wholly within one state violates the Act Regulating Commerce, as amended, by moving interstate traffic without first having filed its applicable schedules and rates with the Interstate Commerce Commission. *United States v. Illinois T. R. Co.*, 168 Fed. 546.

#### **Demanding Illegal Rates.**

Section 10 of the Act Regulating Commerce is violated when a carrier willfully demands an illegal rate. *United States v. Texas & P. R. Co.*, 185 Fed. 820.

#### **C. Reasonableness.**

Jurisdiction of courts in general with respect to rates, see *infra* XIII, B.

#### **Who May Determine Reasonableness of Rates.**

The reasonableness of an interstate freight rate is to be determined by the Interstate Commerce Commission and not by the courts. *Hocking V. R. Co. v. Lackawanna Coal & L. Co.*, 140 C. C. A. 408, 224 Fed. 930; *American Union C. Co. v. Pennsylvania R. Co.*, 159 Fed. 278; *Geraty v. Atlantic C. L. R. Co.*, 211 Fed. 227; *Great N. R. Co. v. Loonan L. Co.*, 25 S. D. 155, 125 N. W. 644; *Atchison, T. & S. F. R. Co.*

*v. Superior Refining Co.*, 83 Kan. 732, 112 Pac. 604; *Missouri, K. & T. R. Co. v. New Era M. Co.*, 80 Kan. 141, 101 Pac. 1011; *Howard Supply Co. v. Chesapeake & O. R. Co.*, 162 Fed. 188.

#### **D. Binding Effect of Established Rates.**

See also same section No. 3, Vol. I, *Federal Ry. Digest*, p. 25.

#### **In General.**

An established interstate freight rate is binding alike upon shippers and carriers until altered by the Interstate Commerce Commission. *Hocking V. R. Co. v. Lackawanna Coal & L. Co.*, 140 C. C. A. 408, 224 Fed. 930.

#### **E. Construction of Schedules and Tariffs.**

##### **In General.**

In construing interstate classification sheets the intention of the framers as to the meaning of the words used should be given effect when ascertainable, regardless of the intention of shippers or of local usages and customs relating to the meaning of the terms used. *Smith v. Great N. R. Co.*, 15 N. D. 195, 107 N. W. 56.

Where a schedule of interstate joint freight rates recites that it was adopted in "connection" with the specified carriers for shipments from a common point originating on the lines of certain connecting carriers, the rates established apply to shipments received from all connecting carriers at such common point. *Kansas City S. R. Co. v. Albers Comm. Co.*, 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316, reversing 79 Kan. 59, 99 Pac. 819.

#### **When Local Rates Applicable to Interstate Shipments.**

Through interstate shipments over the lines of connecting carriers on through bills of lading take the lawfully established local rates where there is no duly established joint through rate. *Kansas City S. R. Co. v. Albers Comm. Co.*, 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316, reversing 79 Kan. 59, 99 Pac. 819.

A joint through interstate freight tariff filed with the Interstate Commerce Commission controls an interstate shipment to the exclusion of lower local rates which were not filed with the Commission. *Alabama G. S. R. Co. v. McFadden*, 232 Fed. 1000.

#### **F. Particular Charges and Rates.**

See also same section, No. 3, Vol. I, *Federal Ry. Digest*, p. 25.

#### **Long and Short Haul Rates.**

A greater charge may be imposed by a railway company for a shorter than for a longer interstate haul, when the shorter



is included within the longer, without violating the Act Regulating Commerce, where the lower charge is justified by reason of water competition. *Brewer v. Central of Ga. R. Co.*, 84 Fed. 258.

### Demurrage and Car Service Charges.

#### — Demurrage on Private Cars.

Private cars cannot be held on a switch track without the payment of demurrage charges, where the track was constructed by a carrier under a contract with the owner of such cars by which his use of the track was restricted to the receipt and delivery of shipments thereon subject to the general use of the track by the carrier when not inconsistent with such contract rights. *St. Louis, I. M. & S. R. Co. v. National Refining Co.*, 226 Fed. 357, affirmed — C. C. A. —, 237 Fed. 347.

Private cars are in "railroad service" within the meaning of a demurrage tariff, while stored on a switch track constructed by a railway company under a contract with the owner of the cars by which his use of the track was restricted to the receipt from and delivery of shipments to him, subject to the general use of the track by the carrier when not inconsistent with the contract rights of the shipper. *St. Louis, I. M. & S. R. Co. v. National Refining Co.*, 226 Fed. 357, affirmed — C. C. A. —, 237 Fed. 347.

#### — When Demurrage Accrues.

Demurrage accrues, under a tariff imposing the same from the date of the arrival of cars, when cars of coal arrive at tidewater rather than when the coal is unloaded into vessels. *Hite v. Central R. of N. J.*, 96 C. C. A. 326, 171 Fed. 370. See *S. C.* 166 Fed. 975.

When coal is shipped subject to re-consignment the consignee becomes liable for demurrage charges after notice of the arrival of the cars in the yards of a carrier, where the tariffs impose such charge from the time of the receipt of notice by the consignee until the cars are released, since the delivery of the cars is a sufficient fulfillment of the contract of carriage and the carrier is not bound to wait for direction as to their disposition before the right to demurrage accrues. *United States v. Erie R. Co.*, 209 Fed. 283.

#### — Who Liable for Demurrage.

A stockyards company owning many miles of tracks constituting a terminal railway, is not liable for demurrage on cars received from connecting carriers for delivery to the private plants of the consignees located on the lines of the terminal railway, where the demurrage tar-

iffs of the connecting carriers do not provide that any other one than the consignee shall be personally liable for such charges, since, in making such deliveries, the terminal carrier acts as agent for the connecting carriers. *Missouri P. R. Co. v. Union Stockyards Co.*, 123 C. C. A. 131, 204 Fed. 757.

A stockyards company owning many miles of tracks constituting a terminal railway, is liable for the established demurrage charges on cars consigned to it and which it holds beyond the free time after delivery from connecting carriers. *Missouri P. R. Co. v. Union Stockyards Co.*, 123 C. C. A. 131, 204 Fed. 757.

#### — Failure to Observe Demurrage Tariff.

The failure of a carrier to observe its demurrage tariff as filed with the Interstate Commerce Commission, violates the Elkins Act. *Lehigh V. R. Co. v. United States*, 110 C. C. A. 513, 188 Fed. 879, affirming 184 Fed. 543, 546.

The fact that the demurrage charges of a carrier, as filed with the Interstate Commerce Commission, discriminate against one person does not permit the carrier to cancel demurrage charges incurred by him, since the proper mode of obtaining redress is through the Commission. *Lehigh V. R. Co. v. United States*, 110 C. C. A. 513, 188 Fed. 879, affirming 184 Fed. 543, 546.

#### — Wrongful Demand for Demurrage.

A carrier wilfully violates section 10 of the Act Regulating Commerce by demanding storage charges on cars after their arrival at destination, but before they are placed in a position for unloading. *United States v. Texas & P. R. Co.*, 185 Fed. 820.

#### Failure to Collect Switching Charges.

Where an importer of bananas from a foreign country had a contract with a third person by which all fruit that was ripe or turning ripe in each shipload became the latter's property, and on the arrival of vessels at a wharf such fruit was loaded into cars, and, for the sole convenience of such purchaser, hauled by a carrier to a nearby team track, from which most of the fruit was sold to local buyers and a small percentage shipped to points in the same and other states, the movement of the cars from the wharf to the team tracks was an interstate movement, and the carrier is liable to prosecution for failing to collect from the purchaser the switching charges specified in the schedules and tariffs filed with the Interstate Commerce Commission. *United States v. Illinois C. R. Co.*, 230 Fed. 940.

### **Coal Shipped on Through Rate, but Used by Carrier for Fuel En Route.**

One who ships coal to a lake port is liable for the local rates on coal that is delivered to vessels for use as fuel coal, rather than for a joint proportional rate on coal intended for transshipment by water. *Hocking V. R. Co. v. Lackawanna Coal & L. Co.*, 140 C. C. A. 408, 224 Fed. 930.

### **Shipments at Lower Rate Over Route Other than Shown by Tariff.**

Where a joint through freight rate was regularly established between designated interstate points the Act Regulating Commerce is violated where the initial carrier makes a shipment between those points by a different route at a lower rate than that shown by such established rate. *United States v. Pennsylvania R. Co.*, 153 Fed. 625.

### **I. Recovery of Undercharges.**

See also same section No. 3, Vol. I, Federal Ry. Digest, pp. 28-33.

#### **When Less Than Tariff Rate Collected.**

A consignee who receives an interstate shipment on payment of less than the full tariff rate, is answerable to the carrier for the difference. *Union P. R. Co. v. American S. & R. Co.*, 121 C. C. A. 182, 202 Fed. 720.

### **J. Recovery of Overcharges.**

See also same section No. 3, Vol. I, Federal Ry. Digest, pp. 28-39.

#### **What Law Controls.**

An overcharge made by a carrier, whose line lies entirely within one state, for an interstate shipment is governed by the Act Regulating Commerce. *Texas & P. R. Co. v. Clark*, 4 Tex. Civ. App. 611, 23 S. W. 698.

#### **Excessive and Unreasonable Rates.**

A shipper cannot maintain an action against a carrier for exacting the established tariff rates for interstate shipments, on the ground that such rates are unreasonable or unlawful, since the question is within the exclusive jurisdiction of the Interstate Commerce Commission. *American Union Coal Co. v. Pennsylvania R. Co.*, 159 Fed. 278.

#### **Action by Interstate Commerce Commission As Condition Precedent.**

A person who is aggrieved by the enforcement by a carrier of an alleged unreasonable interstate freight rate must, as a condition precedent to an action at law for damages, obtain a finding from the Interstate Commerce Commission of

the unreasonableness of the rate and an award of reparation therefor. *Howard Supply Co. v. Chesapeake & O. R. Co.*, 162 Fed. 188.

### **Collection of Interstate Rates on Intrastate Shipments.**

One who contracts to sell cross-ties to a railway company, and deliver them by rail f. o. b. at an intrastate point, is answerable only for the intrastate freight rate, notwithstanding that without being unloaded the ties were shipped by the purchaser to another state. *Louisville & N. R. Co. v. Ohio V. Tie Co.*, 148 Ky. 718, 147 S. W. 421, writ of error dismissed 232 U. S. 737, 58 L. ed. 820, 34 Sup. Ct. Rep. 606.

Where lumber was shipped in the name of the seller on local bills of lading to an intrastate seaport and delivered to the purchaser on docks and by him immediately transported by water to a foreign country under contracts in force at the time he purchased the lumber, since the whole shipment was in foreign commerce and was governed by tariffs filed by the carrier with the Interstate Commerce Commission, the purchaser cannot recover from the carrier the difference between the freight rate he was compelled to pay for the rail transportation and a lower intrastate rate. *Texas & N. O. R. Co. v. Sabine Tram. Co.*, 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229, reversing — *Tex. Civ. App.* —, 121 S. W. 266.

### **N. "Pooling."**

#### **What Constitutes.**

A "physical pool," meaning a distribution by a carrier of property offered for transportation among different and competing carriers in proportion and on a percentage previously agreed on, is in violation of section 5 of the Act Regulating Commerce. In *re Pooling Freights*, 115 Fed. 588.

A "money pool" consisting of a division between competing railways of the aggregate or net proceeds of the earnings of such railways on interstate traffic or any portion thereof, violates section 5 of the Act Regulating Commerce. In *re Pooling Freights*, 115 Fed. 588.

Any arrangement, oral or otherwise, or combination which has for its purpose and eventuates in the pooling of freights of different and competing railways, is within the prohibition of section 5 of the Act Regulating Commerce. In *re Pooling Freights*, 115 Fed. 588.

#### **Liability of Carrier and Officers.**

Section 5 of the Act Regulating Commerce permits the indictment of a corporate carrier and its officers individually

for pooling of freights in violation of law. In re Pooling Freights, 115 Fed. 588.

## V. ALLOWANCES, DISCRIMINATIONS, PREFERENCES AND REBATES.

See also generally same sections No. 3, Vol. I, Federal Ry. Digest, pp. 41-49.

### A. In General.

#### Effect of Passage of Hepburn Act on Elkins Act.

In so far as section 1 of the Elkins Act provided for the punishment of acts of corporate carriers in knowingly offering, granting or giving rebates, concessions, or discriminations from the legal rates and tariffs, it was not abrogated or repealed by the Hepburn Act. Great N. R. Co. v. United States, 84 C. C. A. 93, 155 Fed. 945, affirmed 208 U. S. 452, 52 L. ed. 567, 28 Sup. Ct. Rep. 313.

#### C. Allowances for Services in Connection with Shipment.

See also same section No. 3, Vol. I, Federal Ry. Digest, pp. 41-43.

### In General.

The fact that a person who in his own name forwards freight for others, maintains an office in a foreign country and advertises and solicits freight traffic for shipment over the road of a carrier, does not permit the latter to reimburse the forwarder under section 15 of the Act Regulating Commerce, as for services rendered in connection with the transportation of freight. United States v. Lehigh V. R. Co., 243 U. S. 444, 61 L. ed.—, 37 Sup. Ct. Rep. 434, affirming 222 Fed. 685.

### For Wharfage.

A shipper cannot recover from a carrier for services performed by him in the wharfage of freight unless the charges he seeks to recover are specified in the carrier's duly published schedules or tariffs. Southern Cotton Oil Co. v. Central of Ga. R. Co., 142 C. C. A. 627, 228 Fed. 335, affirming 204 Fed. 476.

A shipper cannot recover from a carrier for services performed by him in the wharfage of freight, where, previous to the bringing of the action, the only schedule or tariff specifying a charge for such services was cancelled by the Interstate Commerce Commission. Southern Cotton Oil Co. v. Central of Ga. R. Co., 142 C. C. A. 627, 228 Fed. 335, affirming 204 Fed. 476.

The mooted question of the validity of a contract of a carrier to pay wharfage

for transferring freight from cars to vessels will not be determined in a friendly suit against a carrier, who is willing to pay the agreed compensation if the court will grant some judgment which may be pleaded in defense should the Interstate Commerce Commission disprove of the contract, since the question is one primarily for that body and not for the court. Southern Cotton Oil Co. v. Cent. of Ga. R. Co., 204 Fed. 476, affirmed 142 C. C. A. 627, 228 Fed. 335.

### D. Discriminations and Preferences.

See also same section No. 3, Vol. I, Federal Ry. Digest, pp. 43-48.

### In General.

An interstate carrier must not discriminate in its rates, charges or facilities in connection with interstate traffic, but must give equal rates and facilities to all. Cutting v. Florida R. & N. Co., 30 Fed. 663.

The provisions of the Elkins Act forbidding the granting of concessions or discriminations cannot be restricted by the narrow language of sections 2 and 3 of the Act Regulating Commerce. Hocking V. R. Co. v. United States, 127 C. C. A. 285, 210 Fed. 735, affirming 194 Fed. 234.

The language of section 2 of the Act Regulating Commerce with respect to the transportation of property for greater or less compensation than that prescribed by established tariffs, relates to the carriage of the goods and not to the person or capacity of the sender. United States v. Wells Fargo Express Co., 161 Fed. 606, affirmed 212 U. S. 522, 53 L. ed. 635, 29 Sup. Ct. Rep. 315.

The Elkins Act is violated if a discrimination practiced by a carrier is or might be material or substantial by giving the favored shipper a real advantage which other shippers were not allowed. Hocking V. R. Co. v. United States, 127 C. C. A. 285, 210 Fed. 735, affirming 194 Fed. 234.

### Discriminations in Rates.

A carrier may be prosecuted under the Elkins Act for carrying freight at a less or different rate than that specified in its tariffs. Hocking V. R. Co. v. United States, 127 C. C. A. 285, 210 Fed. 735, affirming 194 Fed. 234.

A carrier willfully violates the Elkins Act where it knowingly and intentionally departs from its established tariff rates with knowledge that the cost of transportation is thereby diminished by the amount of the rebate or concession. Chicago, St. P. M. & O. R. Co. v. United States, 90 C. C. A. 211, 162 Fed. 835, af-

firming 151 Fed. 84, certiorari denied 212 U. S. 579, 53 L. ed. 659, 29 Sup. Ct. Rep. 689.

#### **Giving Credit for Freight Charges.**

The Elkins Act is violated where a carrier practiced discriminations by extending long credits to one shipper and requiring security and prompt payment from other shippers similarly situated, notwithstanding that such practice had not been forbidden by the Interstate Commerce Commission. *Hocking V. R. Co. v. United States*, 127 C. C. A. 285, 210 Fed. 735, affirming 194 Fed. 234.

The Elkins Act is violated where a carrier, pursuant to an antecedent understanding, granted long time credits to one through shipper and required security from and prompt settlements by other shippers similarly situated, notwithstanding that the favored shipper made cash payments sufficient to cover the charges of the initial carrier, who made prompt settlements with the connecting carriers. *Hocking V. R. Co. v. United States*, 127 C. C. A. 285, 210 Fed. 735, affirming 194 Fed. 234.

When, pursuant to an antecedent arrangement, a carrier accepted from one shipper an interest bearing note in payment for interstate shipments, which was afterwards renewed and subsequently exchanged for 3-year debentures, the Elkins Act was violated by giving a concession or discrimination, where other shippers similarly situated were required to give security and make prompt monthly payments for similar shipments. *Hocking V. R. Co. v. United States*, 127 C. C. A. 285, 210 Fed. 735, affirming 194 Fed. 234.

#### **Free Telephone Service.**

Extending free telephone service to one shipper in notifying him of the arrival of cars and in reconsigning or forwarding the same, while such privilege is denied other shippers similarly situated, does not violate section 6 of the Act Regulating Commerce, since it has no relation to the actual transportation of property or the rates and charges specified in the established tariffs. *United States v. Erie R. Co.*, 209 Fed. 283.

#### **E. Rebates.**

See also same section No. 3, Vol. I, Federal Ry. Digest, pp. 48-49.

#### **In General.**

Willfulness is of the essence to the conviction of a carrier for violating the Elkins Act by giving rebates or concessions from established tariff rates. *Atchison, T. & S. F. R. Co. v. United States*, 95 C. C. A. 446, 170 Fed. 250, reversing

163 Fed. 111; *United States v. Texas & P. R. Co.*, 185 Fed. 820.

#### **Retroactive Application of Elkins Act.**

A carrier is punishable under the Elkins Act for the payment after the passage of such law, of rebates for shipments made prior thereto. *New York C. & H. R. Co. v. United States*, 212 U. S. 500, 53 L. ed. 624, 29 Sup. Ct. Rep. 309, affirming 146 Fed. 298; *United States v. Great N. R. Co.*, 157 Fed. 288.

#### **Rebates Covering Several Shipments.**

Where, after the payment of the legal interstate freight rates on numerous shipments, the shipper was paid rebates at different times pursuant to a prior agreement, a separate offense of rebating, which is forbidden by the Elkins Act, was completed when each rebate was paid, instead of a single offense being created by the agreement for the payment of the rebates. *New York C. & H. R. Co. v. United States*, 212 U. S. 481, 53 L. ed. 613, 29 Sup. Ct. Rep. 304, affirming 146 Fed. 298.

There were four separate offenses of rebating where a single payment of rebates was made covering four distinct and separate carload shipments at different days to different consignees. *Grand Rapids & I. R. Co. v. United States*, 129 C. C. A. 113, 212 Fed. 577.

#### **What Carriers Liable.**

An initial carrier may be convicted of violating the Elkins Act by rebating where, although it did not join in establishing a through joint rate with connecting carriers, the rate from which the rebate was given consisted of the aggregate of the initial carrier's local rate and the regularly established through joint rate of the other connecting carriers. *Chicago, B. & Q. R. Co. v. United States*, 85 C. C. A. 194, 157 Fed. 830, affirmed 209 U. S. 90, 52 L. ed. 698, 28 Sup. Ct. Rep. 439.

#### **For Whose Act Carrier Answerable.**

A carrier is guilty of rebating in violation of the Elkins Act, where, to its knowledge, a shipper over its line was paid rebates by another carrier, which held a majority of the defendant carrier's stock. *United States v. Cleveland, C. & St. L. R. Co.*, 234 Fed. 178.

#### **Particular Rebates.**

##### **— Allowance for Moving Cars on Private Tracks.**

The Elkins Act is violated where a carrier pays a shipper from the regularly established interstate tariff freight rate \$1.00 per car for moving them over private tracks within the shipper's plant:

when such refund is not covered by the carrier's tariffs. *Chicago & A. R. Co. v. United States*, 84 C. C. A. 324, 156 Fed. 558, 26 L. R. A. (N. S.) 551, affirming 148 Fed. 646, affirmed 212 U. S. 563, 53 L. ed. 653, 29 Sup. Ct. Rep. 689.

— **Elevator Charges.**

A rebate or concession is given in violation of the Elkins Act where a carrier refunds to a shipper from the established interstate freight rate the amount paid by the latter for elevator charges for handling grain en route, which was not covered by the carrier's schedules, notwithstanding that such refund was made to all shippers similarly situated. *Chicago, St. P. M. & O. R. Co. v. United States*, 90 C. C. A. 211, 162 Fed. 835, affirming 151 Fed. 84, certiorari denied 212 U. S. 579, 53 L. ed. 659, 29 Sup. Ct. Rep. 689.

A rebate was granted in violation of the Elkins Act, when a carrier paid a shipper of grain for elevator charges which were not covered by the tariff. *Wisconsin C. R. Co. v. United States*, 94 C. C. A. 444, 169 Fed. 76, S. C. 151, Fed. 84.

A carrier knowingly paid a shipper a rebate from the freight charges collected from the consignee, who was the shipper's agent, where it was paid under a pre-existing agreement with the shipper on presentation of the receipted freight bills, as an elevator charge which was not covered by the tariffs. *Wisconsin C. R. Co. v. United States*, 94 C. C. A. 444, 169 Fed. 76, S. C. 151 Fed. 84.

— **Payments to Agent of Shipper.**

The Elkins Act is violated where a carrier pays an agent of a shipper rebates from interstate freight rates in the form of compensation for extra lighterage performed by the shipper. *United States v. Delaware L. & W. R. Co.*, 152 Fed. 269.

Where a forwarder habitually ships in his own name freight not owned by him, and is afterwards paid by a carrier a commission on the amount of freight charges paid at the regular tariff rates, the latter is guilty of rebating. *United States v. Lehigh V. R. Co.*, 222 Fed. 685, affirmed 243 U. S. 444, 61 L. ed. —, 37 Sup. Ct. Rep. 434.

When a forwarder habitually ships in his own name freight which he does not own, a carrier is guilty of rebating where the former is given a reduction from the regularly established tariff rates in the form of a salary for making shipments over the line of such carrier. *United States v. Lehigh V. R. Co.*, 222 Fed. 685, affirmed 243 U. S. 444, 61 L. ed. —, 37 Sup. Ct. Rep. 434.

The fact that a person who forwarded freight in his own name, maintained an

office in a foreign country and advertised and solicited traffic for a carrier does not permit the latter to reimburse such person for services rendered in connection with the transportation of such freight under section 15 of the Act Regulating Commerce. *United States v. Lehigh V. R. Co.*, 243 U. S. 444, 61 L. ed. —, 337 Sup. Ct. Rep. 434, affirming 222 Fed. 685.

— **Improper Allowance of Transit Rates.**

When some inbound local shipments of lumber were used locally and other lumber shipped out in its place under transit rates, and at destination the carrier collected from the consignee the inbound and outbound transit rates and repaid the shipper the inbound local rates, the refunds were knowingly made although the agents who executed the outbound transaction were not aware that the lumber in the inbound cars had been so used or reconsigned, where they had access to books and records of the carrier which showed the whole transaction, since under the circumstances the Elkins Act imputed knowledge to the carrier. *Grand Rapids & I. R. Co. v. United States*, 129 C. C. A. 113, 212 Fed. 577.

— **Delivery Short of Billed Destination.**

Where a carrier received coal from another carrier and intended for the former's use, which it moved to coal pockets but a short distance away in the same city, the terminal carrier did not receive a rebate in violation of the Act Regulating Commerce, although the coal was billed to another point on its line at a rate of \$3.80 per ton from which it received 75 cents as its proportion of the haul, while the rate to the city where it was actually delivered was \$3.55 per ton. *Montpelier & W. R. R. Co. v. United States*, 109 C. C. A. 532, 187 Fed. 271.

— **Wrongful Billing.**

The Act Regulating Commerce is violated where a carrier wrongfully billed a shipment as coming from the line of a connecting carrier and then paid the shipper a rebate of the amount the connecting carrier would have been entitled to as its proportion of the through rate. *United States v. Michigan C. R. Co.*, 43 Fed. 26.

— **Refunding Demurrage Charges.**

The fact that the demurrage charges of a carrier, as filed with the Interstate Commerce Commission, discriminate against one person is no defense to a prosecution of the carrier for violating the Elkins Act by cancelling demurrage charges incurred by him. *Lehigh V. R. Co. v. United States*, 110 C. C. A. 513, 188 Fed. 879, affirming 184 Fed. 543, 546.

— On Transportation Partly in Foreign Country.

A carrier whose line extends through Canada between points in the United States, violates section 6 of the Act Regulating Commerce by giving to a theatrical company, under a prior agreement, monthly rebates from the total charges paid by the latter for transportation between points in the United States and Canada and back into the United States, including trips and stops in Canada, where the rebates were paid from the total monthly fares collected and not from any particular fare for separate trips. *United States v. Grand Trunk R. Co.*, 225 Fed. 283.

— Rebates to Lessee of Carrier.

Where, long before the passage of the Act Regulating Commerce, a coal mining company leased a railway owned by it to an interstate carrier for 999 years in consideration of an annual rental and a reduced freight rate on all of the former's coal shipped over such line, and after the adoption of the Hepburn Act the carrier filed with the Interstate Commerce Commission tariffs showing the terms of such lease, and collected the full tariff rates from the mining company and afterwards paid it rebates, such payments were unlawful and in violation of law, and cannot be regarded as made for the use of an instrumentality of commerce, since the leased road was, for all intents and purposes, the property of the lessee. *Central R. Co. of N. J. v. United States*, 143 C. C. A. 569, 229 Fed. 501.

Good Faith of Carrier.

The fact that a carrier paid rebates to a shipper in good faith under a mistake as to the lawfulness thereof, is no defense to a prosecution for violating the Hepburn Act. *Central R. of N. J. v. United States*, 143 C. C. A. 569, 229 Fed. 501.

The fact that neither a carrier nor its agents had actual knowledge of the circumstances which rendered an interstate freight rate unlawful, does not prevent the conviction of the carrier for "knowingly" granting a rebate or concession in violation of section 1 of the Act Regulating Commerce, as amended, since the carrier cannot willfully or intentionally remain in ignorance of such facts, although negligence or mistake is not equivalent to knowledge. *United States v. Erie R. Co.*, 222 Fed. 444.

A carrier is not guilty of granting an unlawful concession or rebate in rates by applying an "import rate" when a "domestic rate" was applicable, where neither the carrier nor its agents were aware that goods were not to be taken for shipment from the dock, or a warehouse in con-

nection therewith, upon which the goods were originally landed in this country, as was necessary in order to apply the "import rate." *United States v. Erie R. Co.*, 222 Fed. 444.

Allowance of Damages Claims as Rebate.

The acceptance by a carrier of less than its established rates for transporting an interstate shipment violates the Elkins Act, although the concession was made in compromise of a claim for a loss of property in transit. *United States v. Atchison, T. & S. F. R. Co.*, 163 Fed. 111, reversed 95 C. C. A. 446, 170 Fed. 250.

On a prosecution for violating the Elkins Act the defendant may show that a deduction from an established freight rate was made for the purpose of collecting for the actual amount of merchandise transported where the shipper claimed that a portion was lost in transit. *Atchison, T. & S. F. R. Co. v. United States*, 95 C. C. A. 446, 170 Fed. 250, reversing 163 Fed. 111.

## VI. CONTRACTS PERTAINING TO SHIPMENTS.

See generally same section No. 3, Vol. I, Federal Ry. Digest, pp. 50-75.

### A. In General.

#### Agreement to Hold Stock for Feeding.

Where the interstate freight tariffs of a carrier provide for the holding by it of live stock at certain points for 15 days or more at designated charges in order to feed and fatten the stock for market, without designating the total period for such holding, a contract to hold sheep for 45 to 60 days is valid when such privilege is open to all shippers alike. *Klink v. Chicago, R. I. & P. R. Co.*, 135 C. C. A. 169, 219 Fed. 457.

### C. Transportation.

See also same section No. 3, Vol. I, Federal Ry. Digest, pp. 50-51.

#### Duty to Furnish Cars.

The Act Regulating Commerce requires carriers to provide themselves with and to furnish to shippers on reasonable request, sufficient cars and equipment to carry all freight that may be offered. *Illinois C. R. Co. v. River & R. C. & C. Co.*, 150 Ky. 489, 150 S. W. 641.

A carrier is answerable to a shipper for failing to furnish sufficient cars on reasonable request for interstate shipments. *Illinois C. R. Co. v. River & R. C. & C. Co.*, 150 Ky. 489, 150 S. W. 641.

A carrier is not excused from perform-

ing its duty of providing itself with and furnishing to shippers on reasonable request sufficient cars and equipments to carry all freight offered, by reason of a strike on another portion of its road which did not materially affect its failure to supply cars as requested. *Illinois C. R. Co. v. River & R. C. & C. Co.*, 150 Ky. 489, 150 S. W. 641.

#### E. Rates.

See also same section No. 3, Vol. I, Federal Ry. Digest, pp. 52-54.

#### Contracts for Less Than Established Rates.

An initial carrier cannot justify a contract to transport a through interstate shipment for a less sum than the aggregate of its local rate and the rate of a connecting carrier, on the strength of a contract by the latter to maintain its rate for the remainder of the year, which it disregarded by filing an increase with the Interstate Commerce Commission. *Chicago, B. & Q. R. Co. v. United States*, 85 C. C. A. 194, 157 Fed. 830, affirmed 209 U. S. 90, 52 L. ed. 698, 28 Sup. Ct. Rep. 439.

When there is a tariff rate on hay a contract for a different rate for an interstate shipment of old hay is void. *Missouri, K. & T. R. Co. v. Bowles*, 1 Ind. Ter. 250, 40 S. W. 899.

#### H. Contracts For Allowances, Rebates, Discriminations and Preferences

See also same section No. 3, Vol. I, Federal Ry. Digest, pp. 55-57.

#### Loans to Shipper.

Where a railway company borrowed money at 4 per cent and loaned it to a coal mining company for 2 per cent under a contract whereby the latter was to make all shipments over the line of such carrier and to furnish it coal at \$1.20 per ton, which was higher than the carrier was ever required to pay in the open market, the carrier constructing necessary tracks at its own cost for the benefit of the coal company, the carrier was guilty of rebating in violation of the Elkins Act. *Vandalia R. Co. v. United States*, 141 C. C. A. 469, 226 Fed. 713.

#### Recovery by Shipper on Agreement to Pay Rebate.

A shipper may recover on the agreement of a carrier to refund to him the amount paid for his transportation to another state in consideration of his shipping two or more cars of freight over the road of such carrier. *St. Louis & S. F. R. Co. v. Puterbaugh*, 117 Ill. App. 569.

### VII. CARRIERS OF LIVE STOCK.\*

Civil liability of carriers under 28 Hour Act see generally No. 3, Vol. I, Federal Ry. Digest, pp. 75-84.

#### A. In General.

#### 1. Validity and Construction of 28 Hour Act

##### Validity.

The original 28 Hour Act was constitutional. *United States v. Boston & A. R. Co.*, 15 Fed. 209.

The fact that authority is conferred on the shipper or custodian of live stock to consent to its confinement in cars for not to exceed 36 hours does not render the 28 Hour Act unconstitutional by delegating legislative power to shippers. *Southern P. Co. v. United States*, 96 C. C. A. 252, 171 Fed. 360, affirming 162 Fed. 412; *United States v. Oregon R. & N. Co.*, 163 Fed., 640.

The proviso of the 28 Hour Act that sheep need not be unloaded in the night time, but that they may be continued in transit to a suitable unloading place, subject "to the aforesaid limitation of 36 hours," does not render the act void for uncertainty, since the proviso means that in no case shall sheep be continued in transit beyond 36 hours. *Southern P. Co. v. United States*, 96 C. C. A. 252, 171 Fed. 360, affirming 162 Fed. 412.

The sixth Amendment to the Federal Constitution is not violated by permitting an action against a carrier for a violation of the 28 Hour Act to be maintained in a district other than that in which the offense occurred. *Southern P. Co. v. United States*, 96 C. C. A. 256, 171 Fed. 364, affirming 162 Fed. 412.

##### Construction.

The 28 Hour Act must be strictly construed. *United States v. New York C. & H. R. R. Co.*, 156 Fed. 249.

#### 2. What Carriers Within 28 Hour Act.

Liability of Stockyards, Terminal and Transfer Companies under 28 Hour Act, see *infra* VII, F, 9, (c).

##### Intrastate Carriers.

An intrastate railway is subject to the 28 Hour Act where it forms part of a line over which live stock is transported in interstate commerce. *United States v. Boston & A. R. Co.*, 15 Fed. 209.

##### Initial Carriers.

An initial carrier is not answerable for a violation of the 28 Hour Act because a connecting carrier, to whom a shipment of live stock was delivered before the ex-

\*For text of Federal 28 Hour Act see No. 3 Federal Ry. Digest, pp. 184-185.

piration of the statutory period, confined the stock so that in the aggregate it was in the cars for more than 28 hours. *United States v. Louisville & N. R. Co.*, 18 Fed. 480.

A carrier that delivers a shipment of live stock to a connecting carrier within the limits prescribed by the 28 Hour Act, is relieved from further responsibility for the conduct of the subsequent carrier. *United States v. Southern P. Co.*, 157 Fed. 459.

An initial carrier is liable for violating the 28 Hour Act where, before the expiration of that period, it delivered a car of live stock to a terminal company which was controlled by such carrier and other connecting carriers, for transfer to one of such carriers, and the terminal company failed to unload the stock for feed and rest until after the expiration of 28 hours, since the initial carrier was not relieved from liability until the actual delivery of the stock by the terminal carrier to the connecting line. *United States v. Union P. R. Co.*, 130 C. C. A. 34, 213 Fed. 332.

#### **Bridge Company.**

A bridge company that provides the only means for moving cars for several connecting carriers across a river which forms the boundary between two states did not violate the 28 Hour Act by accepting a car of live stock which had been confined beyond the prescribed limit, and moving it across the river to the nearest available place for unloading, since there was not a wilful or knowing violation of the law. *St. Louis Merchants B. & T. R. Co. v. United States*, 126 C. C. A. 422, 209 Fed. 600.

#### **Receivers.**

A receiver of a railroad appointed by a Federal court was not within the provisions of the original 28 Hour Act, and was not liable for the prescribed penalty for confining live stock in cars for more than 28 hours. *United States v. Harris*, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609, affirming 29 C. C. A. 327, 85 Fed. 533, S. C. 78 Fed. 290.

#### **3. What Shipments Within 28 Hour Act Intrastate Shipments.**

The Federal 28 Hour Act does not apply to an intrastate shipment of live stock. *United States v. East Tenn., V. & G. R. Co.*, 13 Fed. 642.

#### **Shipments Passing Through Canada.**

No extraterritorial force is given the 28 Hour Act by applying it to a shipment of live stock passing through Canada en route between domestic points, although the time occupied in transporting it through the foreign country is included in computing the confinement of the cattle.

*United States v. Lehigh V. R. Co.*, 184 Fed. 971, affirmed 109 C. C. A. 211, 187 Fed. 1006.

A carrier is liable for violating the 28 Hour Act where a shipment of live stock originating in one state and bound for another state, was deprived of feed, water and rest even though a part of the statutory period elapsed while the animals were being transported through the Dominion of Canada. *Grand Trunk R. Co. v. United States*, 112 C. C. A. 317, 191 Fed. 803; *United States v. Lehigh V. R. Co.*, 184 Fed. 971, affirmed 109 C. C. A. 211, 187 Fed. 1006.

#### **Shipments Between Foreign Points Passing Through United States.**

The 28 Hour Act is violated where, during transit through the United States, there was a confinement for more than the statutory period of live stock shipped from Ontario to a point in British Columbia. *Grand Trunk R. Co. v. United States*, 143 C. C. A. 392, 229 Fed. 116.

#### **F. Duty to Unload for Feed, Water and Rest.**

##### **1. In General.**

##### **Failure to Feed Stock.**

Civil liability for failure of carrier to unload stock for feed, water and rest, see No. 3, Vol. I, Federal Ry. Digest, pp. 75-83.

A carrier does not violate the 28 Hour Act where, in consequence of the carelessness and negligence of its employees, live stock is not fed while in rest pens. *United States v. Lehigh V. R. Co.*, 123 C. C. A. 9, 204 Fed. 705.

##### **3. Facilities for Feeding, Watering and Resting Stock**

##### **Duty to Provide Shelter Pens.**

The 28 Hour Act does not impose on carriers the duty to provide shelter pens at every place where carload shipments of live stock are delivered. *United States v. Philadelphia & R. R. Co.*, 223 Fed. 211.

Where the transportation of live stock ended during a severe blizzard within the time limit prescribed by the 28 Hour Act, the carrier was not under any obligation to provide shelter pens into which the stock could be unloaded. *United States v. Philadelphia & R. R. Co.*, 223 Fed. 207.

##### **4. Defective and Insufficient Pens.**

##### **Sufficiency of Pens in General.**

Pens located on level dry ground satisfy the 28 Hour Act, where stock was fed hay placed on the ground, and water was given them in clean tubs placed temporarily in the pens, since the law does not require pens to be equipped with permanent hay-



racks or water troughs, it being sufficient if the equipment is such as to serve the purpose at the time stock is placed therein. *United States v. St. Louis, I. M. & S. R. Co.*, 101 C. C. A. 373, 177 Fed. 205.

A carrier does not violate the 28 Hour Act where, in an emergency not due to its fault, it unloads cattle at a small way station for feed, water and rest into pens which allow each animal 48 square feet of dry ground, on which hay was strewn, and water was obtainable by driving the cattle 515 yards along a public lane to a creek. *St. Louis & S. F. R. Co. v. United States*, 94 C. C. A. 437, 169 Fed. 69.

#### 5. When Facilities for Feeding, Watering and Resting in Cars.

##### In General.

In order to bring itself within the exception of the 28 Hour Act dispensing with the necessity for unloading live stock when transported in cars in which stock can be fed, watered, and rested, the carrier must show not only that the animals can have such supplies, but also that they do have them. *United States v. Chicago, B. & Q. R. Co.*, 184 Fed. 984, affirmed 115 C. C. A. 193, 195 Fed. 241.

A carrier does not bring itself within the exception of the 28 Hour Act with respect to unloading live stock for feed, water and rest when transported in cars in which such necessities may be supplied, where the owner of stock accompanied the shipment and agreed to care for, feed and water it but failed to do so, and the carrier did not make a sufficient effort to ascertain if such duty was being performed. *United States v. Chicago, B. & Q. R. Co.*, 184 Fed. 984, affirmed 115 C. C. A. 193, 195 Fed. 241.

Although live stock is shipped in cars which permit them to be fed and watered in transit, the 28 Hour Act is violated where the carrier provides insufficient feed for each car and in some of them not all of the cattle could reach the water. *United States v. New York C. & H. R. R. Co.*, 191 Fed. 938.

The Federal law is violated when live stock is confined for more than 28 hours in cars that are equipped with a type of watering trough which the cattle can tip over so as to spill the water. *United States v. New York C. & H. R. R. Co.*, 186 Fed. 541.

The Federal law is violated when live stock is confined for more than 28 hours in cars in which not all of the watering troughs were filled. *United States v. New York C. & H. R. R. Co.*, 186 Fed. 541.

It is not essential to a recovery of a penalty for violating the 28 Hour Act that it appear that the carrier knew that live stock did not have proper feed, water, or space and opportunity to rest in the cars

in which it was transported, since the carrier is liable if it knowingly and willfully confined the stock for more than the statutory period without proper feed, water and space and opportunity for rest. *Chicago, B. & Q. R. Co. v. United States*, 115 C. C. A. 193, 195 Fed. 241, affirming 184 Fed. 984.

##### Opportunity for Rest.

Live stock is not carried in cars in which they have proper "space and opportunity to rest," within the meaning of the 28 Hour Act, where all of the cattle cannot lie down at the same time. *Erie R. Co. v. United States*, 118 C. C. A. 558, 200 Fed. 406, affirming 191 Fed. 941; *United States v. New York C. & H. R. R. Co.*, 191 Fed. 938.

When a shipment of cattle is made in 4 cars which are claimed to have provided sufficient space and opportunity for the cattle to rest, the 28 Hour Act is violated where there was not sufficient space in one of the cars for all of the animals to lie down at the same time. *Erie R. Co. v. United States*, 118 C. C. A. 558, 200 Fed. 406, affirming 191 Fed. 941.

The Federal law is violated when 21 bulls, some of which were large ones, were confined for more than 28 hours tied side by side in a car 36 feet long, since the cattle did not have sufficient space and opportunity for rest. *United States v. New York C. & H. R. R. Co.*, 186 Fed. 541.

#### 6. Consent to Confinement Beyond 28 Hours.

##### In General.

A request for the confinement of live stock for 36 hours in transit need not be induced by any unforeseen contingencies arising after transportation commences. *Wabash R. Co. v. United States*, 101 C. C. A. 133, 178 Fed. 5, 21 Ann. Cas. 819; *Atchison, T. & S. F. R. Co. v. United States*, 101 C. C. A. 140, 178 Fed. 12; *Missouri, K. & T. R. Co. v. United States*, 101 C. C. A. 143, 178 Fed. 15.

##### Time for Making.

The written request for the confinement of live stock for 36 hours in transit may be made before the transportation of the shipment commences. *Wabash R. Co. v. United States*, 101 C. C. A. 133, 178 Fed. 5, 21 Ann. Cas. 819; *Atchison, T. & S. F. R. Co. v. United States*, 101 C. C. A. 140, 178 Fed. 12; *Missouri, K. & T. R. Co. v. United States*, 101 C. C. A. 143, 178 Fed. 15.

##### Who May Make Request.

A person who has the custody of a shipment of live stock, or the authorized agent of the owner, may consent to their confinement in transit for 36 hours. *Wabash*

R. Co. v. United States, 101 C. C. A. 133, 178 Fed. 5, 21 Ann. Cas. 819.

A railway company may rely on the presumption that one to whom the possession of live stock is entrusted for shipment may execute a request for the confinement of the stock for 36 hours during transit. *Wabash R. Co. v. United States*, 101 C. C. A. 133, 178 Fed. 5, 21 Ann. Cas. 819.

#### Form of Consent.

A written request for the confinement of live stock for 36 hours in transit complies with the 28 Hour Act when written on a railway form which is partly in manuscript and partly in print, but which is separate and apart from any bill of lading or other railway form of similar character. *Wabash R. Co. v. United States*, 101 C. C. A. 133, 178 Fed. 5, 21 Ann. Cas. 819; *Atchison, T. & S. F. R. Co. v. United States*, 101 C. C. A. 140, 178 Fed. 12; *Missouri, K. & T. R. Co. v. United States*, 101 C. C. A. 143, 178 Fed. 15.

A request that a shipment of live stock be run for 36 hours, when written on the end or bottom of a way bill and signed by the shipper, is a sufficient compliance with the requirement of section 1 of the 28 Hour Act that such request "shall be separate and apart from any printed bill of lading, or other railroad form," since it is the separateness of the request as such, and not the separateness of the paper or material on which it is written, that the act requires. *Mobile & O. R. Co. v. United States*, 126 C. C. A. 427, 209 Fed. 605.

#### "Blanket" Requests.

A separate written request for the confinement of live stock for 36 hours must be made for each shipment, and a written request in general terms extending the time for the confinement of all future shipments is ineffectual. *United States v. Pere Marquette R. Co.*, 171 Fed. 586.

A carrier cannot adopt a practice of requiring shippers to execute, at the time of the delivery of live stock for transportation, written requests that it shall not be unloaded if the 28 hour period expires while the stock is in transit and that it may be confined for 36 hours, since such practice practically abrogates the 28 Hour Act. *United States v. Atchison, T. & S. F. R. Co.*, 166 Fed. 160.

### 7. Computing Period of Confinement.

#### Time Required for Loading and Unloading.

The time consumed in loading and unloading live stock is not included as a part of the time during which a carrier may confine the animals in cars. *United States v. Southern P. Co.*, 157 Fed. 459.

The time of confinement of live stock is

to be computed from the completion of their loading into cars and the commencement of the unloading therefrom. *United States v. Southern P. Co.*, 157 Fed. 459.

#### Time Required for Switching.

Time spent in moving a car about in a railway yard cannot be deducted in determining whether the 28 Hour Act has been violated, since only the time required for unloading and loading the animals is to be excluded. *United States v. Northern P. T. Co.*, 181 Fed. 879, reversed on other grounds, 106 C. C. A. 583, 184 Fed. 603.

#### Shipments Passing Through Canada.

The time consumed in transporting a shipment of live stock through the Dominion of Canada while en route between points in the United States, is to be included in determining whether the 28 Hour Act has been violated. *Grand Trunk R. Co. v. United States*, 112 C. C. A. 317, 191 Fed. 803; *United States v. Lehigh V. R. Co.*, 184 Fed. 971, affirmed 109 C. C. A. 211, 187 Fed. 1006.

### 8. Unloading Sheep at Night.

#### In General.

Where the time of confinement of sheep expires in the night time a carrier may transport them to a suitable unloading point, subject to the limitation of 36 hours. *United States v. Southern P. Co.*, 157 Fed. 459.

#### What Constitutes "Night Time."

The words "in the night time," with reference to the unloading of sheep in compliance with the 28 Hour Act, means that period of time between the termination of daylight on the evening of one day and the earliest dawn of the next morning. *United States v. Southern P. Co.*, 157 Fed. 459.

#### When 36 Hour Period Expires at Night.

The provisions of the 28 Hour Act relating to unloading sheep in the night time "subject to the aforesaid limitation of 36 hours," permits the confinement of such animals only when the 28 hour period expires at night, and when the extended period of 36 hours so expires sheep must be unloaded during the preceding day. *United States v. Atchison, T. & S. F. R. Co.*, 107 C. C. A. 323, 185 Fed. 105, S. C. 166 Fed. 160; *United States v. Southern P. Co.*, 157 Fed. 459.

Under the proviso of the 28 Hour Act that sheep need not be unloaded in the night time, but that they may continue in transit to a suitable unloading place, subject "to the aforesaid limitation of 36 hours," it is the duty of a carrier, when requested to run sheep for 36 hours, to un-

load them before dark where it becomes obvious that the 36 hour limit will expire in the night time. *Southern P. Co. v. United States*, 96 C. C. A. 252, 171 Fed. 360, affirming 162 Fed. 412.

When the owner consents to the confinement of sheep for 36 hours and such period expires in the night time, by failing to unload the animals a carrier violates the 28 Hour Act, since the proviso relating to the unloading of sheep in the night time applies only to the expiration of the 28 hour period. *United States v. Atchison, T. & S. F. R. Co.*, 107 C. C. A. 323, 185 Fed. 105.

Where a train containing 17 cars of sheep was inspected and found in good condition before it left a terminal, and it was thereafter delayed for an hour and 20 minutes by the breaking of 2 drawbars and the slipping of the knuckle of a coupler, and there was a further delay of 2 hours by the breaking first of a drawbar on another train and afterwards of the chain by which the break was repaired, so that the sheep arrived at destination at night, and after unloading 2 cars by dragging the sheep out, the remaining 15 cars were not unloaded until the next morning, the violation of the 28 Hour Act was excusable because due to accidental and unavoidable causes which could not have been foreseen or avoided by the exercise of due diligence. *Chicago, B. & Q. R. Co. v. United States*, 114 C. C. A. 334, 194 Fed. 342.

## 9. Liability for Failure to Unload.

### (a) In General.

#### Priority in Moving Live Stock.

The movement of ordinary passenger and freight cars must give way to the movement of cars of live stock through a railway yard to an unloading point, where the stock has been confined in violation of the 28 Hour Act. *United States v. Delaware, L. & W. R. Co.*, 220 Fed. 944.

#### What Satisfies Act.

The mere unloading of live stock does not satisfy the 28 Hour Act. *New York C. & H. R. R. Co. v. United States*, 91 C. C. A. 519, 165 Fed. 833.

### (b) Knowledge and Willfulness of Carrier.

#### In General.

A carrier cannot be punished under the 28 Hour Act unless it knowingly and willfully fails to comply with its requirements. *United States v. Southern P. Co.*, 157 Fed. 459.

#### Meaning of "Willfully and Knowingly."

The words "knowingly and willfully,"

as used in the 28 Hour Act, describe an essential element of the offense therein described, without proof of which the statutory penalties cannot be recovered. *St. Joseph Stockyards Co. v. United States*, 110 C. C. A. 432, 187 Fed. 104, reversing 181 Fed. 625.

The words "knowingly and willfully" in the 28 Hour Act cannot be disregarded, since they describe essential elements of the right to recover the prescribed penalty. *St. Louis & S. F. R. Co. v. United States*, 94 C. C. A. 437, 169 Fed. 69.

The words "willfully and knowingly," as used in the 28 Hour Act, mean either an intentional disregard of the statute by a carrier or indifference to its requirements. *Oregon, W. R. & N. Co. v. United States*, 123 C. C. A. 471, 205 Fed. 337.

The words "knowingly and willfully," as used in the 28 Hour Act, mean a negligent omission to observe the requirements of the act. *New York C. & H. R. R. Co. v. United States*, 91 C. C. A. 519, 165 Fed. 833.

"Willfully" within the meaning of the 28 Hour Act, means purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards or is plainly indifferent to the requirements of the statute. *Chicago, B. & Q. R. Co. v. United States*, 114 C. C. A. 334, 194 Fed. 342; *St. Joseph Stockyards Co. v. United States*, 110 C. C. A. 432, 187 Fed. 104, reversing 181 Fed. 625; *St. Louis & S. F. R. Co. v. United States*, 94 C. C. A. 437, 169 Fed. 69.

Since the term "willfully," as used in the 28 Hour Act, does not imply deliberate intent on the part of a carrier to do injury to live stock or its owner by confining it in cars in excess of the statutory period, the jury may find that a violation of the law was willful if the evidence shows that a carrier, in confining the stock beyond such period, manifested a disregard of the law or indifference towards its requirements. *Chicago & N. W. R. Co. v. United States*, 148 C. C. A. 170, 234 Fed. 268.

The word "willfully," as used in the 28 Hour Act with reference to the confinement of live stock by a carrier in excess of the designated period, does not require an evil intent on the part of the carrier, but only that it shall purposely or intentionally, with knowledge of the facts, fail to obey such statute. *Grand Trunk R. Co. v. United States*, 143 C. C. A. 392, 229 Fed. 116.

The word "willfully," as used in the 28 Hour Act, means the intentional doing of the act forbidden by the statute, and does not import an evil purpose or a bad motive. *United States v. Union P. R. Co.*, 94 C. C. A. 433, 169 Fed. 65.

The word "willfully," in the 28 Hour

Act, does not imply vicious intent on the part of a carrier, but is synonymous with "voluntarily" or "intentionally," and means the confinement of live stock beyond the prescribed period in the absence of accidental or unavoidable causes which could not have been foreseen and avoided by the exercise of due diligence and foresight. *United States v. Atchison, T. & S. F. R. Co.*, 166 Fed. 160.

The word "knowingly," as used in the 28 Hour Act, means with knowledge of the facts. *St. Joseph Stockyards Co. v. United States*, 110 C. C. A. 432, 187 Fed. 104, reversing 181 Fed. 625.

The word "knowingly," as used in the 28 Hour Act, means with a knowledge of the facts, as where stock is received from a connecting carrier with knowledge of the length of time it has been confined, and it is further confined in excess of the statutory limit. *St. Louis & S. F. R. Co. v. United States*, 94 C. C. A. 437, 169 Fed. 69.

#### What Amounts to Willfulness and Knowledge.

A carrier "knowingly and willfully" violates the 28 Hour Act when it intentionally and knowingly confines live stock beyond the prescribed limit, without intending to injure the animals or their owner. *United States v. Sioux City Stockyards Co.*, 162 Fed. 556, affirmed 92 C. C. A. 578, 167 Fed. 126.

Willfulness on the part of a carrier in confining live stock beyond the limit prescribed by the 28 Hour Act, may be established in the absence of evidence of any direct intent to injure the cattle. *Chicago & N. W. R. Co. v. United States*, 148 C. C. A. 170, 234 Fed. 272.

Live stock is "willfully and knowingly" confined in violation of the 28 Hour Act when those in charge of a train intentionally or knowingly confine the stock beyond the period prescribed by the act, unless the confinement was due to storms, or accidental, or unavoidable causes which due diligence and foresight could not have prevented. *United States v. Southern P. Co.*, 157 Fed. 459.

A carrier does not "knowingly and willfully" violate the 28 Hour Act where, in consequence of the carelessness or negligence of its employees, live stock is not fed while in rest pens. *United States v. Lehigh V. R. Co.*, 123 C. C. A. 9, 204 Fed. 705.

A carrier "knowingly and willfully" violates the 28 Hour Act where, although it made and promulgated rules and regulations requiring its employees to observe such act, a conductor negligently failed to do so. *United States v. Atlantic C. L. R. Co.*, 98 C. C. A. 110, 173 Fed. 764.

A carrier "knowingly and willfully" vio-

lates the 28 Hour Act when live stock is confined beyond the prescribed limit in consequence of the oversight, forgetfulness and unintentional neglect of a train dispatcher. *Montana C. R. Co. v. United States*, 90 C. C. A. 388, 164 Fed. 400.

A carrier does not knowingly and willfully violate the 28 Hour Act when it did not unload within the statutory period live stock which it received from a connecting carrier 24 hours after it was loaded into the cars, where it does not appear that the defendant actually knew when the stock was loaded or that it had not been unloaded by the preceeding carrier during the time it was in the latter's possession. *United States v. Louisville & N. R. Co.*, 157 Fed. 979.

When 9 hours before the expiration of the lawful period of confinement, an initial carrier delivered a car of live stock to a connecting carrier which it moved to its yards, but later it refused to accept the car because it could not be transported and delivered to a subsequent carrier before the expiration of the 9 hours and because such carrier might refuse to accept it, and on the refusal of the initial carrier to receive back the car the connecting carrier placed it on the tracks of the initial carrier, and after the expiration of the statutory period the car was moved by the latter carrier to a suitable point and the stock unloaded, the initial carrier did not willfully and knowingly violate the 28 Hour Act. *United States v. Chicago, R. I. & P. R. Co.*, 211 Fed. 778.

A carrier that delivers a shipment of live stock to a connecting carrier in time, according to the usual course of transportation, for their carriage to and unloading within 28 hours at pens suitably equipped for feeding, watering and resting them, either en route or at destination, without notice or knowledge that they must be or will be delayed in their arrival beyond that time, cannot be held to have knowingly and willfully violated the act. *Missouri, K. & T. R. Co. v. United States*, 101 C. C. A. 143, 178 Fed. 15.

#### Imputed Knowledge.

Knowledge that live stock has been confined by a connecting carrier in violation of the 28 Hour Act will be imputed to a delivering carrier in the absence of any evidence showing that it made reasonable inquiry without ascertaining the facts. *New York C. & H. R. R. Co. v. United States*, 122 C. C. A. 255, 203 Fed. 953.

When the government, in an action against a delivering carrier for a violation of the 28 Hour Act, shows that when live stock was received by such carrier from a connecting carrier, the time for unloading the stock had long since elapsed, knowledge of such fact will be imputed to th-

defendant in the absence of evidence showing that after reasonable inquiry, it failed to ascertain the facts. *New York C. & H. R. R. Co. v. United States*, 122 C. C. A. 255, 203 Fed. 953.

### (c) Stock Received From Connecting Carrier.

#### Liability of Receiving Carrier. — In General.

A connecting carrier is liable for a penalty where it receives and transports live stock that has been confined beyond the 28 hour limit by the preceding carrier. *United States v. Lehigh V. R. Co.*, 184 Fed. 971, affirmed 109 C. C. A. 211, 187 Fed. 1006.

When the statutory period of confinement has expired before live stock is received by a connecting carrier it is liable for the penalty prescribed by the 28 Hour Act, since it is not necessary for an additional statutory period to elapse before liability is created. *United States v. Lehigh V. R. Co.*, 184 Fed. 971, affirmed 109 C. C. A. 211, 187 Fed. 1006.

A connecting carrier that accepts from an initial carrier live stock which has been confined in violation of the 28 Hour Act, is not liable for the statutory penalty when the connecting carrier has possession of the shipment for less than 28 hours. *United States v. Chicago, M. & St. P. R. Co.*, 234 Fed. 386.

#### —Duty to Promptly Move or Unload Stock.

It is the duty of a connecting carrier on receiving a car of live stock from another carrier with notice that it has been confined in violation of the 28 Hour Act, to exercise diligence and to act with reasonable promptness in moving the car to the nearest unloading point and begin to unload it. *United States v. Delaware, L. & W. R. Co.*, 220 Fed. 944.

A carrier that receives a car of live stock from a connecting carrier with notice that it has been confined beyond the statutory limit, does not violate the 28 Hour Act if the car is promptly moved to a suitable place and the stock unloaded for feed, water and rest. *United States v. Delaware, L. & W. R. Co.*, 206 Fed. 513.

A delivering carrier must transport live stock to destination 7 miles away as quickly as possible when it is received with notice that the preceding carrier has violated the 28 Hour Act. *New York C. & H. R. R. Co. v. United States*, 122 C. C. A. 255, 203 Fed. 953.

Prima facie 3 hours and 35 minutes is an unreasonable time to consume in moving a car of live stock 7 miles to destination, where the delivering carrier received the stock from a connecting carrier with no-

tice that it had been confined in violation of the 28 Hour Act. *New York C. & H. R. R. Co. v. United States*, 122 C. C. A. 255, 203 Fed. 953.

A delivering carrier that consumes 3 hours and 35 minutes in moving a car of live stock 7 miles to destination when it was aware that the stock had been confined by a connecting carrier for more than the statutory period, is guilty of violating the 28 Hour Act. *New York C. & H. R. R. Co. v. United States*, 122 C. C. A. 255, 203 Fed. 953.

Where, on a cold day, a connecting carrier accepts a car of live stock with notice that it has been confined in excess of the statutory period, and there was an unexplained delay of 1 hour and 25 minutes in moving the cars through busy railroad yards to the nearest unloading point, the receiving carrier was guilty of a violation of the 28 Hour Act. *United States v. Delaware, L. & W. R. Co.*, 220 Fed. 944.

A carrier that receives from a connecting carrier a car of live stock with notice that they have been confined beyond the statutory limit, violates the 28 Hour Act where, although but one hour was required to move the car to the nearest unloading point, there was an unexplained delay of 3 hours in doing so. *United States v. Delaware, L. & W. R. Co.*, 206 Fed. 513.

A carrier that receives live stock from a connecting carrier after it has been confined beyond the statutory period, violates the 28 Hour Act where the stock is not unloaded for feed, water and rest until 4 hours after the receipt thereof. *United States v. New York, C. & H. R. R. Co.*, 156 Fed. 249.

#### Charging Against Receiving Carrier Time of Confinement by Preceding Carrier.

A carrier violates the 28 Hour Act where live stock is confined in excess of the prescribed limit, although a portion of such time elapsed while the stock was in the possession of a preceding carrier. *United States v. Oregon S. L. R. Co.*, 160 Fed. 526.

#### Duty of Receiving Carrier to Ascertain Length of Previous Confinement.

A carrier receiving live stock from a connecting carrier is bound to make reasonable inquiry as to the length of time it has already been confined in the cars. *New York C. & H. R. R. Co. v. United States*, 122 C. C. A. 255, 203 Fed. 953.

A terminal carrier that received a train from another carrier for transfer with notice that it contained 16 cars of sheep on which the time of confinement had nearly expired, and, without notice that a carload of hogs was in another portion of the train, the sheep were unloaded, but

the hogs were kept in the car for more than 28 hours, the terminal carrier is answerable for the prescribed penalty, although the notation on the waybill of the time of the previous unloading of the hogs was so dim as to be scarcely noticeable. *United States v. Sioux City Term. R. Co.*, 234 Fed. 663.

### Particular Carriers.

#### —Terminal and Transfer Companies.

A terminal company in handling a car of live stock is within the terms of the 28 Hour Act where it accepts and moves the same with all possible speed to an unloading pen with knowledge that the connecting carrier has confined the stock in excess of the period permitted by law. *United States v. Northern P. T. Co.*, 181 Fed. 879, reversed 106 C. C. A. 583, 184 Fed. 603.

A terminal railway company that receives for transfer a shipment of live stock which has already been confined for more than 28 hours by a preceding carrier, is liable for the penalty prescribed by the Federal law, although the stock was promptly moved by the terminal company to the nearest stock pens and unloaded for feed, water and rest. *United States v. Northern P. T. Co.*, 186 Fed. 947.

A terminal carrier does not violate the 28 Hour Act by receiving live stock from a connecting carrier after they have been confined beyond the prescribed period, where the stock was moved to and unloaded into pens by the terminal carrier with all reasonable dispatch with the facilities it had for handling the stock. *United States v. Sioux City Stockyards Co.*, 162 Fed. 556, affirmed 92 C. C. A. 578, 167 Fed. 126.

A terminal carrier does not violate the 28 Hour Act by receiving from a connecting carrier a shipment of live stock which had been confined beyond the statutory period, where the former hurried the stock with all possible speed to a stock pen 1,300 feet away and unloaded the animals for feed, water and rest. *Northern P. T. Co. v. United States*, 106 C. C. A. 583, 184 Fed. 603, reversing 181 Fed. 879.

A terminal railway company did not violate the 28 Hour Act where it received from a trunk line carrier live stock for the sole purpose of feeding, watering and resting it, without knowing that it had been confined by the latter carrier for more than 28 hours, and the terminal company used due diligence in moving the stock to stockyards and unloading it. *United States v. Stockyards T. R. Co.*, 101 C. C. A. 147, 178 Fed. 19, affirming 172 Fed. 452.

A terminal railway company that is a distinct corporate entity from the associate railroads for which it does switch-

ing, is not the agent of one of such associate companies so that the imposition of a penalty on the latter for violating the 28 Hour Act will relieve the terminal company from a similar penalty with respect to the same shipment of live stock which it receives with notice that it has been confined by the preceding carrier beyond the statutory limit. *United States v. Northern P. T. Co.*, 186 Fed. 947.

#### —Stockyards Companies.

A stockyards company owning and operating a terminal railway for hauling freight and live stock between the lines of connecting interstate railways and its stockyards and various packing plants, is within the provisions of the 28 Hour Act when moving a shipment of live stock from a trunk line to a packing plant. *United States v. Sioux City Stockyards Co.*, 162 Fed. 556, affirmed 92 C. C. A. 578, 167 Fed. 126.

A stockyards company that receives live stock from a common carrier without actual knowledge that it has been confined for nearly 28 hours, does not knowingly and wilfully violate the 28 Hour Act where, without attempting to ascertain the facts, it promptly moves the stock a few miles and unloads it at the unloading point nearest to the place where the shipment was received. *St. Joseph Stockyards Co. v. United States*, 110 C. C. A. 432, 187 Fed. 104, reversing 181 Fed. 625.

A company maintaining a system of switch tracks in the Chicago stock yards district does not violate the 28 Hour Act, where, under orders from the Stock Yards Association and without seeing the way bills or knowing that horses had been confined by a trunk line carrier beyond the statutory limit, it received and moved a car to the unloading chutes within a reasonable time. *United States v. Chicago J. R. Co.*, 211 Fed. 724.

A company maintaining a system of switch tracks in the Chicago stock yards district did not violate the 28 Hour Act, where, under orders from the Stock Yard Association and without seeing the waybill, it received from a trunk line a car of horses that had been confined in excess of statutory period, and moved it to an unloading chute within a reasonable time, when it was discovered that because the horses were not provided with halters they could not be there unloaded and a further delay was caused in removing them to another chute. *United States v. Chicago J. R. Co.*, 211 Fed. 724.

#### (d) Liability of Carrier for Damages.

See generally Vol. I, No. 3. Federal Ry. Digest, pp. 75-84.

**Under State Law.**

Notwithstanding the Federal 28 Hour Act a shipper may recover under a state statute for the failure of a carrier to feed and water an interstate shipment of live stock, when the violation of the latter law occurs in the state where the shipment originates. *Gulf, C. & S. F. R. Co. v. Gray*, — Tex. Civ. App. —, 24 S. W. 837, reversed 87 Tex. 312, 28 S. W. 280.

**(c) Justification and Excuse.****In General.**

Failure to provide unloading stations, congested traffic conditions reasonably to be anticipated from past experience, and break-downs en route resulting from negligent operation or omission to furnish proper equipment, engines and cars, are not accidental or unavoidable causes which, within the meaning of the 28 Hour Act, cannot be anticipated and avoided by due diligence and foresight. *United States v. Atchison, T. & S. F. R. Co.*, 166 Fed. 160.

It is not essential to a recovery of a penalty under the 28 Hour Act that the government should negative the excuse embodied in section 3 of the Act to the effect that live stock need not be unloaded when it can and has proper feed, water and space and opportunity to rest in the cars. *Chicago, B. & Q. R. Co. v. United States*, 115 C. C. A. 193, 195 Fed. 241, affirming 184 Fed. 984.

The jury may, in an action for the penalty prescribed by the 28 Hour Act, take into consideration the confinement and transportation of the stock from inception to unloading and determine therefrom whether, if due diligence had been used during the early stages of the journey, the stock might have been delivered at destination within the statutory period notwithstanding a delay near destination in consequence of an unavoidable accident. *Chicago & N. W. R. Co. v. United States*, 148 C. C. A. 170, 234 Fed. 268.

**Acts of God and Accidental Causes.****— In General.**

A carrier does not violate the 28 Hour Act when it is prevented from unloading live stock by storms or other accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight. *United States v. Southern P. Co.*, 157 Fed. 459.

A carrier must show that a break-down or wreck resulted from a cause which due diligence and foresight would not have anticipated and avoided, if it desires such cause to excuse it from liability under the 28 Hour Act. *United States v. Atchison, T. & S. F. R. Co.*, 166 Fed. 160.

**— Accidental Causes.**

An "accidental or unavoidable cause" which cannot be avoided by the exercise of due diligence and foresight within the meaning of the 28 Hour Act, is one which reasonably prudent and careful men, under like circumstances, do not and would not ordinarily anticipate, and the effects of which under similar circumstances they do not and would not ordinarily avoid. *Chicago, B. & Q. R. Co. v. United States*, 114 C. C. A. 334, 194 Fed. 342.

An unavoidable accident or occurrence within the meaning of the 28 Hour Act, is one which cannot be avoided by that degree of prudence, foresight, care and caution which the law requires of every one under the circumstances of the particular case. *United States v. Southern P. Co.*, 157 Fed. 459.

The measure of due diligence and foresight necessary to excuse a violation of the 28 Hour Act in consequence of a delay due to unavoidable or accidental causes, is that degree of diligence and foresight which reasonably prudent and careful men ordinarily exercise under like circumstances. *Chicago, B. & Q. R. Co. v. United States*, 114 C. C. A. 334, 194 Fed. 342.

Where, after a shipment of live stock left the last point at which it could be unloaded short of destination, there was ample time for transportation within 28 hours, and en route a recently overhauled engine developed a hot box, and a substituted engine which had worked properly on its previous trip, sprung leaks in its boiler, which defects prevented the arrival of the shipment at destination within such period, the delay was due to accidental and unavoidable causes within the meaning of the 28 Hour Act, which the carrier could not have anticipated or avoided by the exercise of due diligence or foresight. *United States v. Boston & M. R. Co.*, 228 Fed. 915.

**— Contributing Negligence.**

An accident to a train as the result of a carrier's negligence which resulted in the confinement of live stock for more than 28 hours, violates the 28 Hour Act, and is not excusable as the result of an "unavoidable accident." *Newport, N. & M. V. Co. v. United States*, 9 C. C. A. 579, 61 Fed. 488; *United States v. Southern P. Co.*, 157 Fed. 459.

A carrier's conviction for violating the 28 Hour Act is justified where, despite two excusable accidental delays within 16 miles from destination, about 3 hours were consumed in running such distance after stock had, with the consent of the owner, been confined for 36 hours. *Chicago & N. W. R. Co. v. United States*, 148 C. C. A. 170, 234 Fed. 268.

The fact that an unavoidable accident near destination prevented a carrier from delivering live stock before the expiration of the 28 hour period, will not relieve the carrier from liability for the statutory penalty, if, by the exercise of due diligence during the early portion of a long journey, the stock might have been delivered at destination within 28 hours, notwithstanding such accident. *Chicago & N. W. R. Co. v. United States*, 148 C. C. A. 170, 234 Fed. 268.

#### **Unusual Pressure of Business.**

A great and unusual press of business does not, unexplained and of itself, excuse the confinement of live stock beyond the time permitted by the 28 Hour Act, so as to fall within the meaning of an accidental or unavoidable cause which could not have been anticipated or foreseen by the exercise of due diligence and foresight. *United States v. Union P. R. Co.*, 94 C. C. A. 433, 169 Fed. 65.

Mere pressure of business, or the side-tracking of a stock train for the passage of passenger or fast freight trains, is no excuse for the confinement of live stock in violation of the 28 Hour Act, when the meeting of such trains could have been anticipated at the time the stock train was dispatched from a loading point. *United States v. Southern P. Co.*, 157 Fed. 459.

#### **Clerical Errors.**

A carrier is not guilty of willfully and knowingly violating the 28 Hour Act where live stock was confined in excess of the time limit in consequence of the clerical error of a receiving clerk in noting the proper unloading time. *United States v. Philadelphia & R. R. Co.*, 223 Fed. 213.

#### **10. Failure to Allow 5 Hours Rest.**

##### **In General.**

A carrier violates the 28 Hour Act by permitting live stock a rest of but 3 hours at an unloading point, although reloaded at the request of the owner. *United States v. Delaware, L. & W. R. Co.*, 220 Fed. 944.

A carrier that reloads live stock within 3 hours after it was unloaded for feed, water and rest is liable for the violation of the 28 Hour Act, notwithstanding the conviction and payment of a penalty for a subsequent violation by a connecting carrier to whom the shipment was delivered within 28 hours from the time of reloading. *United States v. New York C. & H. R. R. Co.*, 211 Fed. 1000.

When a carrier received a car of live stock from a connecting carrier with notice of its confinement for more than the statutory period, and, at the request of the owner, the stock was reloaded after only 3 hours rest, there were distinct and sep-

arate violations of the 28 Hour Act. *United States v. Delaware, L. & W. R. Co.*, 220 Fed. 944.

#### **11. Failure of Caretaker or Owner to Unload.**

##### **Owner or Caretaker.**

It is the duty of a carrier, after spotting a car of live stock at destination, to exercise due diligence and foresight to see that the stock is unloaded within the 28 hour limit, and the carrier cannot leave the performance of such duty to a caretaker who accompanies the shipment. *Oregon, W. R. & N. Co. v. United States*, 123 C. C. A. 471, 205 Fed. 337.

The facts that the owner or caretaker accompanying a shipment of live stock agrees to care for, feed and water it, and that feed and water were easily accessible to him on the journey, are insufficient to establish the excuse that the animals had proper feed and water, where the stock was knowingly and willfully confined by a carrier for more than 28 hours without having proper feed and water or space and opportunity to rest during transportation. *Chicago, B. & Q. R. Co. v. United States*, 115 C. C. A. 193, 195 Fed. 241, affirming 184 Fed. 984.

#### **12. Termination of Liability.**

##### **Completion of Transportation.**

The obligation to unload live stock for feed, water, and rest, which is created by the 28 Hour Act, is imposed on railways as carriers only and exists only so long as stock is in course of transportation on the road. *United States v. Philadelphia & R. R. Co.*, 223 Fed. 207.

The 28 Hour Act does not require carriers to provide for the care of live stock where transportation ends within the time limit. *United States v. Philadelphia & R. R. Co.*, 223 Fed. 207.

##### **Delivery to Consignee.**

The delivery of live stock by a carrier to a consignee within the time limit prescribed by the 28 Hour Act, relieves the former from liability with respect to the unloading of the stock. *United States v. Southern P. Co.*, 157 Fed. 459.

When, 2 hours before the expiration of the 28 hour limit, a shipment of live stock was delivered by a carrier, according to custom on the private tracks of the consignee in a position for unloading, and notice given the consignee, the carrier is not liable for the statutory penalty where, without notice to or without any reason for the carrier to anticipate his conduct, the consignee failed to unload the stock until after the expiration of such period. *United States v. Philadelphia & R. R. Co.*, 223 Fed. 206.



When custom and practice require that a carrier should place cars of live stock on the private track of the consignee at a point opposite an unloading runway, a shipment which was moved and placed on such track, but not in a position for unloading within the time prescribed by the 28 Hour Act, was not delivered to the consignee so as to relieve the carrier from liability for the statutory penalty. *United States v. Philadelphia & R. R. Co.*, 223 Fed. 202.

Where a car of live stock was, within the time limited by the 28 Hour Act, delivered at night at a place convenient for unloading into pens used exclusively by the consignee, who was given notice of the delivery, the carrier is not answerable for the prescribed penalty because the stock was kept in the car beyond the time limit in consequence of the fact that a severe blizzard was raging and that the consignee's place of business was closed. *United States v. Philadelphia & R. R. Co.*, 223 Fed. 207.

A carrier is not liable for the penalty imposed by the 28 Hour Act where, on a cold, stormy night a car load of hogs was delivered on tracks devoted to the business of the consignee, and notice given him 3½ hours before the expiration of the time for unloading, and the latter refused to unload the stock because his place of business was closed for the night and because the stock would perish if unloaded into the open pens, and the carrier could not have moved the car to sheltered pens and have unloaded the stock any earlier than it was in fact unloaded, since the animals were not confined in violation of the Federal law during transit, and the carrier did not willfully fail to comply with such law. *United States v. Philadelphia & R. R. Co.*, 223 Fed. 211.

#### **G. Transportation of Infected Animals.**

Civil liability of carrier for transporting infected animals, see No. 3, Vol. I, Federal Ry. Digest, pp. 83-84.

#### **Validity of Federal Laws.**

Since the Act of March 3, 1905, prohibits the transportation of live stock from quarantined territory and provides a penalty for a violation thereof, the act is not void because it delegates power to the Secretary of Agriculture to determine when and under what conditions cattle may be transported from such territory. *United States v. Louisville & N. R. Co.*, 176 Fed. 942.

Legislative power is not unconstitutionally delegated to the Secretary of Agriculture by the Act of Feb. 2, 1913, U. S. Comp. St. 1913, sections 8698-8700, by permitting him to make rules and regulations concerning the interstate transportation of animals, hides, etc., except under certain restrictions, in order to prevent the

spread of the diseases of animals. *United States v. Pennsylvania R. Co.*, 235 Fed. 961.

#### **Construction of Federal Law.**

The Act of March 3, 1905 (U. S. Comp. Stats. Supp. 1909, p. 1185), relating to the transportation of infected animals by carriers, is a remedial statute which must be so construed as to most effectually accomplish the legislative intention. *United States v. Southern R. Co.*, 187 Fed. 209.

#### **Regulations of Secretary of Agriculture.**

A carrier may be punished under Act of March 3, 1905, for transporting live stock from a quarantined district without complying with the rules and regulations established by the Secretary of Agriculture. *United States v. Louisville & N. R. Co.*, 176 Fed. 942.

An order of the Secretary of Agriculture, made under the Act of Feb. 2, 1913, declaring a quarantined area and prohibiting the interstate transportation of hides, etc., of animals therefrom, unless the owner files an affidavit with the initial carrier certifying that such articles are from animals which have received a Federal inspection, is reasonable. *United States v. Pennsylvania R. Co.*, 235 Fed. 961.

An order of the Secretary of Agriculture, made under the Act of Feb. 2, 1913, declaring a quarantined area and prohibiting the transportation therefrom of the hides, etc., of animals, unless the owner files with the carrier his affidavit certifying that they are from animals which have received Federal inspection, is not void, since it does not include intrastate traffic. *United States v. Pennsylvania R. Co.*, 235 Fed. 961.

#### **Liability of Receiver.**

Receivers of a railway are, under Act of March 4, 1913, 37 St. L. 831, ch. 145, Comp. Stats. 1913, section 8706, liable to prosecution for transporting in interstate commerce cattle from a quarantined district without complying with the regulations established by the Secretary of Agriculture, since such act extends the original Act of March 3, 1905, 33 St. L. 1264, ch. 1496, Comp. Stats. 1911, p. 1351, so as to include such officials. *United States v. Nixon*, 235 U. S. 231, 59 L. ed. 207, 35 Sup. Ct. Rep. 49.

#### **Liability of Connecting Carriers.**

A connecting carrier does not violate the Act of March 3, 1905 (33 Stats. L. 1264, ch. 1496, U. S. Comp. St. Supp. 1909, p. 1185), by receiving outside of a quarantined district from an initial carrier live stock which had been transported by the initial carrier from such district in violation of the Federal law, since the offense created is the receiving of the stock in

the quarantined district for transportation therefrom into another state or territory. *United States v. Baltimore & O. R. Co.*, 222 U. S. 8, 56 L. ed. 68, 32 Sup. Ct. Rep. 6, *St. Louis M. Bridge Co. v. United States*, 110 C. C. A. 63, 188 Fed. 191.

Regulations made by the Secretary of Agriculture under section 3 of the Quarantine Act of March 3, 1905, are ineffectual to add to the class of carriers or to acts which are denounced by the act; and connecting carriers are not punishable for violating such regulations by receiving and transporting cattle which an initial carrier transported from a quarantined district in violation of law. *St. Louis M. Bridge & T. R. Co. v. United States*, 110 C. C. A. 63, 188 Fed. 191.

The Act of March 3, 1905, relative to the transportation of cattle from a quarantined district applies only to the carrier which transports cattle from such district, and not to a carrier to whom such cattle may be subsequently delivered by the initial carrier for further transportation. *United States v. El Paso & N. E. R. Co.*, 188 Fed. 846.

A carrier does not violate the Act of March 3, 1905, where, without knowledge of the facts, it accepts and transports, without displaying the necessary placards, cattle which a connecting carrier, contrary to law, brought from a quarantined district in another state. *United States v. Chicago, B. & Q. R. Co.*, 181 Fed. 882.

When cattle are consigned as a through shipment from a quarantined area to a place in prohibited territory, each carrier that participates in the transportation is liable under the Act of March 3, 1905 (U. S. Comp. Stat. Supp. 1909, p. 1185), for a failure to comply with the requirements of the Secretary of Agriculture with respect to the transportation of infected animals. *United States v. Southern R. Co.*, 187 Fed. 209.

A connecting carrier that receives a through shipment of cattle which is brought by the initial carrier from a quarantined area, and consigned to a point in prohibited territory, is liable under Act of March 3, 1905 (U. S. Comp. Stat. Supp. 1909, p. 1185), for failing to comply with the requirements established by the Secretary of Agriculture, with respect to the transportation of infected animals. *United States v. Southern R. Co.*, 187 Fed. 209.

#### **Transporting Hides From Quarantined Area.**

A carrier is punishable under section 3 of the Act of Feb. 2, 1913, for transporting hides from a quarantined area in interstate commerce in violation of the rules and regulations established by the Secretary of Agriculture. *United States v. Pennsylvania R. Co.*, 235 Fed. 961.

#### **Breach of Agreement to Transport Cattle From Infected District.**

A carrier is answerable for its breach of an agreement to transport cattle in interstate commerce from a quarantined district, although the carrier did not have separate pens or other facilities for handling the cattle in the manner required by the regulations of the Federal Board of Animal Industry. *Chicago, B. & Q. R. Co. v. Frye-Bruhn Co.*, 106 C. C. A. 217, 184 Fed. 15.

#### **Infecting Other Animals.**

Where quarantine regulations established by the Secretary of Agriculture under the Act of February 2, 1903, are beyond the powers conferred by such acts and are void because applying to both interstate and intrastate commerce, a civil action will not lie to recover damages resulting from the infection of cattle in consequence of the violation of such regulations by a carrier. *Illinois C. R. Co. v. McKendree*, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; same *v. Edwards*, 203 U. S. 531, 51 L. ed. 305, 27 Sup. Ct. Rep. 159.

#### **H. Penalties.**

##### **1. In General.**

#### **Court Must Fix Amount of Penalty.**

It is the province and duty of the court to fix the amount of the recovery in an action for the violation of the 28 Hour Act, and that of the jury to determine whether the defendant has violated that law. *Atchison, T. & S. F. R. Co. v. United States*, 101 C. C. A. 140, 178 Fed. 12; *Missouri, K. & T. R. Co. v. United States*, 101 C. C. A. 143, 178 Fed. 15; *United States v. Southern P. Co.*, 162 Fed. 412, affirmed 96 C. C. A. 252, 256, 171 Fed. 360, 364.

#### **Penalties in General.**

But one continuing violation of the 28 Hour Act occurs when live stock is confined in cars beyond the permitted time and then unloaded into pens of inadequate size which are insufficiently equipped for feeding and watering the stock. *United States v. Oregon S. L. R. Co.*, 218 Fed. 868.

A penalty cannot be imposed under the 28 Hour Act for each animal transported, as but one penalty can be imposed for the whole shipment. *United States v. Boston & A. R. Co.*, 15 Fed. 209.

#### **When More Than One Shipment Moved in Same Train.**

A carrier is liable for as many separate penalties for violating the 28 Hour Act as there are different shipments of

live stock in a train, since it is the shipment and not the train load to which the offense relates. *United States v. Oregon R. & N. Co.*, 163 Fed. 642; *New York C. & H. R. R. Co. v. United States*, 91 C. C. A. 519, 165 Fed. 833; *United States v. Atchison, T. & S. F. R. Co.*, 166 Fed. 160; *United States v. Southern P. Co.*, 157 Fed. 459.

Where a carrier moved 21 cars of live stock belonging to different persons, which was loaded at different periods, and which had been gathered into one train, the 28 Hour Act imposes a penalty for each failure to unload the stock for feed, water and rest as the several periods of lawful confinement of the various separate shipments successively expire, instead of one penalty for the entire train load. *Baltimore & O. S. W. R. Co. v. United States*, 220 U. S. 94, 55 L. ed. 384, 31 Sup. Ct. Rep. 368, modifying and affirming 86 C. C. A. 223, 159 Fed. 33.

Two separate violations of the 28 Hour Act occur when live stock belonging to two different persons and transported in the same train is confined beyond the statutory period. *United States v. New York, C. & St. L. R. Co.*, 94 C. C. A. 76, 168 Fed. 699.

When two consignments of live stock were received into the same train at different times, and, although confined for more than 28 hours, they were unloaded simultaneously, there were two distinct and separate violations of the 28 Hour Act. *United States v. Oregon S. L. R. Co.*, 218 Fed. 868.

There are four violations of the 28 Hour Act when four separate shipments of live stock, consigned to the same person, and moved in the same train, are confined beyond the statutory limit. *Southern P. Co. v. United States*, 96 C. C. A. 252, 171 Fed. 360, affirming 162 Fed. 412.

When two cars of live stock consigned to the same person are loaded at different points within 5 minutes of each other and the shipments are afterwards consolidated into the same train, a connecting carrier which fails to unload the animals for feed, water and rest is guilty of but one violation of the 28 Hour Act. *United States v. New York C. & H. R. R. Co.*, 191 Fed. 938.

Under the original 28 Hour Act but one penalty could be recovered for a violation thereof where more than one car load of live stock was moved in the same train. *United States v. St. Louis & S. F. R. Co.*, 107 Fed. 870.

#### **Effect of Payment of Penalty by Preceding Carrier.**

It is no defense to an action for violating the 28 Hour Act that another carrier who participated in the transportation was

also guilty of a violation of the statute and has forfeited and paid a penalty therefor. *United States v. Wabash R. Co.*, 105 C. C. A. 234, 182 Fed. 802.

A carrier that receives and moves live stock with knowledge that the preceding carrier has violated the 28 Hour Act, is not relieved from liability for its own infraction of such law by the fact that such carrier has paid a penalty for its violation of the statute. *United States v. Northern P. R. Co.*, 181 Fed. 879, reversed on other grounds 106 C. C. A. 583, 184 Fed. 603.

A connecting carrier that transports live stock which is received from a preceding carrier with notice that it has been confined for more than the prescribed limit, is liable for a penalty under the 28 Hour Act, notwithstanding that the initial carrier also pays a penalty for its infraction of such law. *United States v. Northern P. T. Co.*, 186 Fed. 947.

The time which live stock was confined by an initial carrier in excess of the period permitted by the 28 Hour Act cannot be counted against a connecting carrier, where the statutory penalty has been recovered against and paid by the first carrier. *United States v. Stockyards T. R. Co.*, 172 Fed. 452, affirmed on other grounds 101 C. C. A. 147, 178 Fed. 19.

A judgment against a connecting carrier for a penalty for a violation of the 28 Hour Act is no defense to a prosecution of a delivering carrier who, with knowledge that the preceding carrier had violated such act, took 3 hours and 35 minutes to move the stock 7 miles to destination. *New York C. & H. R. R. Co. v. United States*, 122 C. C. A. 255, 203 Fed. 953.

## **2. Actions for Penalties.**

### **(a) Nature.**

#### **In General.**

An action by the government for a recovery of the prescribed penalty for a violation of the 28 Hour Act is of a civil and not a criminal nature, and has all of the incidents of a civil action. *United States v. Wabash R. Co.*, 105 C. C. A. 234, 182 Fed. 802; *United States v. Atlantic C. L. R. Co.*, 98 C. C. A. 110, 173 Fed. 764; *Southern P. Co. v. United States*, 96 C. C. A. 256, 171 Fed. 364, affirming 162 Fed. 412; *Montana C. R. Co. v. United States*, 90 C. C. A. 388, 164 Fed. 400; *United States v. Sioux City Stockyards Co.*, 162 Fed. 556, affirmed 92 C. C. A. 578, 167 Fed. 126; *United States v. Southern P. Co.*, 172 Fed. 909.

So far as the ordinary rules of pleading and proof are concerned an action by the government for a violation of the 28 Hour Act is a civil proceeding. *New York C. & H. R. R. Co. v. United States*, 91 C. C. A. 519, 165 Fed. 833.

An action by the government to recover a penalty for violating the 28 Hour Act is of a criminal nature. *United States v. Louisville & N. R. Co.*, 157 Fed. 979.

### Consolidation of Actions.

Several proceedings to recover penalties for the violation of the 28 Hour Act, may, under U. S. R. S. 921, U. S. Comp. St. 1901, p. 685, be consolidated by the trial court. *Baltimore & O. S. W. R. Co. v. United States*, 220 U. S. 94, 55 L. ed. 384, 31 Sup. Ct. Rep. 368, modifying and affirming 86 C. C. A. 223, 159 Fed. 33.

### (b) Jurisdiction.

#### Offenses Occurring in Territory of United States.

Neither section 2 or article 3 of the Federal Constitution nor the sixth Amendment thereto require an action for a penalty under the 28 Hour Act incurred in the Indian Territory to be brought or tried in the district wherein the violation occurred, and, under section 4 of the act the action may be brought in the district wherein defendant resides or carries on business. *St. Louis & S. F. R. Co. v. United States*, 94 C. C. A. 437, 169 Fed. 69.

### (c) Pleading.

#### Complaint or Declaration.

A complaint in an action against a connecting carrier for violating the 28 Hour Act is defective when it does not allege that the defendant "knowingly" or "willfully" confined live stock beyond the prescribed limit. *United States v. Oregon S. L. R. Co.*, 160 Fed. 526.

A complaint in an action against a connecting carrier for a violation of the 28 Hour Act is defective where it alleges that live stock was confined by a preceding carrier for 19½ hours and by the defendant for a similar length of time, since it does not show that the defendant "knowingly" or "willfully" confined the stock for a period in excess of 28 hours. *United States v. Oregon S. L. R. Co.*, 160 Fed. 526.

The proviso of the 28 Hour Act excusing a violation thereof when due to accidental or unavoidable causes which could not have been prevented by the exercise of due diligence and foresight on the part of a carrier, need not be negated by the government in the complaint in an action for the statutory penalty. *United States v. Oregon S. L. R. Co.*, 160 Fed. 526; *New York C. & H. R. R. Co. v. United States*, 91 C. C. A. 519, 165 Fed. 833.

In an action for the recovery of a penalty for the violation of the 28 Hour Act, an allegation of the petition negating the absence of storms or other un-

avoidable causes excusing compliance with the act is surplusage, and the government need not prove the nonexistence thereof. *Grand Trunk R. Co. v. United States*, 143 C. C. A. 392, 229 Fed. 116.

The government must allege, in a declaration for the violation of the 28 Hour Act, that it was not the result of storms or other accidental or unavoidable causes. *New York C. & H. R. R. Co. v. United States*, 91 C. C. A. 519, 165 Fed. 833.

An allegation in a complaint for the violation of the 28 Hour Act, that a carrier "willfully" confined live stock beyond the statutory limit is a sufficient negation of the proviso of the act relieving a carrier from liability when the confinement of the stock was due to accidental or unavoidable causes which could not have been foreseen or avoided by the exercise of due diligence. *United States v. Oregon S. L. R. Co.*, 160 Fed. 526.

No offense under the 28 Hour Act is shown by a complaint which does not aver the length of time live stock was confined in cars or pens, or both, without food, water or rest. *United States v. Oregon, S. L. Co.*, 218 Fed. 868.

That the defendant was operating a railway is sufficiently shown to sustain a declaration after verdict for the government for a violation of the 28 Hour Act, where the language of the act is followed and the defendant is described as the "lessee" of a certain railway. *New York C. & H. R. R. Co. v. United States*, 91 C. C. A. 519, 165 Fed. 833.

A declaration in an action by the government for a violation of the 28 Hour Act, held sufficient after verdict for the plaintiff. *New York C. & H. R. R. Co. v. United States*, 91 C. C. A. 519, 165 Fed. 833.

#### Transporting Stock From Quarantined District.

An indictment charging a carrier with violating the Act of March 3, 1905, by transporting cattle from a quarantined district in violation of the regulations "made and promulgated" by the Secretary of Agriculture, is insufficient where the facts constituting such promulgation are not averred. *United States v. Louisville & N. R. Co.*, 165 Fed. 936.

### Defenses.

Where a carrier refused to accept a car of live stock from an initial carrier because it could not be moved to destination before the expiration of the 28 hour period, and the former carrier was informed that the stock would be unloaded by the initial carrier for feed, water and rest, and 5½ hours later the connecting carrier accepted the shipment, which in fact had not been unloaded, if the fact

that such carrier was misled by the initial carrier into violating the 28 Hour Act is a defense, it must be pleaded. *Oregan, W. R. & N. Co. v. United States*, 123 C. C. A. 475, 205 Fed. 341.

#### Violation of "Commodities" Clause.

An amendment to the complaint in an action by the United States to enjoin a carrier from transporting in interstate commerce in violation of the commodity clause of the Hepburn Act, coal in which it has an interest, is germane to the cause of action originally stated, where the amendment sets up that the coal was mined by an independent corporation which the carrier dominated by stock control so as to deprive it of all independent existence and so as to make it merely an agency, dependency, or department of such carrier. *United States v. Lehigh V. R. Co.*, 220 U. S. 257, 55 L. ed. 458, 31 Sup. Ct. Rep. 387.

#### (d) Evidence

##### Judicial Notice.

Courts will judicially notice regulations made by the Secretary of Agriculture under Act of March 3, 1905 (U. S. Comp. Stats. Supp. 1909, p. 1, 185) with respect to the transportation of infected cattle by railways. *United States v. Southern R. Co.*, 187 Fed. 209.

##### Presumptions.

There is no presumption that a carrier did not unload live stock within the time required by the 28 Hour Act. *United States v. Sioux City Stock Yards Co.*, 162 Fed. 556, affirmed 92 C. C. A. 578, 167 Fed. 126.

##### Burden of Proof.

##### — Guilt of Defendant.

The government has the burden of establishing a violation of the 28 Hour Act. *United States v. Southern P. Co.*, 157 Fed. 459.

The government has the burden, in an action against a carrier for violating the 28 Hours Act, of showing by testimony sufficient to go to the jury, that the defendant knowingly and willfully failed to unload live stock within the prescribed time. *Oregon, W. R. & N. Co. v. United States*, 123 C. C. A. 471, 205 Fed. 337.

The greater weight of the evidence is sufficient to sustain an action by the United States for a violation of the 28 Hour Act, and it is not required to establish the case beyond a reasonable doubt. *Atchison, T. & S. F. R. Co. v. United States*, 101 C. C. A. 140, 178 Fed. 12; *Missouri, K. & T. R. Co. v. United States*, 101 C. C. A. 143, 178 Fed. 15; *New York C. & H. R. R. Co. v. United States*, 91 C. C. A. 519, 165 Fed.

833; *United States v. Southern P. Co.*, 162 Fed. 413, affirmed 96 C. C. A. 252, 256, 171 Fed. 360, 364; *New York C. & H. R. R. Co. v. United States*, 91 C. C. A. 519, 165 Fed. 833; *United States v. Southern P. Co.*, 157 Fed. 459.

The government must show the violation of the 28 Hour Act by a carrier beyond a reasonable doubt, since the act is of a criminal nature. *United States v. Louisville & N. R. Co.*, 157 Fed. 979.

##### —Excuses and Justification.

The burden of negating the proviso of the 28 Hour Act excusing a violation thereof when due to accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight, rests on a carrier in an action for a violation of the act. *United States v. Oregon S. L. R. Co.*, 160 Fed. 526.

Since the excuses embodied in section 2 of the 28 Hour Act is a separate topic constituting a defense, the burden is on the defendant to establish it. *Chicago, B. & Q. R. Co. v. United States*, 115 C. C. A. 193, 195 Fed. 241, affirming 184 Fed. 984.

If a carrier receives a car of live stock from a connecting carrier with notice that it has been confined beyond the limit prescribed by the 28 Hour Act, and there is a delay in moving the car to the nearest unloading point, the burden is on the carrier to show that the delay was due to storm, accident or unavoidable causes which could not have been anticipated or avoided by the exercise of due diligence and foresight. *United States v. Delaware, L. & W. R. Co.*, 206 Fed. 513.

The defendant has the burden of showing that a violation of the 28 Hour Act was the result of accidental or unavoidable causes. *New York C. & H. R. R. Co. v. United States*, 91 C. C. A. 519, 165 Fed. 833.

When a carrier receives a car of live stock from a connecting carrier with notice of their confinement in violation of the 28 Hour Act, the burden is on the receiving carrier to show the exercise of diligence and promptness in moving the car, including switching operations, to the nearest unloading point. *United States v. Delaware, L. & W. R. Co.*, 220 Fed. 944.

##### Admissibility in General.

Waybills relating to the shipment in question are admissible in an action for the violation of the 28 Hour Act. *New York C. & H. R. R. Co. v. United States*, 91 C. C. A. 519, 165 Fed. 833.

In an action against a delivering carrier for a violation of the 28 Hour Act, where live stock was received from a connecting carrier with notice that it had been con-

fined for more than the statutory period, testimony of two conductors that, on account of the condition of a belt line in preparing for grade improvements, the time required to move the stock 7 miles to destination was reasonable, is insufficient to relieve the carrier from liability under the 28 Hour Act, since the facts themselves should have been stated. *New York C. & H. R. R. Co. v. United States*, 122 C. C. A. 255, 203 Fed. 953.

#### (e) Instructions.

##### In General.

Where a carrier refused to accept a car of live stock from an initial carrier because it could not be transported to destination within the 28 hour limit, when the initial carrier stated that it would unload the stock for feed, water and rest, and 5½ hours later the connecting carrier accepted the shipment, which in fact had not been unloaded, such carrier was not harmed, in an action against it for violating the 28 Hour Act, by an instruction to find for the defendant if it was misled by the initial carrier but not if it was not so misled or deceived. *Oregon, W. R. & N. Co. v. United States*, 123 C. C. A. 475, 205 Fed. 341.

In an action against a carrier for a violation of the 28 Hour Act, where an accidental delay near destination is relied on as a defense, the jury was correctly instructed that they might consider the movement of the stock from origin of shipment to destination in determining whether due diligence was exercised to transport the shipment within the statutory period, and that the carrier could not adopt a slow schedule over a long distance and depend on its ability toward the end of the trip to complete the run within the required time. *Chicago & N. W. R. Co. v. United States*, 148 C. C. A. 170, 234 Fed. 268.

##### Reliance on Compliance With Law by Preceding Carrier.

Where a carrier refused to accept a car of live stock from an initial carrier because there was not sufficient time to move it to destination before the expiration of the 28 hour limit, when the former was informed by the initial carrier that the stock would be unloaded for feed, water and rest, and 5½ hours later the connecting carrier accepted the shipment, which in fact had not been unloaded, an instruction, in an action against the connecting carrier for violating the 28 Hour Act, was properly refused when to the effect that the defendant could rightfully presume that the initial carrier complied with the law and that its failure to unload the stock after the defendant had refused to accept it was an unavoidable

cause which the latter could not have anticipated in the exercise of due diligence and foresight. *Oregon W. R. & N. Co. v. United States*, 123 C. C. A. 475, 205 Fed. 341.

#### (f) Questions of Law and Fact.

##### Knowledge and Willfulness of Carrier.

Whether a carrier knowingly and willfully violates the 28 Hour Act is a question for the jury. *United States v. New York C. & H. R. R. Co.*, 156 Fed. 249.

When a carrier concedes the confinement of live stock beyond the period permitted by the 28 Hour Act, the question of willfulness must be left to the jury where reasonable minds might draw different conclusions from the conceded facts. *Chicago & N. W. R. Co. v. United States*, 148 C. C. A. 174, 234 Fed. 272.

The question whether a carrier intentionally violated the 28 Hour Act is for the jury, where the evidence tends to show that the employees of the carrier had reason to believe that a caretaker who accompanied a shipment of live stock, would see that the consignee unloaded it before the expiration of the statutory time for confinement. *Oregon, W. R. & N. Co. v. United States*, 123 C. C. A. 471, 205 Fed. 337.

Where a carrier refused to accept a car of live stock from a connecting carrier because it could not be moved to destination before the expiration of the 28 hour limit, and 5½ hours later it accepted the car, although the stock had not in fact been unloaded for food, water and rest, the question whether the connecting carrier knowingly and willfully violated the 28 Hour Act is for the jury in an action against it for the statutory penalty. *Oregon, W. R. & N. Co. v. United States*, 123 C. C. A. 475, 205 Fed. 341.

##### Care and Diligence of Carrier.

Whether a carrier exercised due diligence and foresight to see that live stock was unloaded before the expiration of the 28 hour limit after a car was spotted at destination, is a question for the jury, where there was evidence tending to show that a caretaker who accompanied the shipment, agreed to see that the stock was unloaded by the consignee. *Oregon, W. R. & N. Co. v. United States*, 123 C. C. A. 471, 205 Fed. 337.

##### Request for Confinement Beyond 28 Hours.

Whether a request for the confinement of live stock for 36 hours during transit complies with the 28 Hour Act is a question for the court and not for the jury.

Missouri, K. & T. R. Co. v. United States, 101 C. C. A. 143, 178 Fed. 15.

It is error to submit to the jury the question whether a request for the confinement of live stock in transit for 36 hours complies with the 28 Hours Act, since that question is for the court. Missouri, K. & T. R. Co. v. United States, 101 C. C. A. 143, 178 Fed. 15.

### (g) Verdict, Judgment and Costs.

#### Costs.

Under section 974 R. S. U. S. 1901, p. 703, costs may be awarded the government on recovering a penalty for a violation of the 28 Hour Act. United States v. Southern P. Co., 172 Fed. 909.

Fees of the Marshal for serving subpoenas without the district more than 100 miles from place of trial, cannot be taxed in favor of the government on a recovery of a penalty for a violation of the 28 Hour Act. United States v. Southern P. Co., 172 Fed. 909.

A docket or attorney's fee of \$40 may, under sections 824 and 837 U. S. R. S. 1901, pp. 632, 644, be allowed and taxed by the government on the recovery of a penalty for the violation of the 28 Hour Act. United States v. Southern P. Co., 172 Fed. 909.

Mileage for 100 miles may be taxed in favor of the government on a recovery by it, for witnesses coming from without the district to testify in an action for a violation of the 28 Hour Act. United States v. Southern P. Co., 172 Fed. 909.

The government may, on a recovery in its favor, tax mileage for 100 miles traveled by witness coming from within the district to testify in an action for a violation of the 28 Hour Act. United States v. Southern P. Co., 172 Fed. 909.

The necessary expenses of a salaried government employee who is taken from his regular employment to testify in an action for a recovery of a penalty for the violation of the 28 Hour Act, may, under section 850 R. S. U. S. 1901, p. 655, be taxed in favor of the government when it recovers in such action. United States v. Southern P. Co., 172 Fed. 909.

#### Directing Verdict.

A verdict of guilty cannot be directed when a carrier concedes the confinement of live stock beyond the time permitted by the 28 Hour Act, if reasonable minds might draw different conclusions from the conceded facts, as the question of the willfulness of the carrier becomes a question for the jury. Chicago & N. W. R. Co. v. United States, 148 C. C. A. 174, 234 Fed. 272.

When the evidence of the government requires the submission to the jury of

the question whether a carrier "wilfully and knowingly" violated the 28 Hour Act, it was not error to refuse to instruct to find for the defendant if it was justified in relying on notations on the waybills showing the time of the previous unloading of live stock. Houston & T. C. R. Co. v. United States, 94 C. C. A. 307, 168 Fed. 895.

### 3. Appeal and Error.

#### Right of Government to Review.

Since an action to recover a penalty for a violation of the 28 Hour Act is of a civil nature, the government may review the judgment on writ of error. United States v. Baltimore & O. S. W. R. Co., 86 C. C. A. 223, 159 Fed. 33, modified and affirmed 220 U. S. 94, 55 L. ed. 384, 31 Sup. Ct. Rep. 368, 371; United States v. New York, C. & St. L. R. Co., 94 C. C. A. 76, 168 Fed. 699.

#### Jurisdiction of Federal Supreme Court.

Where 11 actions for violations of the 28 Hour Act in which the amount of the possible penalties was \$5,500, were consolidated by the trial court, the Supreme Court of the United States has appellate jurisdiction. Baltimore & O. S. W. R. Co. v. United States, 220 U. S. 94, 55 L. ed. 384, 31 Sup. Ct. Rep. 368, modifying and affirming 86 C. C. A. 223, 159 Fed. 33.

The refusal of the trial court, in an action by the United States to enjoin a carrier from transporting in interstate commerce in violation of the commodities clause of the Hepburn Act, coal in which the carrier has an interest, to permit an amendment to the complaint so as to show that the coal was produced by a corporation which the carrier dominated by means of stock control, is an abuse of discretion which is reviewable by the Federal Supreme Court, since the amendment was germane to the original bill and was not foreclosed by a decision of the latter court on a previous appeal that the commodities clause was constitutional, and remanding the cause for further proceedings. United States v. Lehigh V. R. Co., 220 U. S. 257, 55 L. ed. 458, 31, Sup. Ct. Rep. 387.

#### Review of Actions Tried to Court.

In an action at law in a district court for a violation of the 28 Hour Act, which is triable before a jury, but is by consent tried to the court without a jury, and there is no agreed statement of facts, questions of fact or law decided by the court, are not reviewable in an appellate court, since R. S. U. S. sections 649, 700, U. S. Comp. Stats. 1901, pp. 525, 570, providing for the waiver of juries and a review of judgments in such cases, apply only to proceedings in the Circuit courts.

United States v. St. Louis, I. M. & S. R. Co., 94 C. C. A. 441, 169 Fed. 73.

### VIII. LIABILITY OF CARRIER FOR LOSS OF OR INJURY TO SHIPMENTS.

See same section Nos. 2 and 3, Vol. I, Federal Ry. Digest.

Liability of carriers under Carmack Amendment, see *infra*. XI.

### IX. TRANSPORTATION OF NURSERY STOCK.

#### In General.

A carrier does not violate U. S. Stats. 1912, c. 308, U. S. Comp. St. 1913, sections 8752-8764, relating to quarantine and the transportation of dangerous plant diseases, and forbidding the transportation of nursery stock except in conformity to the regulations made by the Secretary of Agriculture, by transporting uncertified deciduous nursery stock where the same was not included in the notice of quarantine issued by the Secretary. United States v. Adams Express Co., 230 Fed. 531.

### X. INTEREST OF CARRIER IN COMMODITIES TRANSPORTED.

Validity of "Commodities" clause of Hepburn Act, see *supra* I, A.

#### In General.

The commodities clause of the Hepburn Act does not prevent the issuance of certificates by a receiver and the expenditure of the proceeds in opening and improving new coal mines owned by a carrier, where it does not appear that he will not be able to profitably sell the mining stock before such law becomes effective. Central Trust Co. v. Pittsburgh, S. & N. R. Co., 52 Misc. 195, 101 N. Y. Supp. 837.

A decision by the Supreme Court of the United States that the commodities clause of the Hepburn Act did not prohibit a railway company from transporting in interstate commerce articles or commodities manufactured, mined, or produced or owned by a bona fide corporation in which the carrier is a stockholder, does not foreclose the question whether such clause is violated when a carrier, by means of stock ownership, so controls and dominates the affairs of an independent coal mining company as to deprive it of all independent existence, so as to make it virtually but an agency, dependency, or department of the railway.

United States v. Lehigh V. R. Co., 220 U. S. 257, 55 L. ed. 458, 31 Sup. Ct. Rep. 387.

#### Purpose of "Commodities" Clause.

The commodities clause of the Hepburn Act was intended to prevent railways from occupying the dual and inconsistent position of public carriers and private shippers; and in order to separate the business of transportation from that of selling it was made unlawful for carriers to transport in interstate commerce any commodity in which it has any interest either direct or indirect. United States v. Delaware, L. & W. R. Co., 238 U. S. 518, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873, reversing 213 Fed. 240.

The common purpose of the commodities clause of the Hepburn Act which prohibits the transportation in interstate commerce of any article or commodity manufactured, mined or produced by a common carrier or under its authority, or in which it has any direct or indirect interest in whole or in part, was the dissociation of railway companies prior to transportation whether the association results from manufacturing, mining, production, ownership or interest, direct or indirect. United States v. Delaware & H. R. Co., 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527, reversing 164 Fed. 215.

#### What Carriers Within "Commodities" Clause.

A corporation created by a state law to acquire land, to mine coal, to construct a canal and ultimately a railroad for the transportation of the produce of its mine is, in transporting coal in interstate commerce, a railway company within the meaning of the commodities clause of the Hepburn Act. United States v. Delaware & H. R. Co., 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527, reversing 164 Fed. 215.

The commodities clause of the Hepburn Act is applicable to and includes the receiver of an interstate railway. Central T. Co. v. Pittsburgh, S. & N. R. Co., 52 Misc. 195, 101 N. Y. Supp. 837.

#### What Interest or Ownership Within "Commodities" Clause.

The commodities clause of the Hepburn Act prohibits the interstate transportation by a carrier of any article or commodity which is manufactured, mined or produced by such carrier, or under its authority, or in which it has a direct or indirect interest, or which it owns in whole or in part, in a legal or equitable sense, from which it has not, before the transportation, in good faith dissociated itself. United States v. Delaware & H. R. Co., 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527, reversing 164 Fed. 215.



The Commodities clause of the Hepburn Act does not prevent a railway company from transporting in interstate commerce any article or commodity manufactured, mined, produced, or owned in whole or in part by a bona fide corporation in which the transporting carrier holds a stock interest. *United States v. Delaware & H. R. Co.*, 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527, reversing 164 Fed. 215.

Mere stock ownership by a railway company, or by its stockholders, in a producing company, cannot be used as a test to determine the legality of the transportation of such company's productions by the interstate carrier and whether it falls within the prohibition of the commodities clause of the Hepburn Act. *United States v. Delaware, L. & W. R. Co.*, 238 U. S. 518, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873, reversing 213 Fed. 240.

The commodities clause of the Hepburn Act is violated where an interstate railway company owning coal mines, on the passage of such act, caused an independent company to be incorporated with stockholders and officers in common with the carrier, and then entered into a contract under which the carrier did not go out of the mining business or part with its holdings, but by which the title to the coal, when brought to the surface, passed to the coal company f. o. b. and the carrier instantly regained possession thereof as a carrier, it being subsequently paid a price for the coal which was fixed by the contract, and the coal company was prohibited from purchasing coal elsewhere. *United States v. Delaware, L. & W. R. Co.*, 238 U. S. 518, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873, reversing 213 Fed. 240.

In order to satisfy the commodities clause of the Hepburn Act a railway company which is also engaged in coal mining, must absolutely disassociate itself from the coal before it transports the same in interstate commerce, and it cannot retain title to the coal and sell it through an agent, by calling him a buyer where he is so hampered and restricted by contract that he is a mere puppet subject to the control of the carrier. *United States v. Delaware, L. & W. R. Co.*, 238 U. S. 518, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873, reversing 213 Fed. 240.

Where a railway company, by stock ownership, deprives a coal mining company of all real, independent existence so as to make it virtually an agency, dependency, or department of the railway, the latter has such an interest in the coal produced as to fall within the prohibition of the commodities clause of the Hepburn Act against the transportation by carriers in interstate commerce of any articles or commodities manufactured, mined

or produced by or under their authority, or in which they have a direct or indirect interest. *United States v. Lehigh V. R. Co.*, 220 U. S. 257, 55 L. ed. 458, 31 Sup. Ct. Rep. 387.

A carrier had title to hay, so as to make it the owner thereof within the meaning of the commodities clause of the Hepburn Act, where it was purchased by the carrier for delivery f. o. b. at a point on its line with the privilege of inspection before payment at points to which it might be shipped by the carrier, where it was moved in interstate commerce for the use of animals employed by the carrier in a coal mine owned by it, from which 75 per cent of the output was sold to the public and the remainder, of an inferior quality, used by the carrier in its locomotives. *Delaware, L. & W. R. Co. v. United States*, 231 U. S. 363, 58 L. ed. 269, 34 Sup. Ct. Rep. 65.

The commodities clause of the Hepburn Act is violated where an interstate carrier transports in interstate commerce hay intended for feeding animals employed in and about a coal mine owned by the carrier, 75 per cent of the output from which was sold to the public and the remainder, of an inferior quality, was burned in the locomotives of the carrier, since the hay was not necessary for carrying on the business of a common carrier. *Delaware, L. & W. R. Co. v. United States*, 231 U. S. 363, 58 L. ed. 269, 34 Sup. Ct. Rep. 65.

When, after the passage of the commodities clause of the Hepburn Act, a railway company organized a separate corporation to acquire the coal land and mines owned by the former, and declared a 50 per cent dividend which was applied on the purchases of shares in the coal company by the stockholders of the railway company, many of such shares being afterwards sold by the holders to third persons, the railway company not retaining any of the stock but receiving pay at the breakers for all coal mined, the carrier may transport such coal over its lines, since it did not have any direct or indirect interest therein. *United States v. Delaware, L. & W. R. Co.*, 213 Fed. 240, reversed 238 U. S. 518, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873.

Where, on the passage of the Hepburn Act, a railway company organized a separate corporation to acquire and hold coal lands and mines owned by the former, and declared a 50 per cent dividend and applied it on the price of shares in the coal company taken by stockholders of the railway company, which did not retain any of the stock, but which was paid a fixed sum on all coal mined, the railway company does not have any direct or indirect interest in the coal so as to preclude its transportation by such car-

rier, because of an agreement between the carrier and the coal company whereby the price of coal at tidewater governs the price paid the carrier for coal mined. *United States v. Delaware, L. & W. R. Co.*, 213 Fed. 240, reversed 238 U. S. 518, 59 L. ed. 438, 35 Sup. Ct. Rep. 873.

When, on the passage of the commodities clause of the Hepburn Act, a railway company organized a separate corporation to acquire and hold coal land and mines owned by the former, the railway company declaring a 50 per cent dividend and applying it on the price of stock in the new company which was taken by stockholders in the railway company, the carrier not retaining any of the stock and being paid an agreed sum at the breakers for all coal mined, the fact that a small group of persons own the controlling interest in both companies and that some of them are directors and officers of both the railway companies, does not preclude the railway company from transporting the coal mined, where the business of the two companies is conducted separately. *United States v. Delaware, L. & W. R. Co.*, 213 Fed. 240, reversed 238 U. S. 518, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873.

The commodities clause of the Hepburn Act applies even though all the coal mined by an interstate railway company from its mines is sold at the mines so that all of the title and interest of the carrier passes therefrom before it transports the coal over its road. *Central T. Co. v. Pittsburgh, S. & N. R. Co.*, 52 Misc. 195, 101 N. Y. Supp. 837.

## XI. CARMACK AMENDMENT.\*

See also No. 2, Vol. I, Federal Ry. Digest, pp. 12-58, and No. 3, Vol. I, pp. 85-93.

### D. Effect.

#### On State Laws.

The Carmack Amendment supersedes all state laws and regulations pertaining to interstate shipments. *Pennington v. Grand Trunk W. R. Co.*, 199 Ill. App. 479.

That the Carmack Amendment supersedes all state laws regarding interstate shipments, and that the initial carrier only is liable for the loss of or injury thereto, is sufficiently raised by an affidavit of defense stating that the damages to such a shipment are not chargeable to the defendant carrier. *Pennington v. Grand Trunk W. R. Co.*, 199 Ill. App. 479.

\*For text of Act see No. 2, Vol. I, Federal Ry. Digest, p. 394.

## I. Contracts Limiting Liability of Carrier.

### In General.

A stipulation in a contract of carriage limiting a carrier's liability, is a matter of defense in an action against a carrier for tort, and the plaintiff need not produce the contract in making out his case. *Crossley v. St. Louis, I. M. & S. R. Co.*, 199 Ill. App. 195.

### For Negligence.

The Carmack Amendment precludes a carrier from relieving itself by contract for injuries to an interstate shipment when due to its negligence. *Crossley v. St. Louis, I. M. & S. R. Co.*, 199 Ill. App. 195.

### To Lines of Particular Carrier.

Under the Carmack Amendment an initial carrier is answerable for the negligence of a connecting carrier, notwithstanding a provision of the bill of lading limiting the first carrier's liability to negligence occurring on its own line. *Louisville & N. R. Co. v. Walker*, 3 Tenn. Civ. App. 511.

### Agreed Valuation.

The Carmack Amendment permits stipulations in bills of lading limiting the amount of a carrier's liability for the injury to or loss of an interstate shipment. *Crossley v. St. Louis, I. M. & S. R. Co.*, 199 Ill. App. 195.

## J. Notice of Claims for Loss or Damage.

### Validity in General.

The Carmack Amendment permits stipulations in bills of lading as to the time within which notice must be given carriers of claims for damages for injury to or the loss of interstate shipments. *Crossley v. St. Louis, I. M. & S. R. Co.*, 199 Ill. App. 195.

## K. Limitation of Time for Action.

### In General.

The Carmack Amendment permits stipulations in bills of lading limiting the time within which actions shall be brought against the carrier for injury to or the loss of interstate shipments. *Crossley v. St. Louis, I. M. & S. R. Co.*, 199 Ill. App. 195.

## M. Liability of Connecting and Terminal Carriers.

### For Own Negligence.

When an interstate shipment made under a through bill of lading is injured by the negligence of a connecting carrier, the Carmack Amendment restricts the remedy of the shipper to the initial carrier. *Pennington v. Grand Trunk W. R. Co.*, 199 Ill. App. 479.

The Carmack Amendment precludes an action against a negligent connecting carrier for an injury to an interstate shipment made under a through bill of lading, the exclusive remedy being against the initial carrier. *Pennington v. Grand Trunk W. R. Co.*, 199 Ill. App. 479.

## XII. CUMMINS AMENDMENT.\*

See same section No. 3, Vol. I, Federal Ry. Digest, p. 95.

## XIII. ACTIONS.

See also same section Nos. 2 and 3, Vol. I, Federal Ry. Digest.

Actions for penalties for violating 28 Hour Act, see *supra* VII, H.

Criminal actions in general, see *infra* XIV.

### A. In General.

#### Limitations.

A shipper's action against a carrier for discriminating against the plaintiff in exacting demurrage charges, when based on section 9 of the Act to Regulate Commerce in the absence of an order by the Interstate Commerce Commission, is not governed by the two years' limitation prescribed by section 16 of the Act for presenting damage claims to the Commission. *Lyne v. Delaware, L. & W. R. Co.*, 170 Fed. 847, modified 113 C. C. A. 604, 193 Fed. 984.

### B. Jurisdiction.

#### In General.

Relief from excessive interstate freight rates imposed by the established tariffs of a carrier must be obtained through the Interstate Commerce Commission and not from the courts. *Atchison, T. & S. F. R. Co. v. Superior Refining Co.*, 83 Kan. 732, 112 Pac. 604; *Missouri, K. & T. R. Co. v. New Era M. Co.*, 80 Kan. 141, 101 Pac. 1011.

#### Federal Courts.

Section 22 of the Interstate Commerce Act saving to shippers existing common-law or statutory remedies, does not continue in force rights inconsistent with the provisions of the act, but applies only to rights recognized or duties thereby imposed, and any specific remedy given by it is cumulative with other appropriate common-law or statutory remedies for the redress of the particular grievances or

wrongs dealt with in the act. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 462, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075, reversing 38 Tex. Civ. App. 366, 85 S. W. 1052.

The right of a shipper to maintain an action in a Federal court under section 9 of the Act Regulating Commerce without prior application to the Interstate Commerce Commission, is for some violation of the act which may be redressed without action by the Commission. *Franklin v. Philadelphia & R. R. Co.*, 203 Fed. 134.

A shipper cannot recover in a Federal court for the collection of illegal and excessive interstate freight rates until the matter has been passed on by the Interstate Commerce Commission. *Howard Supply Co. v. Chesapeake & O. R. Co.*, 162 Fed. 188.

Without a previous application to the Interstate Commerce Commission for redress a Federal court has jurisdiction of an action against a carrier for the recovery of charges collected in excess of the established interstate freight rates. *Gimbel v. Barrett*, 215 Fed. 1004.

Since a state court did not have jurisdiction of a shipper's action against a carrier for the collection of unreasonable interstate freight rates, a Federal court cannot, on the removal of the action for diverse citizenship, grant relief under the Act to Regulate Commerce, since the right to question the reasonableness of rates is a matter exclusively within the jurisdiction of the Interstate Commerce Commission. *Swift v. Philadelphia & R. R. Co.*, 58 Fed. 858, S. C. 64 Fed. 59.

A Federal court may in the first instance determine the application of a demurrage tariff to interstate shipments. *Hite v. Central R. of N. J.*, 96 C. C. A. 326, 171 Fed. 370. See S. C. 166, Fed. 976.

#### State Courts.

A state court does not have jurisdiction to determine the reasonableness, illegality or impropriety of a published interstate freight rate. *Sunderland v. Baltimore & O. S. W. R. Co.*, — Mo. App. —, 190 S. W. 650.

An action for overcharges in moving an interstate shipment will lie in a state court where the only question involved is as to which of two tariff rates apply. *St. Louis, I. M. & S. R. Co. v. Ft. Smith & V. B. R. Co.*, — Ark. —, 191 S. W. 902.

The Act Regulating Commerce does not deprive a state court of jurisdiction of an action against a carrier on its agreement to refund the plaintiff the amount paid by him for transportation to another state in consideration of his shipping two or more cars of freight over the road of such carrier. *St. Louis & S. F. R. Co. v. Puterbaugh*, 117 Ill. App. 569.

\*For text of Cummins Act see No. 2, Vol. I, Federal Ry. Digest, p. 394.

**E. Pleading.****Sufficiency in General.**

A complaint in a shipper's action against a carrier states a cause of action for a violation of the Act Regulating Commerce, where it alleges that the former was compelled to pay the established tariff rates on interstate shipments of coal while his competitors were permitted to ship at lower rates. *American Union Coal Co. v. Pennsylvania R. Co.*, 159 Fed. 278.

A cause of action against a carrier is shown, irrespective of the validity of the contract, by a petition alleging in substance the breach by the latter of an agreement to transport sheep in interstate commerce to a designated point and there to feed and fatten them for market at a designated charge, and the wrongful sale of the stock by the carrier, and a misappropriation of the proceeds. *Klink v. Chicago, R. I. & P. R. Co.*, 135 C. C. A. 169, 219 Fed. 457.

In a shipper's action under section 1 of the Act to Regulate Commerce for unjust and unfair discrimination in interstate freight rates, the petition states a cause of action by alleging in substance that competitors of the plaintiff were given stated lower rates for similar services under substantially the same circumstances and conditions, although facts tending to show the similarity of services are not alleged, as an allegation of the ultimate facts in the language of the act is sufficient. *Kinnavey v. Terminal R. Assn.*, 81 Fed. 802.

A cause of action against a carrier for the violation of the Act to Regulate Commerce is shown by a declaration averring in substance that the defendant exacted the full tariff rates from the plaintiff for interstate shipments and gave his competitors a lower rate by fraudulent devices, notwithstanding that the declaration also imperfectly set up a conspiracy among the defendant carriers in violation of the Sherman Anti-trust Act. *American U. Coal Co. v. Pennsylvania R. Co.*, 159 Fed. 278.

**Plea or Answer.**

The plea of the defendant in an action against a carrier by a shipper for the breach of a contract to furnish cars, was held sufficient to show the illegality of the agreement under the Act to Regulate Commerce, because of a stipulation for a division of the established interstate freight rates with the shipper. *Taenzer v. Chicago, R. I. & P. R. Co.*, 113 C. C. A. 153, 191 Fed. 543; certiorari denied 223 U. S. 746, 56 L. ed. 640, 32 Sup. Ct. Rep. 553.

**F. Damages.****In General.**

A shipper must show pecuniary damages

in order to recover from a carrier under section 8 of the Act to Regulate Commerce, making carriers liable "for the full amount of damages sustained" by any person in consequence of the violation of the Act by any carrier. *Knudsen-Ferguson F. Co. v. Michigan C. R. Co.*, 79 C. C. A. 46, 148 Fed. 968, certiorari denied 204 U. S. 671, 51 L. ed. 672, 27 Sup. Ct. Rep. 786.

**G. Evidence.****Presumptions.**

It will be presumed, in an action by a shipper against a carrier for the recovery for services rendered by him in connection with the wharfage of freight, that the plaintiff was the owner of the goods, where the contrary is not shown by his petition nor the statement of facts which the defendant adopts as its answer. *Southern Cotton Oil Co. v. Central of Ga. R. Co.*, 142 C. C. A. 627, 228 Fed. 335, affirming 204 Fed. 476.

It will not be presumed that a carrier performed its duty required by the Act Regulating Commerce with respect to filing an interstate freight tariff with the Commission. *Meyers v. Missouri, K. & T. R. Co.*, 120 Mo. App. 288, 96 S. W. 737.

**H. Instructions.****In General.**

In an action by a shipper under section 8 of the Interstate Commerce Act for damages sustained from rebates unlawfully given a competitor on interstate shipments, it was error to refuse to instruct the jury to the effect that the plaintiff could recover only by satisfying the jury that he sustained some loss or injury from the fact that the defendant at the same time carried coal for other persons at a lower rate. *Pennsylvania R. Co. v. International Coal M. Co.*, 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915 A. 315, reversing 97 C. C. A. 383, 173 Fed. 1.

**M. Appeal and Error.****Federal Questions.**

A Federal question is presented where a state court certifies that, in an action for the recovery of damages for the infection of cattle by reason of a carrier's violation of quarantine regulations established by the Secretary of Agriculture under Act of February 2, 1903, the defendant insisted throughout the proceeding that such act was unconstitutional and that if valid it did not confer a civil right of action. *Illinois C. R. Co. v. McKendree*, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; same v. *Edwards*, 203 U. S. 531, 51 L. ed. 305, 27 Sup. Ct. Rep. 159.

A decision of a state court against the

contention of a carrier, when garnished by a creditor of a shipper to recover a charge in excess of a special contract rate for an interstate shipment, that the rate collected was that fixed by its duly established tariffs, involves the interpretation and application of the Interstate Commerce Act, and gives jurisdiction to the Federal Supreme Court. *Kansas City S. R. Co. v. Albers Comm. Co.*, 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316, reversing 79 Kan. 59, 99 Pac. 819.

A contention by a carrier, when garnished by a creditor of a shipper in interstate commerce for charges collected in excess of a special contract rate, that the Interstate Commerce Act precluded a recovery, since in disregarding the special agreement the carrier conformed to the provisions of such act, sets up a right or immunity under a law of the United States within the meaning of U. S. Rev. Stats., section 709, U. S. Comp. Stats., Supp. 1901, p. 575. *Kansas City S. R. Co. v. Albers Comm. Co.*, 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316, reversing 79 Kan. 59, 99 Pac. 819.

#### XIV. CRIMINAL PROSECUTIONS.

Actions against carriers for penalties for violations of 28 Hour Act, see *supra* VII, H.

##### A. In General.

##### Effect of Hepburn Act on Liability Previously Incurred Under Elkins Act.

Section 10 of the Hepburn Act amending and re-enacting the Elkins Act, did not, by repealing conflicting laws and providing that pending actions should not be affected by such repeal, supersede section 13 of U. S. Rev. Stats., saving the right to recover penalties, forfeitures and liabilities for violations of any repealed statute in the absence of an express declaration to the contrary, and, after the passage of the Hepburn Act, a penalty may be recovered for a previous violation of the Elkins Act. *Great N. R. Co. v. United States*, 208 U. S. 452, 52 L. ed. 567, 28 Sup. Ct. Rep. 313, affirming 84 C. C. A. 93, 155 Fed. 945.

Since the saving clause of the Hepburn Act, although relating only to causes pending in Federal courts, does not expressly extinguish criminal liability previously incurred under the Elkins Act, the right to prosecute therefor after the enactment of the Hepburn Act is saved by section 13 of R. S. U. S. (U. S. Comp. St. 1901, p. 6) providing that the repeal of any statute shall not release or extinguish existing liability thereunder unless the repealing act shall expressly so provide. *United States v. Delaware, L. & W. R. Co.*, 152 Fed. 269; *United States v. Chicago,*

*St. P. M. & O. R. Co.*, 151 Fed. 84, affirmed on other grounds 90 C. C. A. 211, 162 Fed. 835, certiorari denied 212 U. S. 579, 53 L. ed. 659, 29 Sup. Ct. Rep. 689.

Since the Hepburn Act did not, in repealing the Elkins Act, expressly bar a prosecution for violations which occurred prior to the passage of the former act, an indictment will lie, under section 13 of U. S. R. S. (U. S. Comp. Stats. 1901, p. 6) saving all rights of action under repealed statutes unless otherwise declared in the repealing act, for a violation of the Elkins Act so occurring. *United States v. New York C. & H. R. R. Co.*, 153 Fed. 630, reversed on other grounds 92 C. C. A. 331, 166 Fed. 267.

##### Dismissing Action Under Commodities Clause.

Where, on remanding for further proceedings an action by the United States to enjoin a carrier from transporting in interstate commerce a commodity in which it has an interest, the admitted facts do not show a violation of the commodities clause of the Hepburn Act, and leave to amend the bill of complaint was not requested, the trial court properly entered a decree of dismissal absolute. *United States v. Erie R. Co.*, 220 U. S. 275, 55 L. ed. 464, 31 Sup. Ct. Rep. 392.

##### B. Jurisdiction.

##### Action for Failure to File Schedule.

A prosecution of a carrier under section 6 of the Act Regulating Commerce for failing to file a rate schedule with the Interstate Commerce Commission, will lie only in the courts of the District of Columbia. *New York C. & H. R. R. Co. v. United States*, 92 C. C. A. 331, 166 Fed. 267, reversing 153 Fed. 630.

Section 1 of the Elkins Act permitting a carrier to be prosecuted for violations thereof in any Federal court within the district wherein the offense was committed, or in which it was commenced or completed, does not permit a carrier to be prosecuted in any other court than those of the District of Columbia for failing to file a rate schedule with the Interstate Commerce Commission as required by section 6 of the Act Regulating Commerce. *New York C. & H. R. R. Co. v. United States*, 92 C. C. A. 331, 166 Fed. 267, reversing 153 Fed. 630.

##### C. Limitations.

##### Violation of Elkins Act.

The limitations prescribed by section 1044 U. S. R. S. 1901, p. 725, controls an indictment for rebating in violation of the Elkins Act. *United States v. Central Vt. R. Co.*, 157 Fed. 291.

Within the period of limitations the

Elkins Act is in full force as to offenses committed prior to the passage of the Hepburn Act. *United States v. Great N. R. Co.*, 157 Fed. 288.

#### D. Parties.

##### Agents of Carriers.

An agent of a carrier is not guilty of violating the Act Regulating Commerce with respect to rebating, merely because he was put on notice that a carrier's dealing with a shipper was out of the ordinary course of business. *United States v. Michigan C. R. Co.*, 43 Fed. 26.

##### Receivers.

A receiver of a railway cannot be held criminally liable under the Act Regulating Commerce for departing from the established interstate rates established by the carrier before he became receiver, and to which he was not a party. *United States v. De Coursey*, 82 Fed. 302.

##### Joindure of Carrier and Agents.

A carrier and its agents may be legally joined as defendants in an indictment for violating the Elkins Act by giving unlawful rebates. *New York C. & H. R. R. Co. v. United States*, 212 U. S. 481, 53 L. ed. 613, 29 Sup. Ct. Rep. 304, affirming 146 Fed. 298.

Since section 1 of the Act Regulating Commerce, as amended, makes both a carrier and its agents or officers who come within its provisions criminally responsible for granting illegal concessions or rebates, such agents or officers may be jointly indicted with their principals. *United States v. Erie R. Co.*, 222 Fed. 444.

Since section 1 of the Act Regulating Commerce, as amended, makes a carrier's officers and agents who come within its provisions, criminally liable for granting illegal concessions or rebates, and as such officers and agents may be jointly indicted with their principal, the acquittal of such an officer or agent is not inconsistent with the conviction of the carrier. *United States v. Erie R. Co.*, 222 Fed. 444.

##### Giver and Receiver of Rebates.

Since the Act Regulating Commerce does not provide a penalty for the receiving of rebates from passenger fares, both the recipient and the carrier giving such rebates may be prosecuted under section 5440 of the U. S. Rev. Stats. for conspiring to commit an offense against the laws of the United States. *United States v. Grand Trunk R. Co.*, 225 Fed. 283.

#### E. Indictment.

##### Discriminations and Preferences.

##### — In General.

An indictment of a carrier for violating

section 2 of the Act Regulating Commerce is sufficient where it states the names of the parties, gives the details of time, place, distance, and amount of discrimination which it charges, and alleges that the services were performed for a less compensation than that received by the defendant from a named person for a similar service in the transportation of a like kind of traffic under similar circumstances and conditions, although the kind of merchandise transported for the latter, the length of the shipment or the amount received therefrom, is not stated. *United States v. De Coursey*, 82 Fed. 302.

##### — Granting Privileges Not Covered by Tariff.

A violation of section 6 of the Act Regulating Commerce by extending to an interstate shipper privileges not enumerated in a carrier's tariffs, is not shown by an indictment alleging merely, without showing any specific facts, that a special privilege was given a shipper by a rail and water route owned by the defendant; that the rates for water transportation of anthracite coal had been fixed for 5 years while the rate on bituminous coal was subject to frequent fluctuations and at most times was higher than that on anthracite coal; that other shippers were required to make special arrangements for each shipment, which was not required of the favored shipper; that the latter was given information concerning shipments of other persons; and that he was given preference in the assignment of barges and barge space. *United States v. Philadelphia & R. R. Co.*, 232 Fed. 946.

A violation of section 6 of the Act Regulating Commerce by extending to an interstate shipper privileges not named in a carrier's tariffs, is not shown where it is not alleged that any tariffs were in fact filed with the Interstate Commerce Commission. *United States v. Philadelphia & R. R. Co.*, 232 Fed. 946.

##### — Refusal to Furnish Switch Tracks.

An indictment charging an interstate carrier with violating section 3 of the Act Regulating Commerce by knowingly and unlawfully practicing an unreasonable and unjust discrimination in respect to the transportation of property in interstate commerce by failing and refusing to give, grant and furnish a coal mining company with switches, sidings, turnouts and connections, to its undue and unjust prejudice, is insufficient, where it is not alleged that such connections, etc., could have been reasonably and safely made, that they were practicable, that they would have furnished traffic to justify their installation, and also that the coal company was able and had offered to pay a reasonable portion of the necessary charges and expenses of making such connections

usually paid under such circumstances. *United States v. Baltimore & O. R. Co.*, 153 Fed. 997.

#### — Refusal to Furnish Cars.

An undue or unreasonable prejudice or disadvantage in violation of section 3 of the Act Regulating Commerce, is not shown by an indictment charging a refusal to furnish a coal company the cars and motive power due it, and by furnishing other similar companies with more than their rightful proportion of cars, where the capacity and output of the various mines is not alleged, and it is not charged that the complaining company was prepared to make shipments, that it had made due demand on the carrier for cars and motive power, and that it had tendered coal for interstate shipment. *United States v. Baltimore & O. R. Co.*, 153 Fed. 997.

#### — Giving Credit to Shipper.

An indictment is sufficient to charge a carrier with unlawful discriminations by giving long credits to one shipper pursuant to an antecedent agreement, and requiring security and prompt settlements from other shippers similarly situated, although the indictment does not show that those discriminated against ever asked for or were refused similar credits. *Hocking V. R. Co. v. United States*, 127 C. C. A. 285, 210 Fed. 735, affirming 194 Fed. 234.

#### — Establishment of Rate.

An indictment for violating the Act Regulating Commerce by deviating from an established interstate through rate sufficiently charges a prima facie establishment of a joint through tariff of rates for the commodity in question by alleging a common arrangement between the defendant carrier and three other carriers for a continuous forwarding of property between named interstate points, the keeping open of printed tariffs of such rate by the defendant for public inspection, together with the allegation that the shipment in question was accompanied by written shipping orders, waybills and transfer slips showing a continuous shipment between such points, since a specific charge that all of the connecting carriers concurred in such joint rate, or that it was filed by their joint action with the Interstate Commerce Commission, is not essential to the validity of the indictment. *United States v. Pennsylvania R. Co.*, 153 Fed. 625.

The failure to allege that the rate charged for moving an interstate shipment over a through route was not published and filed with the Interstate Commerce Commission does not vitiate an indictment for violating the Act Regulating Commerce by accepting a lower rate than that regularly established for a different

through route between the same interstate points. *United States v. Pennsylvania R. Co.*, 153 Fed. 625.

The moment the various carrying lines over which an interstate shipment passes, accept and act upon a through bill of lading, openly charging the aggregate of the published tariffs, they create a through route and accept the published aggregate as the lawful and only through charge, and an indictment for violating the Elkins Act by deviating from such rate held to sufficiently show the established rate. *United States v. Great N. R. Co.*, 157 Fed. 288.

#### — Through Shipment.

An arrangement for a through interstate shipment is shown by an indictment for a violation of the Act Regulating Commerce by deviating from the established rate, where it alleges that the shipment was made under a continuous arrangement between the defendant and the connecting carriers, that it was transported without stoppage or interruption, and that it was accompanied by written shipping orders, waybills and transfer slips indicating a through transportation, and the rate and place of destination was also stated. *United States v. Pennsylvania R. Co.*, 153 Fed. 625.

An indictment against an initial carrier for deviating from an established joint through rate between interstate points in violation of the Act Regulating Commerce, held to show a continuous through shipment and not merely an interstate transportation by the line of such carrier. *United States v. Pennsylvania R. Co.*, 153 Fed. 625.

#### — Failure to Collect Demurrage.

An indictment charging a violation of the Act Regulating Commerce by the failure of a carrier to exact the established demurrage charges for cars of coal, is sufficient, although it does not state whether the cars were to be unloaded by the consignee or the carrier, where the indictment shows that the shipments were made subject to reconsignment and that the consignee was notified of the arrival of cars in the defendant's freight yards, where they were detained beyond the free time without collection of the established demurrage charges. *United States v. Erie R. Co.*, 209 Fed. 283.

An indictment shows a violation of the Act Regulating Commerce by the failure of a carrier to strictly observe its demurrage tariffs, and not merely a failure to observe a custom, where it alleges in substance that for two years the defendant carrier delivered coal to a consignee without assessing demurrage or keeping records thereof, or without rendering bills

and collecting any demurrage charges, while daily records of demurrage against other persons similarly situated were kept and monthly bills rendered and promptly collected. *United States v. Erie R. Co.*, 809 Fed. 283.

Discriminations in favor of an interstate shipper in violation of the Act Regulating Commerce is not shown by an indictment alleging that the defendant carrier held loaded cars for such shipper in a yard some distance short of destination without exacting the established demurrage charges, but not alleging that the cars were held for or by the consignee for unloading, forwarding instructions, or for any other purpose specified in the demurrage tariffs. *United States v. Philadelphia & R. R. Co.*, 232 Fed. 953.

### **Rebates and Concessions.**

#### **— In General.**

Each count of an indictment of a carrier for violating the Elkins Act may relate to a separate shipment, where only one payment of rebates was made covering all shipments, although but a single penalty can be imposed. *United States v. Central Vt. R. Co.*, 157 Fed. 291.

The willful failure of a carrier to observe its published tariffs is sufficiently shown by an indictment of a carrier for rebating, where the payment of the full rate by the shipper and the subsequent return to him of a stated portion thereof by the carrier pursuant to a prior agreement, is alleged. *United States v. New York C. & H. R. R. Co.*, 146 Fed. 298, affirmed on other grounds 212 U. S. 481, 53 L. ed. 613, 29 Sup. Ct. Rep. 304.

#### **— What Must be Alleged.**

The names or descriptions of the carrier's agents who grant an illegal concession or rebate need not be alleged in an indictment of the carrier for violating section 1 of the Act Regulating Commerce, as amended. *United States v. Erie R. Co.*, 222 Fed. 444.

An indictment for violating the Elkins Act by giving rebates need not allege that the defendant carrier paid them pursuant to a prearrangement or understanding that less than the legal tariff rate should be paid and accepted for interstate transportation. *United States v. Chicago, St. P. M. & O. R. Co.*, 151 Fed. 84, affirmed on other grounds 90 C. C. A. 211, 162 Fed. 835, certiorari denied 212 U. S. 579, 53 L. ed. 659, 29 Sup. Ct. Rep. 689.

The method or device resorted to by a carrier in paying an unlawful rebate to a shipper need not be set out in an indictment of the carrier for violating the Federal law. *United States v. Grand Rapids & I. R. Co.*, 129 C. C. A. 113, 212 Fed. 577.

Since an existing cause of action for

violating the Elkins Act by rebating was, by section 13 of R. S. U. S. (U. S. Comp. Stats. 1901, p. 6), saved from the repealing clause of the Hepburn Act, an indictment subsequently found for a violation of the Elkins Act need not allege that the defendant "knowingly" gave a rebate, which would be necessary to a conviction under the Hepburn Act. *United States v. Delaware, L. & W. R. Co.*, 152 Fed. 269.

#### **— Sufficiency in General.**

A violation of the Elkins Act and not a conspiracy in contravention of section 5440 of U. S. R. S. is shown by an indictment alleging that a carrier gave a rebate from the established interstate freight rate pursuant to a pre-existing agreement. *United States v. New York C. & H. R. R. Co.*, 146 Fed. 298, affirmed on other grounds 212 U. S. 481, 53 L. ed. 613, 29 Sup. Ct. Rep. 304.

An indictment of a carrier for violating the Elkins Act is not bad for duplicity where, in the language of the act, it charges that the defendant offered, granted and gave a rebate from an interstate freight rate. *United States v. Delaware, L. & W. R. Co.*, 152 Fed. 269.

An indictment charges a shipper with violating the Elkins Act where it alleges in substance that, in the form of charges for extra lighterage services performed by a shipper, the defendant carrier paid an agent of the shipper rebates from interstate freight charges. *United States v. Delaware, L. & W. R. Co.*, 152 Fed. 269.

An indictment charging a carrier with violating the Elkins Act by giving rebates is not rendered duplicitious by setting out the agreement under which the rebates were paid. *United States v. Great N. R. Co.*, 157 Fed. 288.

An indictment for giving a rebate or concession in violation of the Elkins Act is sufficient, although there is no particular description of the device resorted to by the defendant to accomplish the unlawful transportation, where the indictment clearly and directly shows the kind of property shipped, the time and place of shipment, the consignee, the existing tariff or rate, the payment thereof to the carrier, the subsequent payment of the rebate or concession by the carrier, the time of doing so, and the amount of the payment. *Chicago, St. P. M. & O. R. Co. v. United States*, 90 C. C. A. 211, 162 Fed. 835, affirming 151 Fed. 84, certiorari denied 212 U. S. 579, 53 L. ed. 659, 29 Sup. Ct. Rep. 689.

The granting of a concession or rebate by a carrier in violation of the Elkins Act is sufficiently shown by an indictment, although the word "concession" is omitted, which alleges that the tariff rate for a specific shipment was \$3.50 per ton for a carload of 40,000 pounds, and that the de-



fendant accepted a less sum in payment of such charges. *Atchison, T. & S. F. R. Co. v. United States*, 95 C. C. A. 446, 170 Fed. 250, reversing 163 Fed. 111.

A violation of the Act Regulating Commerce and the Elkins Act is shown by an indictment against a carrier alleging the payment of a rebate to a shipper from an interstate freight rate pursuant to a pre-existing agreement, although it does not allege that any other person was charged a higher rate. *United States v. New York C. & H. R. R. Co.*, 146 Fed. 298, affirmed on other grounds 212 U. S. 481, 53 L. ed. 613, 29 Sup. Ct. Rep. 304.

An indictment for rebating in violation of the Elkins Act is sufficient where it alleges in substance the interstate shipment of coal over the line of the defendant and the payment to the shipper of a rebate knowingly by another carrier which held a majority of the stock of the defendant carrier. *United States v. Cleveland, C. C. & St. L. R. Co.*, 234 Fed. 178.

An indictment against a carrier for rebating in violation of the Elkins Act is sufficient, although the through joint rate is not stated, where it avers that a designated sum was returned a shipper from the regularly established rate over a portion of the route. *Chicago, B. & Q. R. Co. v. United States*, 85 C. C. A. 194, 157 Fed. 830, affirmed 209 U. S. 90, 52 L. ed. 698, 28 Sup. Ct. Rep. 439.

#### **Failure to File or Publish Schedules and Tariffs.**

An indictment for violating the Elkins Act by the failure of one carrier to file a joint through tariff with the Interstate Commerce Commission, need not allege that none of the other carriers had filed copies of the joint tariff. *United States v. New York C. & H. R. R. Co.*, 153 Fed. 630, reversed on other grounds 92 C. C. A. 331, 166 Fed. 267.

A violation of the Elkins Act by the failure of an initial carrier to file and publish a through tariff between interstate points is shown by an indictment alleging the establishment of a through joint rate over the lines of designated connecting carriers, and that the shipment in question was made by the initial carrier at a lower rate over a different route. *United States v. Pennsylvania R. Co.*, 153 Fed. 625.

A common arrangement between the defendant carrier and several other connecting carriers for a through interstate shipment under a joint tariff rate is sufficiently charged in an indictment of an intrastate carrier for failing to file with the Interstate Commerce Commission a copy of such tariff as required by the Elkins Act, where each carrier's proportion of the through rate is stated, and it

is alleged that the shipment in question was made between the interstate points under shipping orders, transfer slips and waybills showing a through shipment. *United States v. New York C. & H. R. R. Co.*, 153 Fed. 630, reversed on other grounds 92 C. C. A. 331, 166 Fed. 267.

A violation of the Act Regulating Commerce by transporting an interstate shipment by a rail and water route controlled, owned, managed or arranged by the rail carrier without having filed with the Interstate Commerce Commission tariffs showing the rates for the water transportation, is not shown by an indictment alleging in substance the transportation of coal billed to an intrastate seaport and its further transportation to an interstate port but without mentioning a consignor, consignee, or an interstate billing. *United States v. Philadelphia & R. R. Co.*, 232 Fed. 946.

#### **Verification.**

When a warrant is not asked an information need not be verified in a proceeding against an express company for transporting in interstate commerce nursery stock which is not marked in accordance with the requirements of U. S. Stat. 1912, c. 308, Comp. Stats. 1913, secs. 8752-8764, relating to the establishment by the Secretary of Agriculture of quarantine regulations against dangerous plant diseases and insect pests, and forbidding connecting carriers receiving for transportation goods covered by such regulations unless inspected and certified by the proper officials. *United States v. Adams Express Co.*, 230 Fed. 531.

#### **F. Evidence.**

##### **Burden of Proof.**

The burden rests on the government in the prosecution of a carrier for deviating from established through joint rates in violation of the Act Regulating Commerce, to show a common arrangement for a continuous carriage between the points mentioned. *United States v. Pennsylvania R. Co.*, 153 Fed. 625.

##### **Admissibility.**

On the prosecution of a carrier for granting rebates on 14 carload shipments by improperly allowing transit rates, evidence pertaining to many other similar shipments to which such rates were properly applied during the same period, was properly excluded because it did not tend to show absence of the carrier's intention to violate the law. *Grand Rapids & I. R. Co. v. United States*, 129 C. C. A. 113, 212 Fed. 577.

On the prosecution of a carrier for rebating by applying transit rates to local

inbound and outbound shipments, evidence is admissible concerning the shipments involved and the transit rates, where it tends to show a scheme calculated alike to conceal and to carry out the thing charged in the indictment. *Grand Rapids & I. R. Co. v. United States*, 129 C. C. A. 113, 212 Fed. 577.

### G. Instructions.

#### In General.

An instruction, in a prosecution of a carrier for violating the Elkins Act, taken as a whole, held not to permit a conviction for acts of its officers and agents committed previously to the passage of such law. *New York C. & H. R. R. Co. v. United States*, 212 U. S. 500, 53 L. ed. 624, 29 Sup. Ct. Rep. 309, affirming 146 Fed. 298.

#### Rebating.

Where, on learning that a transit rate had been improperly applied, a carrier collected from all the consignees but one an amount sufficient to cover the full tariff rates, and on the prosecution of the carrier for paying to the shipper rebates in the form of the inbound local rates on the shipments made under the transit rates, an instruction that the offense should be regarded as consummated and beyond recall or not, and that verdict should be rendered for or against the carrier, according as the jury should conclude whether the defendant acted with or without knowledge of the facts, was as favorable to the defendant as the law permitted. *Grand Rapids & I. R. Co. v. United States*, 129 C. C. A. 113, 212 Fed. 577.

There was no error in refusing to instruct that a carrier could not be convicted for rebating in violation of the Elkins Act for merely concocting a scheme to do so, unless property was actually transported at less than the established tariff rates, where the necessary elements of such offense had been previously pointed out to the jury. *Vandalia R. Co. v. United States*, 141 C. C. A. 469, 226 Fed. 713.

#### Failure to Produce Witness.

On the criminal prosecution of a carrier for giving a shipper rebates in violation of the Elkins Act, the jury was correctly instructed that they might take into consideration the failure of the defendant to produce a witness who had knowledge of the transaction, and the books in which the record thereof was entered, where the jury was also instructed that there was no evidence that the defendant, or those who controlled its corporate action, destroyed or failed to produce any paper which the government demanded. *New York C. & H. R. R. Co. v. United States*,

212 U. S. 481, 53, L. ed. 613, 29 Sup. Ct. Rep. 304, affirming 146 Fed. 298.

### H. Variance and Failure of Proof.

#### Action for Rebating.

Since the precise sums alleged in an indictment are not of the essence of the offense of rebating in violation of the Federal Law, the failure of the government to prove the same is immaterial, and it is sufficient if the payment of any substantial amount is proved. *Grand Rapids & I. R. Co. v. United States*, 129 C. C. A. 113, 212 Fed. 577.

When an indictment charges a carrier with giving rebates on outbound shipments, or a violation of a local tariff, and the proof shows that the rebates were given on inbound shipments, or in violation of transit tariffs, there is not a fatal variance, where some inbound shipments under local tariffs were disposed of at destination and similar property reshipped, or where the inbound freight was re-consigned without being treated under any existing transit privilege and at final destination the carrier collected from the consignee the total of the inbound and the outbound transit rates and subsequently paid the shipper the amount of the local inbound rates. *Grand Rapids & I. R. Co. v. United States*, 129 C. C. A. 113, 212 Fed. 577.

### I. Questions of Law and Fact.

#### In General.

Whether a carrier made a settlement with a shipper for demurrage charges imposed during the period covered by an indictment for rebating or giving concessions, is a question for the jury. *United States v. Philadelphia & R. R. Co.*, 184 Fed. 543, 546, affirmed 110 C. C. A. 513, 188 Fed. 879.

Whether the alleged concession was simply a settlement of a disputed demurrage charge to which a consignee had established a legal defense, is a question for the jury on a prosecution for giving concessions or rebates. *United States v. Philadelphia & R. R. Co.*, 184 Fed. 543, 546, affirmed 110 C. C. A. 513, 188 Fed. 879.

### J. Verdict, Judgment and Penalties.

#### When One Good Count in Indictment.

A judgment against a carrier for rebating in violation of the Elkins Act will be sustained if good under any count of an indictment, although all other counts are bad, when the amount of the judgment does not exceed that which might have been rendered on any one of the counts. *Wisconsin C. R. Co. v. United States*, 94 C. C. A. 444, 169 Fed. 76, S. C. 151 Fed. 84.

**Number of Penalties Imposed.**

Only one penalty can be imposed for a violation of the Elkins Act where a single payment of rebates covers a number of distinct and separate shipments. *United States v. Central Vt. R. Co.*, 157 Fed. 291.

Where a carrier made but one payment of rebates covering a number of carload shipments, a conviction on a number of counts, each relating to a different shipment, is not prejudicial to the carrier when but one penalty is imposed. *United States v. Philadelphia & N. R. R. Co.*, 184 Fed. 543, 546, affirmed 110 C. C. A. 513, 188 Fed. 879; *United States v. Lehigh V. R. Co.*, 184 Fed. 546.

**K. Appeal and Error.****What Reviewable by Federal Supreme Court.**

An order of the trial court setting aside the service of process on an express company in a prosecution for violating the Act Regulating Commerce, on the ground that the indictment showed that the defendant was not a corporation but a joint stock association created under a state

law, the motion to quash being treated as a demurrer to the indictment, amounts to a construction of the statutes upon which the indictment was founded, and, under the Act of March 2, 1907, ch. 2564, 34 Stat. L. 1246, is reviewable by the Federal Supreme Court. *United States v. Adams Express Co.*, 229 U. S. 381, 57 L. ed. 1237, 33 Sup. Ct. Rep. 878.

The sufficiency of an indictment for violating the Elkins Act will not be determined by the Federal Supreme Court on certiorari where the question was not, although open under the objections made, presented at the trial or in the Circuit Court of Appeals. *Great N. R. Co. v. United States*, 208 U. S. 452, 52 L. ed. 567, 28 Sup. Ct. Rep. 313, affirming 84 C. C. A. 93, 155 Fed. 945.

**When "Nolo Contendere" Pleaded.**

A plea of nolo contendere by a carrier in a prosecution for violating the Elkins Act does not preclude it from obtaining a review on the merits. *Hocking V. R. Co. v. United States*, 127 C. C. A. 285, 210 Fed. 735, affirming 194 Fed. 234.

## EMPLOYERS' LIABILITY ACT\*

### FEDERAL

- I. VALIDITY.
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- XX. APPEAL AND ERROR.

See also same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

#### I. VALIDITY.

See also same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

#### In Territories of United States.

The Federal Employers' Liability Act of 1906 is constitutional as applied to the territory of Porto Rico. *Cortejo v. American R. Co.*, 2 Porto R. Fed. 389; *Ramirez v. Ponce R. & L. Co.*, 5 id. 353. *Contra Colon v. Ponce & G. R. Co.*, 3 id. 367, disapproved 5 id. 353.

#### II. NATURE AND CONSTRUCTION.

See also same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

#### Exclusiveness of Remedy.

The remedy under the Federal Employers' Liability Act is exclusive where an employee is injured or killed while en-

gaged in interstate commerce. *Southern R. Co. v. Howard*, 1 Tenn. Civ. App. 599; *Kleinguenther v. Philadelphia & R. Co.*, 25 Pa. Dist. Ct. 425.

#### Territorial Extent.

Both the original and the second Federal Employers' Liability Acts are in force in Porto Rico. *Ramirez v. Ponce R. & L. Co.*, 5 Porto R. Fed. 353; *Rios v. Caguas Tram. Co.*, 5 Porto R. Fed. 596.

#### III. OPERATION.

See also same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

#### Effect on Particular State Laws.

A state statute creating a presumption of negligence from injuries to a railway employee caused by the running of the locomotives or other machinery of a railway company, is not applicable to an action founded on the Federal Employers' Liability Act. *Louisville & N. R. Co. v. Rhoda*, — Fla. —, 74 So. 19. S. C. 71 Fla. 526, 71 So. 369, last case reversed 338 U. S. 608, 59 L. ed. 1487, 35 Sup. Ct. Rep. 662.

The amount of recovery in an action under the Federal Employers' Liability Act for wrongful death is not limited by the amount prescribed in a state Workmen's Compensation law. *Grybowski v. Erie Co.*, 88 N. J. L. 1, 95 Atl. 764, affirmed — N. J. L. —, 98 Atl. 1085.

#### IV. CONTRACTS AGAINST AND RELEASES FROM LIABILITY.

See also same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

#### Release of Existing Cause of Action.

An administrator may compromise and accept settlement of an unliquidated claim for damages under the Federal Employers' Liability Act for wrongful death, without special authority from the probate court; and such settlement cannot be impeached except for fraud, mistake or gross negligence amounting to fraud. *Treadway v. St. Louis, I. M. & S. R. Co.*, — Ark. —, 191 S. W. 930.

Where a widow, acting as the personal representative of a deceased railway employee, agreed to settle with a railway company for a stated amount, and the

\*For text of Act see No. 2, Vol. I, Federal Ry. Digest, p. 395.

company supplied an attorney to bring a friendly suit under the Federal Employers' Liability Act, and judgment for the agreed amount was entered by consent, there was no fraud which would vitiate the settlement. *Treadway v. St. Louis, I. M. & S. R. Co.*, — Ark. —, 191 S. W. 930.

#### V. WHAT CARRIERS AND TRAF- FIC WITHIN ACT.

See also same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

##### **Electric Railway Companies.**

An electric street railway in Porto Rico is within the second Federal Employers' Liability Act. *Ramirez v. Ponce R. & L. Co.*, 5 Porto R. Fed. 353.

##### **Navigation Companies.**

The Federal Employers' Liability Act of 1906 was not applicable to employers and employees engaged in navigation by water. *Valdivieso v. Insular Line*, 6 Porto R. Fed. 484.

#### VI. WHAT EMPLOYEES WITHIN ACT.

See also same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

##### **In General.**

The Federal Employers' Liability Act applies when a carrier and an employee are both engaged in interstate commerce at the time the latter is injured or killed. *Wagner v. Chicago, R. I. & P. R. Co.*, 200 Ill. App. 305.

##### **Engineer on Way to Wreck.**

An engineer on his way with an engine to the scene of the wreck of a train containing interstate traffic, was conceded to be within the Federal Employers' Liability Act. *Savannah & N. W. R. Co. v. Roach*, — Ga. App. —, 91 S. E. 506.

##### **Crew of Switch Engine on Way for Water.**

A switchman who was injured while on the way with a switch engine for water was within the Federal Employers' Liability Act, where the engine had just been engaged in moving both interstate and intrastate traffic, and the water was necessary in order to permit the continuance of such work. *Macon D. & S. R. Co. v. Robinson*, — Ga. App. —, 91 S. E. 492.

##### **Moving Partly Emptied Interstate Car.**

A car is still moving in interstate commerce within the meaning of the Federal

Employers' Liability Act, where a switchman was injured while necessarily moving the car from the consignee's siding before the interstate shipment was entirely removed, with the intention of immediately returning such car to the siding for the completion of unloading and then for reloading with interstate freight. *Wagner v. Chicago, R. I. & P. R. Co.*, 277 Ill. 114, 115 N. E. 201, affirming 200 Ill. App. 305.

##### **Employees Repairing Tracks.**

A section hand employed to repair an interstate railroad track was within the Federal Employers' Liability Act, where he was thrown from a handcar and killed. *Treadway v. St. Louis, I. M. & S. R. Co.*, — Ark. —, 191 S. W. 930.

A track repairer who was injured while repairing the main track of an interstate railway line, was within the Federal Employers' Liability Act. *Illinois C. R. Co. v. Xigas*, 4 Tenn. Civ. App. 257.

##### **Crossing Watchman.**

A flagman at a street crossing of interstate railroads was within the Federal Employers' Liability Act where, while he was attempting to stop a horse and vehicle that was crossing the track, he was struck and killed by cars containing interstate traffic which were being shunted across the street in course of delivery to the consignee. *Dunlavy v. Chicago, B. & Q. R. Co.*, 200 Ill. App. 75.

##### **Foreman of Carpenters.**

A foreman of carpenters was not within the Federal Employers' Liability Act where he was struck and killed by a car of lumber which was being shifted in a railway yard for use by him in repairing a coal chute at which locomotives engaged in both interstate and intrastate commerce were coaled. *Kelly v. Pennsylvania R. Co.*, — C. C. A. —, 238 Fed. 95.

##### **Shop Employee Working on Leased Locomotive.**

A shop employee was within the Federal Employers' Liability Act when injured while cleaning a part from a locomotive used in interstate commerce and leased by his employer, an interstate railway company, to a subsidiary company, in which the former company held the stock control, where the trains of both roads were dispatched by the lessor and operated over its terminals and connecting tracks. *Erie R. Co. v. Krysiensky*, — C. C. A. —, 238 Fed. 142.

##### **Janitor of Office Building.**

A janitor who was injured while breaking up coal for a furnace in the general offices of an interstate railway company was not within the Federal Employers'

Liability Act, although the business of the carrier was almost wholly interstate. *Great N. R. Co. v. King*, — Wis. —, 161 N. W. 371.

## VII. NEGLIGENCE FOR WHICH CARRIER ANSWERABLE.

See also same sections, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

### In General.

Since the Federal Employers' Liability Act provides a remedy only when an employee is injured or killed from a cause incident to or arising out of railway employment, the ordinary rules governing the relation of master and servant necessarily apply, and the employer is liable only where it has been negligent in the performance of some duty which is imposed upon it as master. *Roebuck v. Atchison, T. & S. F. R. Co.*, 99 Kan. 544, 162 Pac. 1153.

Even where contributory negligence and assumed risk are rightfully pleaded, but not proved, in an action based on the Federal Employers' Liability Act, there cannot be a recovery if the evidence shows without contradiction that the defendant was not negligent in the manner alleged. *Louisville & N. R. Co. v. Rhoda*, — Fla. —, 74 So. 19. S. C. 71 Fla. 526, 71 So. 369, last case reversed 238 U. S. 608, 59 L. ed. 1487, 35 Sup. Ct. Rep. 662.

### Common-Law Rules.

In determining what constitutes negligence under the Federal Employers' Liability Act, the common-law rules control, except when abrogated, qualified, or restricted by the terms of the Federal law, and in case of conflict between the state and Federal courts as to what constitutes negligence, the common law, as interpreted and applied by the latter courts, controls. *Roebuck v. Atchison, T. & S. F. R. Co.*, 99 Kan. 544, 162 Pac. 1153.

### Assault by Vicious Coemployee.

The negligence of a carrier in retaining in its employ a vicious, turbulent and dangerous servant with actual knowledge of his character, does not render the employer answerable under the Federal Employers' Liability Act for an assault committed by such servant on a coemployee. *Roebuck v. Atchison, T. & S. F. R. Co.*, 99 Kan. 544, 162 Pac. 1153.

Where a section foreman, who did not have authority to discharge the men under him, notified his superior, who had such power, that he could not get along with a member of his gang because of his dangerous disposition, and he was directed

by such superior to retain such servant, and informed that the company would see that no harm came to him, and, without provocation or warning, while he was engaged in the discharge of his duties, the latter was killed by such servant, the carrier is not liable therefor under the Federal Employers' Liability Act, since the killing was not within the scope of such servant's duties nor in the furtherance of the master's business. *Roebuck v. Atchison, T. & S. F. R. Co.*, 99 Kan. 544, 162 Pac. 1153.

### Violation of State Safety Statutes and Ordinances.

The failure of a carrier to observe a state statute for the protection of employees is not negligence under the Federal Employers' Liability Act. *Southern R. Co. v. Howard*, 1 Tenn. Civ. App. 599.

Negligence cannot be predicated under the Federal Employers' Liability Act, on a carrier's violation of a municipal ordinance relating to the shunting of cars. *Dunlavy v. Chicago, B. & Q. R. Co.*, 200 Ill. App. 75.

### Violation of Rules and Regulations by Injured Employee.

A rule forbidding employees from riding on the pilots of engines does not extend to a road engine while engaged in switching, nor preclude a recovery under the Federal Employers' Liability Act for injuries sustained by a trainman while so engaged, since such rule applies only while engines are moving on the road. *Lusk v. Osborne*, — Ark. —, 191 S. W. 944.

### Kicking Cars Without Warning.

A carrier is answerable under the Federal Employers' Liability Act where a car inspector, while standing between two tracks at night to the knowledge of the defendant, in the discharge of his duties, was struck by a car which contrary to custom was kicked at a speed of from 8 to 17 miles an hour without having a brakeman or a light on the car to give warning of its approach. *Lincoln v. Pryor*, 199 Ill. App. 228.

### Striking Cars With Unusual Violence.

A carrier is answerable under the Federal Employers' Liability Act where, on the arrival of a passenger train at destination, the first car was moved a short distance from the remainder of the cars, and a car inspector was killed while working about the buffers of the detached car by the other cars being shoved against him when they were struck with unusual violence by a switch engine. *Koepke v. Chicago, R. I. & P. R. Co.*, 200 Ill. App. 247.

## VIII. PROXIMATE CAUSE.

See same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

## IX. ASSUMED RISK.

See also same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

**Violation of Safety Appliance Act.**

The question of assumed risk is eliminated from an action under the Federal Employers' Liability Act where an employee's injuries are due to the failure of the defendant to comply with the Safety Appliance Act. *Wagner v. Chicago, R. I. & P. R. Co.*, 200 Ill. App. 305, affirmed 277 Ill. 114, 115 N. E. 201; *Chicago, R. I. & G. R. Co. v. De Bord*, — Tex. —, 192 S. W. 767, reversing — Tex. Civ. App. —, 146 S. W. 667.

**Violent and Unusual Movement of Cars.**

Where, on the arrival of a passenger train at destination, the first car was moved a short distance from the remainder of the train, and a car inspector was killed while working about the buffers of the detached car when the other cars were driven against him on being struck by a switch engine with unusual violence, he cannot, in an action under the Federal Employers' Liability Act, be charged with assumption of the risk. *Koepke v. Chicago, R. I. & P. R. Co.*, 200 Ill. App. 247.

**Jumping From Car Into Hole Beside Track.**

Under the Federal Employers' Liability Act a brakeman does not assume the risk of injury from jumping from the door of a freight car and striking a hole beside the track of the existence of which he was unaware, and which was covered with grass and weeds cut by the defendant and negligently permitted to lie where they fell. *Winslow v. Missouri, K. & T. R. Co.*, — Mo. App. —, 192 S. W. 121.

## X. CONTRIBUTORY NEGLIGENCE.

See also same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

**Effect.**

The contributory negligence of a brakeman in jumping from the door of a box car which caused him to sprain a weak ankle, merely reduces amount of the damages he may recover under the Federal Employers' Liability Act, where there was no other way for him to leave the car, and his injury was due to striking a hole beside the track of the existence

of which he was unaware, which the defendant had negligently permitted to remain there and to become covered with falling grass and weeds when cut. *Winslow v. Missouri, K. & T. R. Co.*, — Mo. App. —, 192 S. W. 121.

## XI. FELLOW-SERVANT DOCTRINE.

See same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

## XII. LAST CLEAR CHANCE DOCTRINE.

See same section, No. 2, Vol. I, Federal Ry. Digest.

## XIII. WHO ENTITLED TO BENEFIT OF ACT.

See same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

## XIV. SURVIVAL OF EMPLOYEE'S RIGHT OF ACTION.

See same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

## XV. ADMINISTRATIONS OF DECEDENT'S ESTATE.

See same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

## XVI. ACTIONS.

See also same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

**Recovery Under State Workmen's Compensation Act.**

There cannot be a recovery under a state Workmen's Compensation Act for injuries sustained by an employee of an interstate railway while both were engaged in interstate commerce, irrespective of the question of negligence or the absence thereof, since the Federal Employers' Liability Act provides the exclusive remedy. *Miller v. Illinois C. R. Co.*, 201 Ill. App. 519.

**Jurisdiction of Federal Courts.**

Under section 6 of the Federal Employers' Liability Act as amended, an action thereunder will lie in a Federal court of the district in which the defendant does business, although the plaintiff was injured in another state of which he was a resident. *Connely v. Cent. R. of N. J.*, 238 Fed. 932.

A railway company is doing business in a district, within the meaning of section 6 of the Federal Employers' Liability Act as amended, permitting actions under such law to be brought in a Federal court of the district in which the defendant does business, where it owned an office building in the district and piers at which interstate traffic was handled. *Connelly v. Cent. R. of N. J.*, 238 Fed. 932.

#### **Jurisdiction of State Courts.**

##### **—When Death Occurs in Foreign State.**

A state court does not have jurisdiction of an action based on the Federal Employers' Liability Act for wrongful death occurring in another state, where the state death act expressly withholds jurisdiction from state courts when death occurs in a foreign state. *Walton v. Pryor*, 276 Ill. 563, 115 N. E. 2.

A provision of a state constitution conferring original jurisdiction on circuit courts in all cases at law or in equity, does not confer jurisdiction over an action based on the Federal Employers' Liability Act for wrongful death which occurs within another state, where the state death act withholds jurisdiction from such state courts over actions for deaths occurring in foreign states. *Walton v. Pryor*, 276 Ill. 536, 115 N. E. 2.

Section 6 of the Federal Employers' Liability Act as amended, conferring concurrent jurisdiction on the Federal courts and those of the several states, and prohibiting the removal to the Federal courts of actions from state courts of competent jurisdiction, confers jurisdiction on such state courts only as have power under the local laws to hear and determine such actions as are created by the Federal law. *Walton v. Pryor*, 276 Ill., 563, 115 N. E. 2.

##### **Time When Jurisdiction May Be Questioned.**

Since the consent of the parties cannot confer on courts jurisdiction of the subject matter, a state court's want of jurisdiction over an action under the Federal Employers' Liability Act may be questioned at any time. *Walton v. Pryor*, 276 Ill. 563, 115 N. E. 2.

##### **Removal of Causes.**

An action based on the Federal Employers' Liability Act cannot be removed to a Federal court from a state court of competent jurisdiction, on the ground of diverse citizenship or of a Federal question being involved. *Lusk v. Osborne*, — Ark. —, 191 S. W. 944.

When the employees whose negligence concurred with that of a carrier in causing the death of a coemployee were joined as defendants in an action under the Federal Employers' Liability Act, and the

complaint in a state court disclosed a cause of action against all the defendants, the cause cannot be removed by the defendant carrier to a Federal court on the ground of a fraudulent joinder, where the petition for removal did not traverse the allegations of the complaint other than to state that no cause of action existed against the alleged negligent employees. *Lusk v. Osborne*, — Ark. —, 191 S. W. 944.

#### **Pleading.**

##### **—Necessity for Alleging Federal Law.**

The Federal Employers' Liability Act need not be mentioned in a declaration for injuries sustained by an employee, where the facts stated give the plaintiff a cause of action thereunder. *Wagner v. Chicago, R. I. & P. R. Co.*, 277 Ill. 114, 115 N. E. 201, affirming 200 Ill. App. 305.

When the pleadings in an action for injuries to a railway employee are sufficient to admit evidence of his employment in interstate commerce at the time of his injury, the Federal question is sufficiently raised without directly setting up the Federal Employers' Liability Act. *Chicago, R. I. & G. R. Co. v. DeBord*, — Tex. —, 192 S. W. 767, reversing — Tex. Civ. App. —, 146 S. W. 667.

##### **—Sufficiency.**

A declaration is sufficient in an action under the Federal Employers' Liability Act which avers that the defendant was engaged in interstate commerce, and charges negligence in moving a car with a broken, defective and inoperative coupler, although not alleging in terms that such negligence was a violation of the Federal law requiring automatic couplers which will couple by impact without the necessity of men going between cars. *Wagner v. Chicago, R. I. & P. R. Co.*, 277 Ill. 114, 115 N. E. 201, affirming 200 Ill. App. 305.

A declaration alleging that the failure of the defendant, a carrier engaged in interstate commerce, to comply with the Safety Appliance Act caused the injury of the plaintiff, an employee, is sufficient to show negligence and to bring the action within the purview of the Federal Employers' Liability Act, since a violation of the Safety Appliance Act is prima facie evidence of negligence. *Wagner v. Chicago, R. I. & P. R. Co.*, 277 Ill. 114, 115 N. E. 201, affirming 200 Ill. App. 305.

After verdict a declaration will not be held bad in an action under the Federal Employers' Liability Act, for the failure to allege the employment of the plaintiff in interstate commerce at the time of his injury, where it was averred that the defendant was a common carrier engaged in such commerce, and that the plaintiff, a switchman, was injured in con-



sequence of the defendant's failure to comply with the Safety Appliance Act. *Wagner v. Chicago, R. I. & P. R. Co.*, 277 Ill. 114, 115 N. E. 201, affirming 200 Ill. App. 305.

## XVII. DAMAGES.

See also same section in Nos. 2 and 3, Vol. I, Federal Ry. Digest.

### Future Suffering.

The plaintiff may recover in an action founded on the Federal Employers' Liability Act, for future suffering and loss of health when the evidence shows his present sufferings and the necessity for submitting to another amputation of a limb in order to restore his health. *Lincoln v. Pryor*, 199 Ill. App. 228.

### Reasonableness.

A verdict for \$8,000 is not excessive for a crushed foot, in an action under the Federal Employers' Liability Act. *Wagner v. Chicago, R. I. & P. R. Co.*, 200 Ill. App. 305, affirmed 277 Ill. 114, 115 N. E. 201.

A verdict for \$8,000 for the loss of a left leg below the knee, the loss of the end of a finger, and an injured shoulder is not excessive under the Federal Employers' Liability Act. *Lincoln v. Pryor*, 199 Ill. App. 228.

## XVIII. EVIDENCE.

See also same section in Nos. 2 and 3, Vol. I, Federal Ry. Digest.

### Presumption of Negligence.

No presumption of negligence arises in an action under the Federal Employers' Liability Act, from the fact that an employee was injured while engaged in interstate commerce. *Temple v. Cent. of Ga. R. Co.*, — Ga. App. —, 91 S. E. 502.

### Res Ipsa Loquitur.

The circumstances surrounding an accident may, under the doctrine of *res ipsa loquitur*, warrant an inference of negligence in an action founded on the Federal Employers' Liability Act. *Louisville & N. R. Co. v. Rhoda*, — Fla. —, 74 So. 19. S. C. 71 Fla. 562, 71 So. 369, last case reversed, 238 U. S. 608, 59 L. ed. 1487, 35 Sup. Ct. Rep. 662.

### Burden of Proof.

#### — Employment in Interstate Commerce.

Where the plaintiff, in an action for injuries to a railway employee, shows facts which make the Federal Employers' Liability Act applicable, he satisfies the initial burden resting on him and it is for the

defendant to prove the contrary. *Erie R. Co. v. Krysiensky*, — C. C. A. —, 238 Fed. 142.

#### — Negligence.

The plaintiff has the burden of proving the negligence of the defendant in an action under the Federal Employers' Liability Act. *Louisville & N. R. Co. v. Rhoda*, — Fla. —, 74 So. 19. S. C. 71 Fla. 526, 71 So. 369, last case reversed 238 U. S. 608, 59 L. ed. 1487, 35 Sup. Ct. Rep. 662.

#### — Contributory Negligence.

The defendant has the burden of proving contributory negligence in an action based on the Federal Employers' Liability Act. *Lusk v. Osborne*, — Ark. —, 191 S. W. 944; *Grand Trunk W. R. Co. v. Thrift Trust Co.*, — Ind. App. —, 115 N. E. 685.

#### Circumstantial Evidence.

While the plaintiff has the burden of proving negligence in an action under the Federal Employers' Liability Act, he may do so by either direct or circumstantial evidence. *Mulligan v. Atlantic C. L. R. Co.*, 104 S. C. 173, 88 S. E. 445, affirmed 242 U. S. 620, 61 L. ed. —, 37 Sup. Ct. Rep. 241.

In establishing liability and proving negligence in an action under the Federal Employers' Liability Act for wrongful death, it is not essential that there should have been eye witnesses to the fact, which may be shown by either direct or circumstantial evidence. *Mulligan v. Atlantic C. L. R. Co.*, 104 S. C. 173, 88 S. E. 445, affirmed 242 U. S. 620, 61 L. ed. —, 37 Sup. Ct. Rep. 241.

#### Custom.

Evidence of a custom, although not pleaded, to station a man or a light on kicked cars at night to give warning, is admissible as bearing on the question of due care and assumed risk in an action under the Federal Employers' Liability Act for injuries sustained by a car inspector at night while to the knowledge of the defendant, he was standing between tracks in the discharge of his duties, by being struck by a kicked car moving from 8 to 17 miles an hour, without having a brakeman or a light thereon as custom required. *Lincoln v. Pryor*, 199 Ill. App. 228.

#### Employment in Interstate Commerce.

A *prima facie* case of employment in interstate commerce is shown, in an action based on the Federal Employers' Liability Act for injuries to a switchman, by evidence that they were received while coupling a car having a defective coupler to a car from which an interstate ship-

ment had been partly unloaded preparatory to receiving another similar shipment. *Wagner v. Chicago, R. I. & P. R. Co.*, 200 Ill. App. 305, affirmed 277 Ill. 114, 115 N. E. 201.

An employee may testify, in an action under the Federal Employers' Liability Act, that the cars which caused his injury were loaded with merchandise which came from another state, although his knowledge was acquired from the waybills, which need not be produced as the best evidence. *Wagner v. Chicago R. I. & P. R. Co.*, 277 Ill. 114, 115 N. E. 201, affirming 200 Ill. App. 305.

#### **Inoperative Condition of Couplers.**

Where a switchman was injured while attempting to adjust a defective coupler by kicking it, evidence of the defective and inoperative condition of the coupler on the car with which a coupling was to be made, is admissible in an action based on the Federal Employers' Liability Act, although the condition of such coupler was not mentioned in the plaintiff's declaration, since the condition thereof was material to the action. *Wagner v. Chicago, R. I. & P. R. Co.*, 277 Ill. 114, 115 N. E. 201, affirming 200 Ill. App. 305.

#### **Res Gestæ.**

What statements are admissible as a part of the *res gestæ* in an action for wrongful death under the Federal Employers' Liability Act, must be left to the sound discretion of the trial court. *Mullivan v. Atlantic C. L. R. Co.*, 104 S. C. 173, 88 S. E. 445, affirmed 242 U. S. 620, 61 L. ed. —, 37 Sup. Ct. Rep. 241.

When the defective condition of a coupler is charged as negligence in an action under the Federal Employers' Liability Act for injuries sustained by a switchman while attempting to couple a car to another, evidence as to the defective condition of the coupler of the latter car and as to manner in which the cars came together, is admissible as part of the *res gestæ*. *Wagner v. Chicago, R. I. & P. R. Co.*, 200 Ill. App. 305, affirmed 277, Ill. 114, 115 N. E. 201.

### **XIX. TRIAL.**

See also same sections in Nos. 2 and 3, Vol. I, Federal Ry. Digest.

#### **Exhibition of Injuries to Jury.**

Although the plaintiff, in an action under the Federal Employers' Liability Act, was improperly permitted to exhibit to the jury his injured foot and the shoe he wore at the time of his injury, such error was harmless when the amount awarded the plaintiff did not show that

the defendant was prejudiced by such exhibition. *Wagner v. Chicago, R. I. & P. R. Co.*, 277 Ill. 114, 115 N. E. 201, affirming 200 Ill. App. 305.

#### **Questions of Law and Fact.**

##### **— Assumed Risk.**

The question of assumed risk is for the jury in an action under the Federal Employers' Liability Act, where a section hand was injured by attempting to lift a heavy rail with the assistance of but two men, when six or eight should have been provided by the defendant for the work. *Sorenson v. Northern P. R. Co.*, — Mont. —, 163 Pac. 560.

The question of assumed risk is for the jury in an action under the Federal Employers' Liability Act for injuries received by a car inspector who at night while, to the knowledge of the defendant, he was between two tracks in the discharge of his duties, was struck by a kicked car running from 8 to 17 miles an hour, and, contrary to custom, without a brakeman or light thereto to give warning of the danger. *Lincoln v. Pryor*, 199 Ill. App. 228.

##### **— Contributory Negligence.**

Whether a brakeman was guilty of negligence which will bar or diminish a recovery for his death caused by a collision, is a question for the jury in an action under the Federal Employers' Liability Act, where the decedent was not in a position to look ahead to ascertain whether the track was clear before moving a train and such duty was entrusted to a coemployee. *Lusk v. Osborne*, — Ark. —, 191 S. W. 944.

Whether a brakeman was guilty of contributory negligence while engaged in switching in riding on the pilot of an engine when coupled to a freight car, is a question for the jury in an action based on the Federal Employers' Liability Act. *Lusk v. Osborne*, — Ark. —, 191 S. W. 944.

The question of the contributory negligence of a car inspector is for the jury in an action under the Federal Employers' Liability Act, where, on the arrival of a passenger train at destination, the first car was moved a short distance from the rest of the train, and while he was working about the buffer of the detached car he was killed by the other cars being driven against him when they were struck with unusual violence by a switch engine. *Koepke v. Chicago, R. I. & P. R. Co.*, 200 Ill. App. 247.

##### **— Employment in Interstate Commerce.**

The question of employment in interstate commerce need not be submitted to the jury in an action based on the Federal Employers' Liability Act, where the

facts, although denied by the defendant, clearly established the plaintiff's employment in such commerce at the time he was injured. *Macon, D. & S. R. Co. v. Robinson*, — Ga. App. —, 91 S. E. 492.

#### — Negligence of Defendant.

The question of the negligence of the defendant is for the jury in an action under the Federal Employers' Liability Act, where a car inspector while, to the knowledge of the defendant, standing between two tracks in the discharge of his duties, was struck and injured by a car which, contrary to custom, was kicked at a speed of from 8 to 17 miles an hour at night without having a brakeman or a light thereon to give warning. *Lincoln v. Pryor*, 199 Ill. App. 228.

The question of the defendant's negligence is for the jury, in an action under the Federal Employers' Liability Act for the death of a car inspector, where on the arrival of a passenger train at destination the first car was moved a short distance from the remainder of the train, and the decedent, while working about the buffers of the detached car, was killed by the other cars being driven against him when they were struck with unusual violence by a switch engine. *Koepke v. Chicago, R. I. & P. R. Co.*, 200 Ill. App. 247.

The question of the defendant's negligence is for the jury in an action under the Federal Employers' Liability Act for the death of an engineer who was caught between the cable and drum of a hoisting engine, where the evidence was conflicting as to whether a coemployee negligently started the engine when the decedent was in a place of danger. *Russell v. Erie R. Co.*, — App. Div. —, 163 N. Y. Supp. 893.

#### — Proximate Cause.

The question of proximate cause is for the jury in an action under the Federal Employers' Liability Act for injuries sustained by a car inspector who at night, while, to the knowledge of the defendant he was between two tracks in the discharge of his duties, was struck by a car which, contrary to custom, was kicked at a speed of from 8 to 17 miles an hour without having a brakeman or light thereon to give warning of its approach. *Lincoln v. Pryor*, 199 Ill. App. 228.

#### Instructions.

##### — Employment in Interstate Commerce.

In an action under the Federal Employers' Liability Act for injuries sustained by a repair shop employee while handling a part of an engine used in interstate commerce, and leased by the defendant to a subsidiary company in

which the defendant had the stock control, the jury was correctly instructed to find for the plaintiff if such part belonged to an engine that the defendant either through itself or by its subsidiary companies used in such commerce, and that it made no difference whether the engine was leased to such subsidiary company if it was used by it in connection with the defendant in interstate commerce, since such instruction did not declare that the defendant's dominant ownership was enough to prove business, if not corporate, entity. *Erie R. Co. v. Krysiensky*, — C. C. A. —, 238 Fed. 142.

##### — Assumed Risk.

An instruction requested by the defendant, in an action for injuries received by a brakeman, to the effect that he assumed the risk of injury from the construction of coal bins too close to a track if a person of ordinary prudence would not have continued in the service with knowledge of the danger or defect, relates to common-law assumption of risk and not to a state statute so as to constitute a waiver by the defendant of the right to have the case tried under the common-law rules as affected by the Federal Employers' Liability Act. *Chicago, R. I. & G. R. Co. v. DeBord*, — Tex. —, 192 S. W. 767, reversing — Tex. Civ. App. —, 146 S. W. 667.

##### — Negligence of Defendant.

In an action under the Federal Employers' Liability Act for the death of a brakeman in a collision between a train of his employer and that of another company where both used the same track, an instruction to find for the plaintiff if by a preponderance of the evidence the jury found that the accident was due to the negligence of the agents and employees of the defendant in failing to exercise ordinary care to prevent the accident, as set forth in the complaint, and if the decedent was killed in consequence of the negligence, in whole or in part, of such employees as alleged, unless the decedent assumed the risk, does not permit the jury to find negligence in the several particulars mentioned in the complaint, in the absence of proof to sustain it. *Lusk v. Osborne*, — Ark. —, 191 S. W. 944.

##### — Damages.

An instruction permitting a recovery for future suffering and loss of health is justified in an action under the Federal Employers' Liability Act when the evidence shows the present suffering of the plaintiff and the necessity for another amputation of a limb in order to restore him to health. *Lincoln v. Pryor*, 199 Ill. App. 228.

**Curing Erroneous Instructions.****—In General.**

The error in failing to instruct the jury that under the Federal Employers' Liability Act the plaintiff's damages should be diminished to the extent his negligence contributed to his injuries, is cured by an instruction given at the request of the defendant to the effect that the plaintiff could not recover if he failed to prove that he was in the exercise of ordinary care and caution for his safety at the time of and immediately prior to his injury. *Lincoln v. Pryor*, 199 Ill. App. 228.

**—By Remittitur.**

An erroneous instruction as to the method of using the mortality and annuity table in an action under the Federal Employers' Liability Act for personal injuries, cannot be cured by writing off a part of the plaintiff's judgment. *Macon, D. & S. R. Co. v. Robinson*, — Ga. App. —, 91 S. E. 492.

**Directing Verdict.**

A verdict cannot be directed for the defendant in an action based on the Federal Employers' Liability Act, where enough is shown by the plaintiff, although the question is an extremely close one, to warrant the submission of the case to the jury. *Overstreet v. Norfolk & W. R. Co.*, — C. C. A. —, 238 Fed. 565.

**XX. APPEAL AND ERROR.**

See also same section in Nos. 2 and 3, Vol. I, Federal Ry. Digest.

**Denial of Rights Under Federal Law.**

When, on a second trial of an action for the death of a railway employee brought under a state law by a personal representative, the defendant asserted that the Federal Employers' Liability Act controlled, and the case was tried thereunder and the charge of the court was

based thereon, the defendant was not deprived of any right under the Federal law. *Savannah & N. W. R. Co. v. Roach*, — Ga. App. —, 91 S. E. 506.

**What Reviewable.**

The defendant is not estopped from contending on appeal that the Federal Employers' Liability Act governs an action founded on a state law, where the defendant was refused a peremptory instruction based on such ground which was also made the basis for a motion for a new trial. *Dunlavy v. Chicago, B. & Q. R. Co.*, 200 Ill. App. 75.

**Reversible Error.**

Any error in the exclusion of evidence in an action under the Federal Employers' Liability Act is cured by the subsequent admission of the same facts in any other form. *Mulligan v. Atlantic C. L. R. Co.*, 104 S. C. 173, 88 S. E. 445, affirmed 242 U. S. 620, 61 L. ed. —, 37 Sup. Ct. Rep. 241.

A judgment for the plaintiff when based on the Federal Employers' Liability Act must be reversed where no count of the declaration is sufficient to sustain the recovery. *Dunlavy v. Chicago, B. & Q. R. Co.*, 200 Ill. App. 75.

When, in an action for injuries to a railway employee which was brought more than two years after the accident, and which was removed by the defendant from a state to a Federal court because of diverse citizenship, the complaint stated a common-law action only and neither the plaintiff nor the defendant pleaded the Federal Employers' Liability Act, the rejection of evidence offered by the defendant to invoke such Act by showing the employment of the plaintiff in interstate commerce at the time of his injury, was prejudicial to the defendant, where the state law differed from the Federal law by permitting the recovery of punitive damages and not requiring the action to be brought within two years. *Atlantic C. L. R. Co. v. Woods*, — C. C. A. —, 238 Fed. 917.

# HOURS OF LABOR ACT\*

## FEDERAL

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- VIII. APPEAL AND ERROR.

Liability of carriers for injuries to employees caused by violation of Hours of Labor Act, see Nos. 2 and 3, Vol. I, Federal Ry. Digest.

### I. VALIDITY AND CONSTRUCTION.

See also same section, Nos. 2 and 3, Vol. I Federal Ry. Digest.

#### Constitutionality.

The fact that the Hours of Labor Act imputes to carriers knowledge of the acts of employees in working in excess of the prescribed period, does not deny to the former due process of law or the equal protection thereof as guaranteed by the Fourteenth Amendment to the Federal Constitution. *Oregon S. L. R. Co. v. United States*, 148 C. C. A. 350, 234 Fed. 584, affirming 228 Fed. 561.

#### Construction.

Since the Hours of Labor Act is highly remedial, although a penalty is imposed for its violation, it should be liberally construed in order to effect its purpose. *St. Joseph & G. I. R. Co. v. United States*, 146 C. C. A. 397, 232 Fed. 349; *United States v. Great N. R. Co.*, 136 C. C. A. 238, 220 Fed. 630; *Delano v. United States*, 136 C. C. A. 243, 220 Fed. 635; *San Pedro, L. A. & S. L. R. Co. v. United States*, 130 C. C. A. 28, 213 Fed. 326; *United States v. Kansas C. S. R. Co.*, 121 C. C. A. 136, 202 Fed. 828; *United States v. Atlantic C. L. R. Co.*, 224 Fed. 160; *United States v. Chicago, M. & St. P. R. Co.*, 197 Fed. 624; *United States v. Kansas City S. R. Co.*, 189 Fed. 471.

The remedial purpose of the Hours of Labor Act being to protect human life and to promote railroad efficiency, it demands that, despite the penal character

\*For text of Act see No. 2, Vol. I, Federal Ry. Digest, p. 396.

of the act, its provisions shall be construed and the legislative intent found from the language actually used interpreted according to its fair and obvious meaning. *Chicago, R. I. & P. R. Co. v. United States*, 141 C. C. A. 135, 226 Fed. 27.

Although the Hours of Labor Act is to be enforced through the imposition of penalties, it is not to be construed so strictly as to defeat the obvious intention of the legislature. *United States v. Grand Rapids & I. R. Co.*, 140 C. C. A. 177, 224 Fed. 667.

The Hours of Labor Act is a remedial statute which should be construed, if its language permits, so as to best accomplish the protective purpose for which it was enacted. *United States v. Atlantic C. L. R. Co.*, 128 C. C. A. 275, 281, 211 Fed. 897.

Although the Hours of Labor Act is remedial legislation which should be construed so as to give reasonable effect to its general purposes, it cannot be given a construction which will violate the plain letter of the Act and entirely destroy its several provisos. *United States v. Atchison, T. & S. F. R. Co.*, 212 Fed. 1000.

The Hours of Labor Act is not a criminal statute which should be strictly construed. *United States v. Atlantic C. L. R. Co.*, 128 C. C. A. 275, 281, 211 Fed. 897, 903; *United States v. St. Louis S. W. R. Co.*, 189 Fed. 954, affirmed 117 C. C. A. 666, 199 Fed. 990.

#### Effect on State Laws.

##### —Laws Applicable to Both Interstate and Intrastate Roads.

A state law regulating the hours of employment of telegraph operators and train dispatchers by carriers operating in whole or in part any railway within a state, was superseded by the Federal Hours of Labor Act, since it was impossible to separate the provisions of the state law relating to intrastate traffic from those affecting interstate commerce. *State v. Chicago, M. & St. P. R. Co.*, 136 Wis. 407, 17 N. W. 686, 19 L. R. A. (N. S.) 326.

A state law lessening the hours of labor provided by the Federal Hours of Labor Act, is in conflict with the latter Act when applied to employees engaged in both interstate and intrastate commerce. *State v. Texas & N. O. R. Co.*, — Tex. Civ. App. —, 124 S. W. 984.

The Federal Hours of Labor Act avoided a state law prescribing for block system telegraph and telephone operators and signalmen fewer hours of labor than those prescribed by the Federal law, as applied to operators employed by a railway engaged in both interstate and intrastate commerce, to space trains by the

block system and to report the movements thereof to the train dispatcher and other offices. *Erie R. Co. v. State*, 233 U. S. 671, 58 L. ed. 1149, 34 Sup. Ct. Rep. 761, 52 L. R. A. (N. S.) 266, reversing 198 N. Y. 369, 91 N. E. 849, 29 L. R. A. (N. S.) 240, 19 Ann. Cas. 811.

##### —Laws Regulating Intrastate Carriers.

A state law limiting the hours of service of trainmen was superseded by the Federal law, although expressly limited to intrastate carriers. *State v. Wabash R. Co.*, 238 Mo. 21, 141 S. W. 646.

A state cannot, in the interim between the passage and the taking effect of the Federal Hours of Labor Act, adopt or enforce an existing local law regulating the hours of service of employees engaged in interstate commerce. *Northern P. R. Co. v. State*, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160, reversing 53 Wash. 673, 102 Pac. 876, 17 Ann. Cas. 1013; *Erie R. Co. v. People*, 233 U. S. 671, 58 L. ed. 1149, 34 Sup. Ct. Rep. 756, reversing 198 N. Y. 369, 91 N. E. 849, 29 L. R. A. (N. S.) 240, 19 Ann. Cas. 811, 139 Am. St. Rep. 828; *State v. Texas & N. O. R. Co.*, — Tex. Civ. App. —, 124 S. W. 984; *State v. Missouri P. R. Co.*, 212 Mo. 658, 111 S. W. 500; *Contra State v. Northern P. R. Co.*, 36 Mont. 528, 93 Pac. 945.

## II. WHAT CARRIERS WITHIN ACT.

### Receivers.

A receiver operating a railway engaged in interstate commerce, is within the terms of the Hours of Labor Act, since he is a common carrier. *United States v. Ramsey*, 116 C. C. A. 568, 197 Fed. 144, 42 L. R. A. (N. S.) 1031.

## III. WHAT EMPLOYEES WITHIN ACT.

### A. In General.

#### Employees Handling Interstate Traffic in State of Destination.

A trainload of cinders which came from another state and which were intended for use on the roadbed of an interstate railway is, after arrival within the state of destination and until it reaches ultimate destination, moving in interstate commerce so as to bring the train crew within the Hours of Labor Act. *St. Joseph & G. I. R. Co. v. United States*, 146 C. C. A. 397, 232 Fed. 349.

#### Work Train Employees.

An engineer is not within the Hours of Labor Act while hauling wholly within

one state a work train containing earth for use in filling a bridge on a railway constituting a through highway of interstate commerce. *United States v. Chicago, M. & St. P. R. Co.*, 218 Fed. 701.

A carrier is not guilty of violating the Hours of Labor Act by keeping on duty for more than 16 hours an engineer who ran an engine of an intrastate work train for 59 days, notwithstanding that both before and after such employment he was engaged in interstate commerce. *United States v. Chicago, M. & St. P. R. Co.*, 219 Fed. 632.

A fireman of an engine hauling an interstate work train is within the Hours of Labor Act. *St. Joseph & G. I. R. Co. v. United States*, 146 C. C. A. 397, 232 Fed. 349.

Work train employees are engaged in interstate commerce and within the terms of the Hours of Labor Act, although their train is operated wholly within one state, while they are engaged in picking up logs from along the right-of-way and loading them on cars which are subsequently moved to other states by regular trains. *United States v. Chicago, M. & St. P. R. Co.*, 197 Fed. 624.

#### **Yardmaster.**

A yardmaster is within the provisions of the Hours of Labor Act as to the period of labor of operators, train dispatchers and other employees dispatching, reporting, transmitting, receiving or delivering by telegraph or telephone orders pertaining to or affecting train movements, where he has charge of all train movements within the yard limits and controls them by the use of a telephone. *United States v. Pennsylvania R. Co.*, 239 Fed. 576.

#### **Switchmen.**

Employees of a common carrier are, when engaged in switching and moving drags of one or more interstate cars in a railway yard, within the terms of the Hours of Labor Act. *Brooklyn E. D. Terminal v. United States*, — C. C. A. —, 239 Fed. 287.

#### **D. Telegraph and Telephone Operators.**

Keeping operators on duty overtime in consequence of wrecks, see *infra* V. D. 7.

Requiring operators to work overtime because of absence, illness, or death of other employees, see *infra* V. D. 8, 9, 10.

Requiring operator to work overtime because of death of relative of other employee, see *infra* V. D. 10.

Working operators overtime as violation of Hours of Labor Act in general, see *infra* V. A. 2.

### **1. In General.**

#### **Who Within Act.**

The words "other employees" in the proviso of section 2 of the Hours of Labor Act respecting the period of employment of telegraph and telephone operators, include only employees such as are engaged in the same character of service as train dispatchers or operators who by the use of telegraph or telephone perform the work described in such proviso. *Missouri P. R. Co. v. United States*, 128 C. C. A. 271, 211 Fed. 893.

#### **Operation of Act.**

Section 2 of the Hours of Labor Act is not ambiguous or uncertain with respect to the hours of service of telegraph operators as compared with other employees. *United States v. St. Louis S. W. R. Co.*, 189 Fed. 954, affirmed 117 C. C. A. 666, 199 Fed. 990.

The Hours of Labor Act with respect to the time telegraph or telephone operators may be kept on duty, does not distinguish between offices in which train orders originate and local offices which merely receive and deliver orders and which may be and frequently are closed during a substantial portion of the 24 hours. *United States v. Atlantic C. L. R. Co.*, 128 C. C. A. 275, 281, 211 Fed. 897, 903.

The proviso of the Hours of Labor Act relating to the hours telegraph and telephone operators may be kept on duty, applies to every place where train orders are handled by telegraph or telephone irrespective of the number or frequency thereof. *United States v. Atlantic C. L. R. Co.*, 128 C. C. A. 275, 281, 211 Fed. 897, 903.

#### **What Constitute Train Orders.**

The word "orders," as used in the Hours of Labor Act with respect to the hours of duties of employees transmitting or receiving orders pertaining to the movement of trains, is not limited to train orders emanating from a train dispatcher's office and reduced to writing for delivery to the conductors and engineers of trains, but comprehends all orders pertaining to train movements. *United States v. Houston B. & T. R. Co.*, 125 C. C. A. 481, 205 Fed. 344.

### **2. Dispatchers and Copy Operators.**

#### **Train Dispatchers.**

Train dispatchers are "employees" who are within the protection of the Hours of Labor Act which gives to all employees at least 8 consecutive hours off duty in each day. *Atchison, T. & S. F. R. Co. v. United States*, 100 C. C. A. 534, 177 Fed. 114, affirmed 220 U. S. 37, 55 L. ed. 361, 31 Sup. Ct. Rep. 362.

**Copy Operators.**

A copy operator, whose duties do not require him to handle train orders, is within the Hours of Labor Act, where, after performing his regular duties for 8 hours, he is compelled to take the place of and perform the duties of a regular train dispatcher. *United States v. New York, O. & W. R. Co.*, 216 Fed. 702.

**3. Employees of Intrastate Carriers.****Handling Orders for Interstate Trains.**

A telegraph operator is engaged in interstate commerce within the meaning of the Hours of Labor Act, although employed on a section of track over which the defendant operated its intrastate trains only, but over which the interstate trains of another company were run, where the operator received from the dispatcher of the latter company orders for the meeting of trains of the two companies which the former delivered to the intrastate trains of the defendant and occasionally to the interstate trains of the other company, although on the day the violation of the Act was alleged the operator did not receive any orders relating to interstate trains. *Denver & I. R. Co. v. United States*, 150 C. C. A. —, 236 Fed. 685.

**4. Day and Night Offices.****In General.**

The test of the period that telegraph or telephone operators who handle train orders may, under the Hours of Labor Act, be required to work at towers, offices, places and stations continuously operated day and night, is the time during which such places are kept open for the performance of such duties during a 24-hour period rather than the number or frequency of the orders handled during a given time. *United States v. Illinois C. R. Co.*, 234 Fed. 433.

The Interstate Commerce Commission's interpretation of what constitutes a tower, office, place or station which is operated night and day within the meaning of the Hours of Labor Act, although not binding on the courts, is persuasive and entitled to much weight, and may be followed unless from the plain language of the statute it clearly appears to be erroneous. *United States v. Illinois C. R. Co.*, 234 Fed. 433.

**What Offices Are Open Day and Night.****— In General.**

An office in which orders pertaining to interstate trains are handled is open continuously day and night, within the meaning of the Hours of Labor Act, where an operator is on duty from 4:30 a. m. to 6 a. m., from 7 a. m. to 11 a. m. and

from 12 m. until 5 p. m., a total of 10½ hours, and another operator is on duty from 12 m. until 9:30 p. m., a total of 9½ hours, the office then remaining closed until 4:30 a. m. *United States v. Grand Rapids & I. R. Co.*, 140 C. C. A. 177, 224 Fed. 667.

A telegraph office in which one operator is on duty from 6:30 a. m. to 12 m., and from 1 p. m. to 6 p. m., a total of 10½ hours, and another operator is on duty from 11 a. m. to 1 p. m., from 3 p. m. to 5 p. m. and from 6 p. m. until 11 p. m., a total of 10 hours, after which the office remains closed until 6:30 a. m., is an office open continuously day and night within the meaning of the Hours of Labor Act and in which operators handling orders for interstate trains cannot be kept on duty for more than 9 hours in any 24-hour period. *United States v. Grand Rapids & I. R. Co.*, 140 C. C. A. 177, 224 Fed. 667.

A telegraph office which is open daily from 6:30 a. m. to 10:15 p. m. is an office operated continuously day and night within the meaning of the Hours of Labor Act. *United States v. Atlantic C. L. R. Co.*, 128 C. C. A. 275, 281, 211 Fed. 897, 903.

A telegraph office is continuously operated day and night within the meaning of the Hours of Labor Act, although four times each day the office is closed for intervals of an hour. *United States v. St. Louis S. W. R. Co.*, 189 Fed. 954, affirmed 117 C. C. A. 666, 199 Fed. 990.

A telegraph office in which 2 operators are on duty for 11 hours each, with an hour off duty during that time, is operated continuously night and day within the meaning of the Hours of Labor Act. *United States v. Missouri, K. & T. R. Co.*, 208 Fed. 957.

**— When More Than One Office at Same Place.**

Where day and night telegraph offices were maintained 2½ mile apart in a railway yard, the operator at each station working 12 hours and then closing his office and transferring the work to the other office, so that there was no interruption in the work, such offices constitute a single office which is operated continuously day and night within the meaning of the Hours of Labor Act. *Atchison, T. & S. F. R. Co. v. United States*, 150 C. C. A. —, 236 Fed. 906.

When train orders are handled at a station between 7 a. m. and 7 p. m. and the work then transferred to an interlocker tower a short distance away, where they are handled from 7 p. m. until 7 a. m., the station and tower combined constitute but one office which is open continuously night and day within the



- meaning of the Hours of Labor Act. *United States v. Illinois C. R. Co.*, 234 Fed. 433.

#### E. Towermen and Switch Tenders.

##### Towermen.

Towermen whose principal duties are to operate the levers of interlocking switches, but who also receive and communicate notices regarding train movements, although not technically train orders, are within the scope of the Hours of Labor Act with respect to the period of employment of persons transmitting orders relative to the movements of trains. *Chicago & N. W. R. Co. v. United States*, 141 C. C. A. 138, 226 Fed. 31.

Towermen who, by means of a telephone, notify another tower of the approach of trains and engines so that switches may be lined up for them, and who, in case of the blocking of one main track, control, by the same means, trains and engines running against the current of traffic, are, with respect to their hours of employment, within the terms of the Hours of Labor Act regarding telegraph and telephone operators who handle orders pertaining to trains. *United States v. Houston B. & T. R. Co.*, 125 C. C. A. 481, 205 Fed. 344.

##### Switch Tenders.

The words "other employees who by the use of the telegraph or telephone dispatch, report, transmit, receive or deliver orders pertaining to or affecting train movements," as used in section 2 of the Hours of Labor Act, are not, by the application of the rule of ejusdem generis, limited to a class to which operators and train dispatchers belong, but include switchmen who, in order to secure the speedy passage of passenger trains, telephone notice of their approach to towermen at a nearby crossing of another road. *Chicago, R. I. & P. R. Co. v. United States*, 141 C. C. A. 135, 226 Fed. 27.

Switch tenders are not brought within the limits of service prescribed by the Hours of Labor Act for telegraph or telephone operators, because they operate switches pursuant to directions received by telephone, since the primary duties of such employees are not in any sense to dispatch, report, transmit, receive or deliver by telegraph or telephone orders pertaining to or affecting train movements. *Missouri P. R. Co. v. United States*, 128 C. C. A. 271, 211 Fed. 893.

#### F. Trainmen Receiving Orders by Telephone.

##### Conductors.

The conductor of an interstate train who is permitted or required during his

run to stop at stations and by telephone to report, transmit, receive or deliver orders pertaining to or affecting his train, is not within the proviso of the Hours of Labor Act limiting the service of operators, train dispatchers, or other employees who by telegraph or telephone dispatch, report, transmit, receive or deliver orders pertaining to or affecting train movements, since the words "other employees" refer to such as are charged with duties similar to those of telegraph operators or train dispatchers. *United States v. Florida E. C. R. Co.*, 137 C. C. A. 571, 222 Fed. 33.

A freight conductor is not brought within the scope of the Hours of Labor Act with respect to the hours of service of telephone operators merely because the rules of the carrier require him to use the telephone in obtaining orders from the dispatcher when his train is held for more than 30 minutes on a siding where there is no open telegraph office. *United States v. Chicago, M. & St. P. R. Co.*, 219 Fed. 1011.

#### IV. COMPUTING PERIOD OF EMPLOYMENT.

##### A. In General.

##### What Constitutes "Week."

Seven days constitute the "week" referred to in section 2 of the Hours of Labor Act permitting the keeping of telegraph operators and dispatchers on duty in cases of emergency in excess of the prescribed hours for not more than 3 days in any week. *United States v. Southern P. Co.*, 126 C. C. A. 384, 209 Fed. 562.

##### Making Round Trip.

A train crew must be treated as within the meaning of the Hours of Labor Act, where they make a daily round trip to a small town at which no extra crews are stationed. *Denver & R. G. R. Co. v. United States*, 147 C. C. A. 132, 233 Fed. 62.

##### Time Required for Inspecting Engine at End of Run.

The time spent by engineers and firemen under the rules of a carrier in inspecting their engines at the end of their runs, is to be included in the time which the Hours of Labor Act permit them to be kept on duty. *United States v. Chicago, M. & St. P. R. Co.*, 195 Fed. 783.

##### Time Lost Waiting Passage of Other Trains.

The time lost by a freight train in sidetracking for the passage of passenger trains and superior freight trains must be counted in the 16 hours the crew may be

kept on duty. *United States v. Kansas City S. R. Co.*, 189 Fed. 471.

### B. When Duties Begin.

#### In General.

The expression "on duty," as used in the Hours of Labor Act, means "to be actually engaged in work or to be charged with present responsibility for such should the occasion arise." *United States v. Denver & R. G. R. Co.*, 197 Fed. 629.

#### Employees Reporting for Duty.

An employee is on duty, within the meaning of the Hours of Labor Act, when he is at his post in obedience to the rules or requirements of his superior, and is ready and willing to work whether actually at work, waiting for orders, or for the removal of hindrances from any cause. *United States v. Chicago, M. & P. S. R. Co.*, 195 Fed. 783.

The services of an engineer begin, within the meaning of the Hours of Labor Act, when, under the rules of a railway company, he reports for duty and begins preparations for a trip 30 minutes before the departure of a train, irrespective of whether he receives pay for such time. *United States v. Illinois C. R. Co.*, 180 Fed. 630.

Where, according to the rules of a carrier, a fireman reports for duty half an hour before the departure of his train, such time must be included in determining the length of his services under the Hours of Labor Act. *San Pedro, L. A. & S. L. R. Co. v. United States*, 130 C. C. A. 28, 213 Fed. 326.

Where members of a train crew, conforming to a rule of a carrier, report for duty 15 minutes before starting time, during which they are engaged in work preliminary to the trip, they are, during such time, "on duty" within the meaning of the Hours of Labor Act, notwithstanding that their pay does not begin until the starting time of their train. *United States v. Denver & R. G. R. Co.*, 197 Fed. 629.

The time which the rules of a carrier require employees to go on duty before the departure of a train is to be included in the time which the Hours of Labor Act permits them to be kept on duty. *United States v. Chicago, M. & P. S. R. Co.*, 195 Fed. 783.

### C. Temporary Release from Duty.

#### In General.

If the crew of a delayed train is released from duty en route for definite periods which give them a substantial and opportune time for rest, the aggregate thereof may be deducted from the

total running time of the train in determining whether there is a violation of the Hours of Labor Act. *Southern P. Co. v. United States*, 137 C. C. A. 564, 223 Fed. 46.

#### For Meals.

Brief periods allowed employees for taking their meals cannot be deducted from their time of service so as to break its continuity in determining if the Hours of Labor Act is violated, since the Act is not limited to such employees as are kept on duty for 16 hours without interruption for meals or otherwise. *United States v. Chicago, M. & St. P. R. Co.*, 197 Fed. 624.

The absolute release of a train crew from duty for 2 hours or 2 hours and 20 minutes at a terminal at mealtime, is not such a period of "substantial rest" as will break the continuity of service so as to avoid a violation of the Hours of Labor Act. *United States v. Minneapolis & St. L. R. Co.*, 236 Fed. 414.

The employment of a telegraph operator from 8 a. m. to 6 p. m. in a day and night office does not violate the Hours of Labor Act where he was off duty for one hour at noon and not subject to call except in case of an emergency. *United States v. Atchison, T. & S. F. R. Co.*, 232 Fed. 196.

The fact that a telegraph operator is customarily allowed an hour each for dinner and supper does not break the continuity of his services within the meaning of the Hours of Labor Act, where he is always subject to call when his services are necessary during meal hours or at other times. *United States v. Chicago & N. W. R. Co.*, 219 Fed. 342.

#### Awaiting Arrival of Other Trains.

The temporary release from duty of the crew of a delayed freight train for an hour and a half while awaiting the arrival of superior trains at a station, does not break the continuity of their services within the meaning of the Hours of Labor Act. *Northern P. R. Co. v. United States*, 136 C. C. A. 200, 220 Fed. 180, affirming 213 Fed. 539.

Where a train was held upon a siding for 55 minutes awaiting the passage of another train, the exact time of arrival of which was uncertain, it being the duty of the crew to resume their journey immediately on the passage of such train, the period of waiting does not break the continuity of their service within the meaning of the Hours of Labor Act, although the headlight of the engine was extinguished the brakemen slept and the conductor read during the wait. *United States v. Denver & R. G. R. Co.*, 197 Fed. 629.

### Awaiting Return of Engine.

The fact that a train crew did nothing while awaiting the return of their engine which was away obtaining water and necessary repairs, does not relieve a carrier from liability under the Hours of Labor Act when the crew was kept on duty for more than 16 hours, where during the absence of the engine the crew were under orders and liable to be called upon at any time. *Missouri, K. & T. R. Co. v. United States*, 231 U. S. 112, 58 L. ed. 144, 34 Sup. Ct. Rep. 26.

### Awaiting Arrival of Helper Engine.

The continuity of the employment of a train crew is not broken within the meaning of the Hours of Labor Act, when, while awaiting the arrival of a delayed helper engine, they were relieved from duty for an indefinite period, and, although off duty for 3 hours, they did not know when the engine would arrive. *United States v. Chicago, M. & St. P. R. Co.*, 197 Fed. 624.

### Awaiting Arrival of Wrecking Train.

A train crew was on duty within the meaning of the Hours of Labor Act, where, on the derailment of a train, they ran the engine to a nearby farmhouse, partook of refreshments, and awaited the arrival of a wrecking train. *Denver & R. G. R. Co. v. United States*, 147 C. C. A. 132, 233 Fed. 62.

## V. VIOLATION OF ACT.

### A. What Constitutes.

#### 1. In General.

#### Admissions and Concessions.

A prima facie violation of the Hours of Labor Act is established when the complaint alleges and the defendant admits in its answer that on a stated occasion a train crew was required or permitted to remain on duty for a longer period than 16 consecutive hours. *United States v. Atchison, T. & S. F. R. Co.*, 212 Fed. 1000.

A prima facie violation of the Hours of Labor Act is established by a carrier's concession that it permitted or required employees to remain on duty for more than the statutory time. *United States v. Kansas City S. R. Co.*, 121 C. C. A. 136, 202 Fed. 828.

#### Delay of Train Due to Violation of Safety Appliance Act.

The Hours of Labor Act was violated where a train crew was kept on duty for more than 16 consecutive hours in

consequence of hauling in a revenue train a car which had a broken coupler, when such car, which did not contain live stock or perishable freight and which was fastened to the train with a chain in violation of the Safety Appliance Act. *United States v. Atchison, T. & S. F. R. Co.*, 212 Fed. 1000.

### 2. Telegraph and Telephone Operators Working Overtime.

#### In General.

In determining whether a telegraph operator is required to work in violation of the Hours of Labor Act, the 24-hour period must in each instance be calculated from the time the operator went on duty each day rather than from an arbitrary hour selected by the government. *United States v. Missouri P. R. Co.*, 235 Fed. 944.

The Hours of Labor Act is violated where a telegraph operator is required to remain on duty an aggregate of 10 hours daily, although at no time was he required to work without interruption for more than 9 consecutive hours. *United States v. St. Louis S. W. R. Co.*, 189 Fed. 954, affirmed 117 C. C. A. 666, 194 Fed. 990.

A telegraph operator who works for 5½ hours and then, after an interval of 3 hours, for 3½ hours longer in the same 24 hours in an office which is open night and day, is not employed for more than 9 hours in any 24 in violation of the Hours of Labor Act. *United States v. Atchison, T. & S. F. R. Co.*, 220 U. S. 37, 55 L. ed. 361, 31 Sup. Ct. Rep. 362, affirming 100 C. C. A. 534, 177 Fed. 114.

The approval by the Interstate Commerce Commission of the system adopted by an interstate railway whereby telegraph operators who handle train orders work in excess of the period prescribed by the Hours of Labor Act, does not estop the government from recovering a penalty for the resulting violations of the Act. *United States v. Illinois C. R. Co.*, 234 Fed. 433.

#### On Opening Day and Night Office.

Where, on the morning of the day a telegraph office was scheduled to become a continuously operated day and night station the order was suspended until evening because of the nonarrival of an operator, when the office was kept open all night, the fact that during that day the day operator was kept on duty for more than 9 hours does not show a violation of the Hours of Labor Act, since the office did not become a day and night office until the evening of the day in question. *United States v. Oregon S. L. R. Co.*, 228 Fed. 561, affirmed 148 C. C. A. 350, 234 Fed. 584.

### Transferring Work at Night to Neighboring Office.

Where day and night telegraph offices were maintained 2/5 mile apart in a railway yard, the operator at each station working 12 hours and then closing the office and transferring the work to the other office so that there was no interruption in the work, such offices constitute a single office which is operated continuously day and night within the meaning of the Hours of Labor Act, which was violated by requiring such operators to remain on duty for more than 9 hours in any 24-hour period. *Atchison, T. & S. F. R. Co. v. United States*, 150 C. C. A. —, 236 Fed. 906.

There is a violation of the Hours of Labor Act where an interstate railway keeps an operator on duty at a station handling train orders from 7 a. m. to 7 p. m. and then transfers the work to an interlocker tower a short distance away, where it is handled from 7 p. m. to 7 a. m. *United States v. Illinois C. R. Co.*, 234 Fed. 433.

### Operator Performing Other Duties.

The Hours of Labor Act is violated where, at a day and night office, an employee is required to work as a telegraph operator for 6 hours and thereafter for 5½ hours at other duties not pertaining to or affecting the movement of trains. *Delano v. United States*, 136 C. C. A. 243, 220 Fed. 635.

### 3. Failure to Allow Necessary Period for Rest.

#### In General.

The Hours of Labor Act is violated where employees, who were on duty for more than 16 hours, are required to return to duty the following day before they have had at least 10 consecutive hours off duty. *United States v. Chicago, M. & St. P. R. Co.*, 197 Fed. 624.

### 4. Starting Train With Notice That Run Cannot Be Completed in 16 Hours.

#### In General.

There was a violation of the Hours of Labor Act, where, on a report from the conductor of a derailed train that it would take less than an hour to rerail it after the arrival of a derrick car, the train dispatcher, without waiting for a report from the wrecking crew, ordered another train to leave a terminal, and, in consequence of its taking more than the estimated time to clear the track, the crew was kept on duty for more than 16 hours, since the starting of the train from the terminal under the circumstances, and not the accident, caused the violation of the statute. *Denver & R. G. R.*

*Co. v. United States*, 147 C. C. A. 132, 233 Fed. 62.

### 5. Fireman Watching Engine at End of Run.

#### In General.

The Hours of Labor Act is violated where a train is sidetracked short of destination after 16 hours of service and all of the crew released from duty with the exception of the fireman, who is required to remain on duty for a longer period to watch his engine and keep up steam. *Northern P. R. Co. v. United States*, 130 C. C. A. 157, 213 Fed. 577; *Great N. R. Co. v. United States*, 134 C. C. A. 98, 218 Fed. 302; *United States v. Great N. R. Co.*, 206 Fed. 838, affirmed 127 C. C. A. 595, 211 Fed. 309, certiorari denied 234 U. S. 760, 58 L. ed. 158, 34 Sup. Ct. Rep. 770.

When, after nearly 16 hours of service, a train is sidetracked short of destination and all of the crew is released from duty, with the exception of the fireman, who is required to remain on duty for a longer period to watch the engine and keep up steam, the fact that during the overtime he is not actually engaged in or connected with the movement of a train does not relieve the carrier from liability for the violation of the Hours of Service Act. *San Pedro, L. A. & S. L. R. Co. v. United States*, 130 C. C. A. 28, 213 Fed. 326; *Northern P. R. Co. v. United States*, 130 C. C. A. 157, 213 Fed. 577; *Great N. R. Co. v. United States*, 127 C. C. A. 595, 211 Fed. 309, certiorari denied 234 U. S. 760, 58 L. ed. 158, 34 Sup. Ct. Rep. 770.

There is a violation of the Hours of Service Act where, after a train is tied up short of destination after 16 hours of road service, a fireman is required for 8 additional hours to watch his engine and keep the fires alive until the arrival of a relief crew. *San Pedro, L. A. & S. L. R. Co. v. United States*, 130 C. C. A. 28, 213 Fed. 326.

Where, after working for 16 hours, a fireman in the absence of a competent watchman remains on his engine for 5 additional hours, there is a violation of the Hours of Labor Act. *St. Joseph & G. I. R. Co. v. United States*, 146 C. C. A. 397, 233 Fed. 349.

If, after 16 hours' road services, a fireman is required to remain on his engine in order to keep up steam while it is being towed in another train to a terminal, there is a violation of the Hours of Labor Act. *United States v. Missouri P. R. Co.*, 206 Fed. 847.

The fact that, when a train was sidetracked short of destination after 16 hours of service, it could not have been moved

further because of an unprecedented snowstorm, does not make the keeping of the fireman on duty for more than 6 hours to watch his engine and keep up steam, the result of an act of God so as to relieve the carrier from liability for the penalty prescribed by the Hours of Service Act. *Northern P. R. Co. v. United States*, 130 C. C. A. 157, 213 Fed. 577.

### 6. Inability to Provide Relief.

See also *infra* V. D. 9, 10.

### On Discharge of Employee.

Where, on discharging a telegraph operator from an office open continuously day and night, a carrier was unable to obtain a substitute and directed the station agent to act as such for 3 hours daily and then to act as telegraph operator for 6 hours, but in no event to work for more than 9 hours daily, and, without the knowledge of the carrier, he worked 12 hours daily as station agent and then 5 hours as operator, there was a violation of the Hours of Service Act, and the carrier is answerable for the statutory penalty. *Oregon-W. R. & N. Co. v. United States*, 139 C. C. A. 142, 223 Fed. 596, affirming 213 Fed. 688.

### B. Knowledge or Consent of Carrier to Overtime Work.

#### In General.

The words "require or permit" in the Hours of Labor Act, with respect to the length of services of telegraph operators, do not imply the necessity of actual consent or knowledge of a carrier to a violation of the act, since section 3 imputes knowledge to the latter. *United States v. Oregon-W. R. & N. Co.*, 213 Fed. 688, affirmed 139 C. C. A. 142, 223 Fed. 596.

Since the duty imposed on a carrier by the Hours of Labor Act is absolute, the exercise of reasonable care to prevent a violation of the Act by employees, or the ignorance of the carrier, its officers or agents of such violation, is no defense to an action for the statutory penalty. *United States v. Oregon-W. R. & N. Co.*, 218 Fed. 925.

A carrier's want of actual knowledge or notice that an employee has worked in excess of the period prescribed by the Hours of Labor Act, is no defense to the recovery of the statutory penalty. *Oregon S. L. R. Co. v. United States*, 148 C. C. A. 350, 234 Fed. 584, affirming 228 Fed. 561.

A carrier is answerable for the statutory penalty where, without its knowledge or consent, an employee remains on duty in excess of the time prescribed by the

Hours of Labor Act. *United States v. Oregon, W. R. & N. Co.*, 218 Fed. 925.

### Employees Working Overtime in Violation of Orders and Rules.

Where, without the actual knowledge of a carrier and in violation of its express rules, a telegraph operator, after the expiration of the time of service prescribed by the Federal law, remained on duty performing clerical work only, the carrier is liable for the prescribed penalty, since the law imputes to it knowledge of all acts of its officers and agents. *Oregon S. L. R. Co. v. United States*, 148 C. C. A. 350, 234 Fed. 584, affirming 228 Fed. 561.

The Hours of Labor Act is violated where, contrary to the express directions of and without the knowledge of a carrier, a station agent worked as such for 12 hours daily and thereafter worked an additional 5 hours as a telegraph operator, since section 3 of the Act imputes knowledge to the carrier. *United States v. Oregon, W. R. & N. Co.*, 139 C. C. A. 142, 223 Fed. 596, affirming 213 Fed. 688.

### C. Taking Delayed Train to End of Run.

#### In General.

Where, before a train arrived and departed from a station which was a terminal for other trains, a carrier became aware that the crew could not complete their run within 16 hours, it did not violate the Hours of Labor Act by permitting the crew to continue on duty to the end of the run, since the word "terminal" in the proviso of section 3 means the end of the run of each particular train or crew. *United States v. Atchison, T. & S. F. R. Co.*, 212 Fed. 1000.

The fact that, but for a delay falling within the proviso of the Hours of Labor Act, a crew would have completed their run within the prescribed time, will not permit a carrier to require them to take the train to the end of their run, although they might, having due regard to the surrounding facts and circumstances, have taken the train to a point where they could have been relieved or taken the rest prescribed by the statute. *United States v. Atchison, T. & S. F. R. Co.*, 236 Fed. 154.

Where, short of destination, a train was delayed by accidental and unavoidable causes, so that its run could not be completed within 16 hours, the Hours of Labor Act does not require that the train shall proceed to the next suitable stopping place and there be tied up and the crew released, but they may continue on duty to the terminal or end of that particular run; since the proviso of section 3 takes the case out of the operation of

the Act in every instance where the officers or agents of the carrier in charge of such employees did not know or could not have foreseen the existence of the cause of the delay at the time they left a terminal or starting point. *United States v. Atchison, T. & S. F. R. Co.*, 212 Fed. 1000.

Notwithstanding that a landslide which caused the detouring of a train over the lines of other roads is within the proviso of section 3 of the Hours of Service Act permitting the keeping of employees on duty for more than 16 hours, it does not permit them to be kept on duty until the end of their run when they might have been relieved at intermediate division points, although an order of the Interstate Commerce Commission permitted delayed employees to continue to the terminal or end of their run. *San Pedro, L. A. & S. L. R. Co. v. United States*, 136 C. C. A. 343, 220 Fed. 737.

When a train was delayed by the breaking of an axle and the crew was kept on duty for more than 16 hours until the end of the run was reached, there was a violation of the Hours of Labor Act where the crew might have been relieved at an intermediate division point. *Atchison, T. & S. F. R. Co. v. United States*, 136 C. C. A. 354, 220 Fed. 748.

#### **D. Exceptions and Excuses.**

##### **1. In General.**

##### **Nature of Exceptions and Excuses.**

The excuses embodied in the provisos of the Hours of Labor Act for permitting or requiring employees to remain on duty in excess of the permitted period of time, are separate and affirmative defenses. *United States v. Kansas City S. R. Co.*, 121 C. C. A. 136, 202 Fed. 828.

In order to escape the penalty prescribed by the Hours of Labor Act, a carrier must bring itself strictly within the letter and reason of the proviso thereof. *United States v. Kansas City S. R. Co.*, 189 Fed. 471.

##### **2. Care and Diligence to Prevent Violation.**

##### **In General.**

The Hours of Labor Act imposes on carriers an absolute and positive duty which is not satisfied by the exercise of reasonable diligence or due care. *United States v. Oregon-W. R. & N. Co.*, 213 Fed. 688, affirmed 139 C. C. A. 142, 223 Fed. 596.

In order to bring itself within the proviso of the Hours of Labor Act a carrier must be held to such a high degree of diligence and foresight in guarding

against the delay of trains as may be consistent with the object aimed at by the Act, and the practical operation of the road. *United States v. Kansas City S. R. Co.*, 121 C. C. A. 136, 202 Fed. 828.

In order to escape a liability for a violation of the Hours of Labor Act it is incumbent on a carrier to show that the excess service could not have been prevented by the exercise of that high degree of care in the matter of its equipment and in the practical operation of its road which was consistent with the purpose to be accomplished by such statute. *United States v. Atchison, T. & S. F. R. Co.*, 236 Fed. 154.

#### **3. Acts of God, Casualty and Unforeseen Causes.**

##### **In General.**

The Hours of Labor Act absolutely prohibits the employment of servants beyond the hours therein prescribed except where the excess service is due to unavoidable accident, casualty, the act of God or causes which were not known to the carrier or which it could not have foreseen before a train left a terminal. *United States v. Atchison, T. & S. F. R. Co.*, 236 Fed. 154.

In order for a carrier to justify the excess of service beyond the period prescribed by the Hours of Labor Act, it must show that such excess was not in any respect occasioned by the lack of that high degree of care and foresight properly required of the carrier, but that it was the direct result of an act of God, a casualty, unavoidable accident, or of a cause not known to or which could not have been foreseen by the carrier or its officers in charge of such employees, at the time they left a terminal. *San Pedro, L. A. & S. L. R. Co. v. United States*, 136 C. C. A. 343, 220 Fed. 737.

The proviso of section 3 of the Hours of Labor Act permitting the keeping of employees on duty in excess of the prescribed hours in cases of emergency, casualty, unavoidable accident or act of God, must be reasonably construed so as to effect the purpose of the Act. *United States v. New York, O. & W. R. Co.*, 216 Fed. 702.

The proviso of section 3 of the Hours of Labor Act exempts a carrier from liability for the prescribed penalty where, in consequence of a casualty, unavoidable accident or the act of God, it becomes necessary to keep a telegraph operator on duty beyond the permitted period. *United States v. Missouri P. R. Co.*, 130 C. C. A. 5, 213 Fed. 169.

##### **Act of God.**

An "act of God," within the meaning

of the Hours of Labor Act, is something which occurs exclusively by the violence of nature and implies an entire exclusion of all human agencies. *United States v. Kansas City, S. R. Co.*, 189 Fed. 471.

#### Casualty.

A "casualty," within the meaning of the Hours of Labor Act, is an act which proceeds from an unknown cause or is an unusual effect of a known cause. *United States v. Kansas City S. R. Co.*, 189 Fed. 471.

Where a fireman voluntarily remains on duty to watch an engine on the refusal of a watchman to do so because he had previously had some trouble with the injector, which, in fact, was in good condition, and because he was afraid that the boiler might explode, his insubordination was a casualty within the meaning of section 3 of the Hours of Labor Act. *Denver & G. R. Co. v. United States*, 147 C. C. R. 132, 233 Fed. 62.

The fact that a train crew was kept on duty for more than 16 hours in consequence of the delay of a train as the result of the heavy movement of grain on a railway, is not an unavoidable casualty, within the meaning of the proviso of section 3 of the Hours of Labor Act. *Great N. R. Co. v. United States*, 134 C. C. A. 98, 218 Fed. 302.

#### Unforeseen Causes.

The fact that a train crew was kept on duty for more than 16 hours in consequence of the delay of a train as the result of the heavy movement of grain on the road, is not a cause which could not have been foreseen by a carrier before the train left a terminal, and does not fall within the proviso of section 3 of the Hours of Labor Act. *Great N. R. Co. v. United States*, 134 C. C. A. 98, 218 Fed. 302.

An extraordinary head wind is not an unforeseen cause of the delay of a train within the meaning of the proviso of section 3 of the Hours of Labor Act, so as to excuse the keeping of the crew on duty for more than 16 hours. *Great N. R. Co. v. United States*, 134 C. C. A. 98, 218 Fed. 302.

#### 4. Emergencies and Unavoidable Accidents.

##### Emergencies.

##### — In General.

The words "in cases of emergency" as used in the Hours of Labor Act permitting the keeping of telegraph operators on duty for a greater length of time than that prescribed in the Act, were used by Congress in their usual and ordinary sense. *United States v. Atlantic C. L. R. Co.*, 224 Fed. 160.

The delay of a mail and passenger train because of badly working steam connections, which, together with the thawing out of the ash pan of the engine, the meeting with a delayed train, a heavy wind, snow, cold weather, and a badly clinkered fire, do not create an emergency which will excuse the keeping of a telegraph operator on duty, in violation of the Hours of Labor Act, awaiting the arrival of such train. *United States v. Missouri P. R. Co.*, 235 Fed. 944.

When the delay of a train, which kept the crew on duty for more than 16 hours, was due to leaking flues and a bent or broken shaker rod which prevented the cleaning of the fire while the train was in motion, the delay was not due to causes which could not have been foreseen before the train left a terminal, where the flues had been repaired twice within 30 days, and the condition of the shaker rod had been twice reported without its being mended, and it did not appear that, even though the rod was broken or became defective during the trip, it was not an ordinary incident of operation which should have been anticipated by the carrier. *United States v. Kansas City S. R. Co.*, 121 C. C. A. 136, 202 Fed. 828.

The fact that a telegraph operator was kept on duty in violation of the Hours of Labor Act until the arrival of a train which was delayed because of the loss of the relief valve of the superheater on the engine, a heavy wind, snow, cold weather, and a badly clinkered fire, does not show an emergency within the meaning of such Act. *United States v. Missouri P. R. Co.*, 235 Fed. 944.

##### — Dispatcher's Negligence.

No emergency exists, within the meaning of the Hours of Labor Act, so as to permit the employment of a telegraph operator at a day station for more than 13 hours because the train dispatcher forgot to order a train to take a car of live stock from such station, which oversight required the operator to remain on duty until the arrival of another train. *United States v. Missouri P. R. Co.*, 235 Fed. 944.

The fact that a train was delayed because of the failure of the train dispatcher to order the filling of coal chutes does not create an emergency which will excuse the keeping of a telegraph operator on duty at a station, in violation of the Hours of Labor Act, until the arrival of the train. *United States v. Missouri P. R. Co.*, 235 Fed. 944.

##### — Erroneously Reporting Arrival of Train.

Keeping a telegraph operator on duty in violation of the Hours of Labor Act is not due to an emergency merely because the time of the arrival of a trainload

of silk was erroneously reported to the train dispatcher. *United States v. Missouri P. R. Co.*, 235 Fed. 944.

#### —Failure of Air Pump.

The delay of a train in consequence of the failure of the air pump on the engine is not such an emergency as will permit the keeping of a telegraph operator on duty at a station until the arrival of such train, in violation of the Hours of Labor Act. *United States v. Missouri P. R. Co.*, 235 Fed. 944.

#### —Train Breaking in Two.

The keeping of a telegraph operator on duty in violation of the Hours of Labor Act is not due to an emergency when caused by the delayed arrival of a train in consequence of the pulling out of the drawbar between the engine and tender. *United States v. Missouri P. R. Co.*, 235 Fed. 944.

#### Unavoidable Accidents.

##### —In General.

An unavoidable accident, within the meaning of the Hours of Labor Act, is an inevitable accident which could not have been foreseen and prevented by the exercise of that degree of diligence which reasonable men would exercise under like conditions, and which is not attributable to any fault of the party sought to be held responsible. *United States v. Kansas City S. R. Co.*, 189 Fed. 471.

##### —Poor Coal.

A delay caused by an engine getting out of steam in consequence of poor coal is not due to an unavoidable cause within the meaning of the Hours of Labor Act. *United States v. Kansas City S. R. Co.*, 189 Fed. 471.

A delay caused by the necessary cleaning the fires of an engine in consequence of poor coal is not due to an unavoidable cause within the meaning of the Hours of Labor Act. *United States v. Kansas City S. R. Co.*, 189 Fed. 471.

That the delay of a train was excusable because of the poor steaming quality of the coal used, is not shown in an action for the penalty prescribed by the Hours of Labor Act, where the coal was of the quality that had been used for 3 years without showing any inferiority, and there was evidence that the delay might have been caused by leaky flues. *United States v. Kansas City S. R. Co.*, 121 C. C. A. 136, 202 Fed. 828.

##### —Bad Water.

Where heavy switching on a temporary logging road compelled an engine to take impure warm water from a stream on a hot day, and, when within 4 miles of a terminal, in consequence of the condition of the water, the injector, which was in good condition, refused to work, and

a resulting delay kept the train crew on duty in excess of 16 hours, the delay was due to an unavoidable accident within the meaning of the Hours of Labor Act, which could not have been foreseen and prevented by the exercise of due care. *United States v. Chicago, M. & St. P. R. Co.*, 212 Fed. 574.

##### —Hot Boxes.

A hot box does not fall within the proviso of section 3 of the Hours of Service Act as an unavoidable accident. *Great N. R. Co. v. United States*, 134 C. C. A. 98, 218 Fed. 302; *United States v. Kansas City S. R. Co.*, 189 Fed. 471.

Where a train crew was kept on duty beyond the 16 hour period while cooling a hot box on the locomotive, a further delay caused by other trains running into the block ahead of the stalled train, is part of the excusable delay within the meaning of section 3 of the Hours of Labor Act. *United States v. New York C. & H. R. R. Co.*, 134 C. C. A. 369, 218 Fed. 611.

##### —Train Breaking in Two.

If the breaking in two of a freight train was due to a cause or causes which should have been foreseen when a train left a terminal, such as defective equipment or improper handling, it does not fall within the proviso of section 3 of the Hours of Labor Act so as to relieve a carrier from the prescribed penalty for keeping the crew on duty more than 16 hours. *United States v. Southern P. Co.*, 136 C. C. A. 351, 220 Fed. 745.

A good defense is shown in an action for the violation of the Hours of Labor Act, by an answer alleging that the keeping of a train crew on duty in excess of the permitted time was due to the breaking in two of a freight train as the result of an unavoidable accident from a cause which was not known to the defendant or which could not have been foreseen when the train left a terminal. *United States v. Southern P. Co.*, 136 C. C. A. 351, 220 Fed. 745.

#### 5. Defective Appliances and Equipments.

##### In General.

Since the proviso of section 3 of the Hours of Labor Act does not relieve a carrier from the duty of exercising proper diligence to avoid working its employees overtime, officials in charge of train crews must know when starting trains on their runs, whether the engines and cars are in proper condition. *Great N. R. Co. v. United States*, 134 C. C. A. 98, 218 Fed. 302.

##### Bent or Broken Shaker Rod.

A violation of the Hours of Labor Act



is not excused by the fact that a train was delayed because of a bent or broken shaker rod which prevented the cleaning of the fire while the train was in motion, where such defect had been twice previously reported, but not repaired. *United States v. Kansas City S. R. Co.*, 121 C. C. A. 136, 202 Fed. 828.

#### **Leaking Flues.**

A carrier is not relieved from liability for a violation of the Hours of Labor Act by the fact that a train was delayed in consequence of leaky flues, where it does not appear when they began to leak, and there was evidence that twice recently the flues had been repaired. *United States v. Kansas City S. R. Co.*, 181 C. C. A. 136, 202 Fed. 828.

#### **Broken Packing Rings.**

The fact that broken packing rings in the cylinder of an engine delayed the arrival of a train at a station is not the result of an emergency which will justify the keeping of a telegraph operator on duty in violation of the Hours of Labor Act. *United States v. Missouri P. R. Co.*, 235 Fed. 944.

#### **Defective Injector.**

The fact that a train was delayed and the crew kept on duty for more than 16 hours in consequence of a defective injector of which a carrier was not aware and could not have foreseen when the train left a terminal, does not fall within the proviso of section 3 of the Hours of Labor Act, where the trouble with the injector might have been caused by the bad quality of the water which was well known, and the question of the delay being within such proviso was raised by a motion to direct a verdict for the defendant. *Missouri, K. & T. R. Co. v. United States*, 231 U. S. 112, 58 L. ed. 144, 34 Sup. Ct. Rep. 26.

#### **6. Delayed Trains.**

##### **In General.**

A delay in starting a train in consequence of the late arrival of another train, does not fall within the provision of the Hours of Labor Act permitting the keeping of a train crew on duty for more than 16 hours. *United States v. Kansas City S. R. Co.*, 189 Fed. 471.

A delay in the arrival of a train regularly received from the line of a connecting carrier, does not create an emergency which will permit the retention of a telegraph operator on duty in excess of the time fixed by the Hours of Labor Act. *United States v. Chicago N. W. R. Co.*, 219 Fed. 342.

The delay of a mail train at different stations en route does not create an

emergency which will, under the Hours of Labor Act, excuse the keeping of a telegraph operator on duty at a station beyond the statutory period in order to handle the mail and look after passengers from the belated train. *United States v. Missouri P. R. Co.*, 235 Fed. 944.

The fact that the departure of an extra train was delayed by the act of intoxicated employees of a carnival company in running a wagon off a flat car of a train which was being loaded on a main track, does not create an emergency which permits an operator to remain on duty in excess of the period prescribed by the Hours of Labor Act. *United States v. Chicago & N. W. R. Co.*, 219 Fed. 342.

#### **7. Wrecks.**

##### **In General.**

The derailment of a train, whether in consequence of negligence of employees or the result of pure accident, is within the exception of section 3 of the Hours of Labor Act permitting the keeping of employees on duty for more than 16 hours. *Denver & R. G. R. Co. v. United States*, 147 C. C. A. 132, 233 Fed. 62.

When, in consequence of the wreck of a passenger train near a terminal on a single track which was used by many passenger and freight trains daily, another train was delayed just after it had left a terminal, but 5 hours later its crew was transferred to a train on the other side of the wreck on which they completed their run, and, without having the required 8 hours rest, they made their return trip, the violation of the Hours of Labor Act is excusable under the proviso of section 3, as the result of a cause which could not have been anticipated when the crew left the terminal, where the failure of the train dispatchers to check up the time of the crew so as to prevent the violation of the Act, was due to their engrossment in arranging and caring for the large number of trains and the necessary wrecking outfits. *United States v. Northern P. R. Co.*, 131 C. C. A. 372, 215 Fed. 64.

##### **Keeping Telegraph Operators on Duty as Result of Wreck.**

Keeping a telegraph operator on duty until the arrival of a train which was delayed by a wreck, is due to an emergency within the meaning of the Hours of Labor Act. *United States v. Missouri P. R. Co.*, 235 Fed. 944.

Where a carrier expected to clear away a wreck within an hour, but because of unforeseen developments 7 hours was required to do so, the keeping of a telegraph operator on duty beyond the time prescribed by the Hours of Labor Act, in consequence of inability to procure a re-

relief operator, is the result of a casualty or unavoidable accident. *United States v. Missouri P. R. Co.*, 130 C. C. A. 5, 213 Fed. 169.

When, on being notified of the sudden illness of an operator at a day and night office, a train dispatcher sent a relief operator as soon as possible, but on the way his train was wrecked and in order to expedite the clearing of the track he was directed to open a temporary telegraph office at the wreck, a casualty or emergency arose, within the meaning of the proviso of section 3 of the Hours of Labor Act, which will permit the keeping of the operators at the regular office on duty for 12 hours each for 3 successive days. *San Pedro, L. A. & S. L. R. Co. v. United States*, 136 C. C. A. 343, 220 Fed. 737.

### 8. Illness or Death.

#### Sudden Illness of Dispatcher or Operator.

The sudden illness of a train dispatcher, coupled with the inability of a railway company to procure an experienced substitute to fill the vacancy, constitutes an emergency within the meaning of the Hours of Labor Act which permits the keeping of other dispatchers on duty in excess of the prescribed period for 3 days in one week. *United States v. Southern P. Co.*, 126 C. C. A. 384, 209 Fed. 562.

The sudden and unexpected illness of a train dispatcher is a casualty within the meaning of the proviso of the Hours of Labor Act, which will permit the keeping of another operator on duty in excess of the statutory limit. *United States v. New York, O. & W. R. Co.*, 216 Fed. 702.

Where a train dispatcher was promptly notified of the illness of a telegraph operator and it does not appear that he could not have sent a relief operator, no emergency existed which will permit the keeping of a regular operator on duty in excess of the time prescribed by the Hours of Labor Act. *United States v. Atlantic C. L. R. Co.*, 224 Fed. 160.

The sudden illness of a train dispatcher which caused the keeping of other dispatchers on duty in excess of the time permitted by the Hours of Labor Act, was justified as an emergency, although the chief train dispatcher, who occupied an executive position, might have taken the place of the disabled dispatcher and prevented the working of the other employees overtime. *United States v. Southern P. Co.*, 126 C. C. A. 384, 209 Fed. 562.

A carrier need not keep an extra telegraph operator on hand to take the place of one who becomes incapacitated by sudden illness, since the Hours of Labor

Act recognizes the right to keep operators on duty for more than the prescribed time in an emergency, where, during 7 years, but one such similar unexpected absence had occurred. *United States v. Southern P. Co.*, 126 C. C. A. 384, 209 Fed. 562.

#### Death of Employee's Mother.

The sudden and unexpected death of the mother of a train dispatcher, who was a member of his family, is a casualty within the meaning of the proviso of section 3 of the Hours of Labor Act, which will permit a carrier to keep another telegraph operator on duty in excess of the prescribed period. *United States v. New York, O. & W. R. Co.*, 216 Fed. 702.

### 9. Unavoidable Absence of Employees.

#### Operator Detained as Witness.

Where, when subpoenaed as a witness for the defendant in an action against a railway company, a telegraph operator who had ample time to return to his place of employment before his trick began, on learning that the case would not be called in time to permit him to do so, immediately notified the train dispatcher, and, because of the time of arrival of a train, the latter was unable to send a relief operator, an emergency existed which permitted the keeping of another operator on duty in excess of the time prescribed by the Hours of Labor Act. *United States v. Atlantic C. L. R. Co.*, 224 Fed. 160.

### 10. Discharge of Employees.

See also *supra* V, H, 6.

#### Requiring Others to Work Overtime.

When a train dispatcher became abusive, insubordinate and defiant, and was discharged because his retention was inconsistent with discipline and dangerous to the interests of a carrier and the safety of the public, an emergency arose, within the meaning of the Hours of Labor Act, which permitted the keeping of another telegraph operator on duty in excess of the prescribed hours of service until such vacancy was filled two days later. *United States v. Denver & R. G. R. Co.*, 136 C. C. A. 275, 220 Fed. 293.

## VI. REPORTS OF VIOLATIONS.

#### Validity of Requirements for.

Section 4 of the Hours of Labor Act and section 20 of the Act Regulating Commerce as amended, confer authority on the Interstate Commerce Commission to require the secretary or similar officers of railway companies to make verified monthly reports showing what employees have worked in violation of the former Act, and to give the reasons and

excuses therefor. *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621.

An order of the Interstate Commerce Commission requiring monthly verified reports from carriers showing what employees have been required to work in excess of the periods prescribed by the Hours of Labor Act, and the reasons and excuses therefor, does not violate the constitutional prohibition against unreasonable searches and seizures. *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621.

Neither a railway company nor its secretary or similar officers can plead privilege against self-crimination in justification of a refusal to make monthly verified reports to the Interstate Commerce Commission in compliance with an order of that body, showing what employees have been required to work in violation of the Hours of Labor Act and giving the reasons and excuses therefor. *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621.

#### What Must Be Reported

A railway company need not report to the Interstate Commerce Commission instances where a telegraph operator was kept on duty with a wrecking crew at a wreck in excess of the time prescribed by the Hours of Labor Act. *United States v. Baltimore & O. R. Co.*, 226 Fed. 220.

A railway company must report to the Interstate Commerce Commission all instances where telegraph operators are, because of emergencies, kept on duty for more than the time prescribed by the Hours of Labor Act, together with the cause or necessity therefor. *United States v. Baltimore & O. R. Co.*, 226 Fed. 220.

#### Failure to Make Reports.

##### — In General.

A railway company is answerable for a penalty of \$100 per diem, as fixed by the Act Regulating Commerce, for failing to report to the Interstate Commerce Commission instances where employees are, because of emergencies, kept on duty in excess of the time prescribed by such Act. *United States v. Baltimore & O. R. Co.*, 226 Fed. 220.

#### Omissions From Reports.

A carrier is not liable for the penalty of \$100 per day, under section 20 of the Hours of Labor Act, for omitting from the reports of the violation of such Act required to be filed with the Interstate Commerce Commission, the names of several employees whom the carrier in good

faith believed were not on duty in excess of 16 hours. *United States v. Northern P. R. Co.*, 242 U. S. 190, 61 L. ed. —, 37 Sup. Ct. Rep. 22, affirming 129 C. C. A. 514, 213 Fed. 162, L. R. A. 1917A, 1198.

A carrier that inadvertently and honestly omits from a report required by the Interstate Commerce Commission instances where employees were permitted to remain on duty for a longer period of time than that prescribed by the Hours of Labor Act, is not subject to the penalty prescribed by the Act Regulating Commerce for failing to comply with the orders of the Commission. *Oregon, W. R. & N. Co. v. United States*, 143 C. C. A. 662, 229 Fed. 1022.

The penalty of \$100 per diem imposed on carriers by section 20 of the Act Regulating Commerce, as amended, for failure to file any report required by the Interstate Commerce Commission, does not apply to the omission from a duly filed report of instances where employees were kept on duty for a longer period than permitted by the Hours of Labor Act, since such section does not apply to willful or accidental omissions from or misstatements in periodical reports which are filed in due time. *Elgin, J. & E. R. Co. v. United States*, 142 C. C. A. 107, 227 Fed. 411.

An honest or inadvertent omission from a report filed by a carrier with the Interstate Commerce Commission of instances where employees are permitted to remain on duty in violation of the Hours of Labor Act, does not render the carrier liable for the prescribed penalty. *Oregon, W. R. & N. Co. v. United States*, 138 C. C. A. 367, 222 Fed. 887.

#### Penalties.

Where, in good faith and under the belief that reports were not required in such cases, a railway company fails to report to the Interstate Commerce Commission instances where, in cases of emergencies, employees are kept on duty in excess of the time prescribed by the Hours of Labor Act, the penalty of \$100 per diem will be imposed for each employee so worked without an additional penalty for each day such report was withheld. *United States v. Baltimore & O. R. Co.*, 226 Fed. 220.

The provision of section 20 of the Act Regulating Commerce prescribing a penalty of \$100 per day for a carrier's failure to make and file the reports required by the Interstate Commerce Commission, is mandatory, and the court has no discretion in imposing a penalty for the failure of a carrier to file a monthly report of violations of the Hours of Service Act. *United States v. Yazoo & M. V. R. Co.*, 203 Fed. 159.

The provisions of section 20 of the Act Regulating Commerce declaring that carriers shall be subject to the forfeiture "last above provided" for a failure to make and file periodical or special reports within the time fixed by the Interstate Commerce Commission, permits the imposition of the mandatory penalty of \$100 for each day of a carrier's default in filing the monthly reports required by the Commission of violations of the Hours of Labor Act. *United States v. Yazoo & M. V. R. Co.*, 203 Fed. 159.

Since the penalty of \$100 per diem imposed on carriers by section 20 of the Act Regulating Commerce for their failure to file the monthly reports required by the Interstate Commerce Commission, showing violations of the Hours of Labor Act, is mandatory, the court cannot take into consideration mitigating circumstances in fixing the amount of the penalty. *United States v. Yazoo & M. V. R. Co.*, 203 Fed. 159.

## VII. ACTIONS FOR VIOLATION.

### A. Civil.

Liability for injuries sustained by employees as result of overtime work, see *Federal Ry. Digest No. 2*, pp. 343-345, and *No. 3*, p. 161.

### B. Recovery of Penalties.

#### 1. Nature of Action.

An action for the recovery of a penalty for a violation of the Hours of Labor Act is of a civil nature. *United States v. Great N. R. Co.*, 136 C. C. A. 238, 220 Fed. 630; *Delano v. United States*, 136 C. C. A. 243, 220 Fed. 635; *United States v. Houston B. & T. R. Co.*, 125 C. C. A. 481, 205 Fed. 344; *United States v. Minneapolis, St. P. & S. S. M. R. Co.*, 235 Fed. 951.

#### 2. Pleading.

##### Complaint.

Since an action against a carrier for the violation of the Hours of Labor Act is of a civil nature, the pleader is not required to state his cause of action with the exactness and particularity necessary in a criminal indictment. *United States v. Houston B. & T. R. Co.*, 125 C. C. A. 481, 205 Fed. 344.

The complaint in an action for the violation of the Hours of Labor Act need not negative the conditions of the proviso of section 2 relieving carriers from liability where employees are kept on duty in excess of the permitted time in consequence of casualty, unavoidable accident, or the act of God. *United States v. Great N. R. Co.*, 136 C. C. A. 238, 220 Fed. 630; *United States v. Houston B. & T. Co.*, 125 C. C. A. 481, 205 Fed. 344.

##### Answer.

If a carrier relies on defects in an engine as an excuse for permitting an employee to remain on duty for more than 16 hours, such excuse must be pleaded. *United States v. Kansas City S. R. Co.*, 121 C. C. A. 136, 202 Fed. 828.

If a carrier relies on any defense under the proviso of section 3 of the Hours of Labor Act, it must, before the trial, allege the facts constituting such defense. *Great N. R. Co. v. United States*, 134 C. C. A. 98, 218 Fed. 302.

In an action against a carrier for violating the Hours of Labor Act the defendant must allege and prove facts which bring it within the exceptions of the Act. *United States v. Houston B. & T. R. Co.*, 125 C. C. A. 481, 205 Fed. 344.

### 3. Evidence.

#### Burden of Proof.

The burden is on the government, in an action for the penalty for violating the Hours of Labor Act, to establish that the defendant required or permitted employees to remain on duty in excess of the permitted time. *United States v. Kansas City S. R. Co.*, 121 C. C. A. 136, 202 Fed. 828.

When the government's testimony shows without dispute that a fireman was required to remain on duty in and about his engine for more than 16 hours, the burden is cast on the defendant, in an action for the statutory penalty, to allege and prove by the greater weight of the testimony, facts that bring the case within the proviso of section 3 of the Hours of Labor Act. *Great N. R. Co. v. United States*, 134 C. C. A. 98, 218 Fed. 302.

When a carrier concedes that employees were permitted or required to remain on duty in excess of the period prescribed by the Hours of Labor Act, it has the burden of discharging itself from liability by bringing itself within the proviso of the Act. *United States v. Kansas City S. R. Co.*, 121 C. C. A. 136, 202 Fed. 828.

The burden is on a carrier to show that the employment of a train crew in excess of the time prescribed by the Hours of Labor Act was justified and within the proviso relating to casualty, unavoidable accident, the act of God, or the result of causes not known to or which could not have been foreseen by the carrier at the time the train left the terminal. *United States v. Atchison, T. & S. F. Co.*, 236 Fed. 154.

In an action for the violation of the Hours of Labor Act, the defendant has the burden of proving that a train crew was kept on duty in excess of 16 hours

as the result of an unavoidable accident or a cause which was unknown to and could not have been foreseen by the carrier or its agents when the train left a terminal. *United States v. Southern P. Co.*, 136 C. C. A. 351, 220 Fed. 745.

#### Scope of Issue.

Evidence tending to show a defense under the proviso of section 3 of the Hours of Labor Act is not admissible in an action for the statutory penalty, where, before the trial, the defendant does not allege in its answer facts constituting such defense. *Great N. R. Co. v. United States*, 134 C. C. A. 98, 218 Fed. 302.

When an affirmative defense under the proviso of section 2 of the Hours of Labor Act is pleaded, the proof should bring the case clearly within the letter and spirit of the proviso. *United States v. Great N. R. Co.*, 136 C. C. A. 238, 220 Fed. 630.

#### Admissibility.

When the defendant, in an action for a violation of the Hours of Labor Act, sets up that the breaking of draw bars and air hose created an unavoidable delay, the government may, as tending to show a negligent habit of the officers and agents of the defendant, prove that like troubles had been of daily occurrence for several preceding months, although such testimony must be restricted to such purpose. *United States v. Great N. R. Co.*, 136 C. C. A. 238, 220 Fed. 630.

#### 4. Instructions.

##### In General.

In an action for a violation of the Hours of Labor Act, it was reversible error to instruct the jury to the effect that the defendant was not liable if the violation was due to the breaking of draw bars and air hose, even though it was an unavoidable accident, since such accidents are not within the proviso of section 2 of the Act. *United States v. Great N. R. Co.*, 136 C. C. A. 238, 220 Fed. 630.

#### 5. Questions of Law and Fact.

##### Sufficiency of Rest Periods.

Where a train consumes more than 16 hours in making a trip and en route the crew was absolutely released from duty for definite periods, the court cannot determine as a matter of law whether such periods gave substantial and opportune periods for rest which may be deducted from the running time in determining whether there is a violation of the Hours of Labor Act. *Southern P. Co. v. United States*, 137 C. C. A. 584, 222 Fed. 46.

When a train left a terminal at 5:30 a. m. and, by reason of a delay, consumed

more than 16 hours in making a trip, but the crew was absolutely released from duty from 9:15 a. m. to 11:40 a. m. and again from 1:30 p. m. until 2:30 p. m., it is for the jury to say, in action for violating the Hours of Labor Act, whether under the circumstances the released time gave the crew substantial and opportune periods of rest which may be deducted from the running time of the train in determining whether the crew was kept on duty for more than 16 hours. *Southern P. Co. v. United States*, 137 C. C. A. 584, 222 Fed. 46.

The question whether intermission in the employment of telegraph operators breaks the continuity of their employment within the meaning of the Hours of Labor Act or are subterfuges resorted to in order to evade the law, is for the jury where the hours of intermission were short and variant as to time. *United States v. Missouri P. R. Co.*, 235 Fed. 944.

#### Avoidability of Cause of Overtime.

Where a train crew was kept on duty for more than 16 hours in consequence of the blowing out of a cylinder head of a locomotive and the breaking of the knuckle of a drawbar as the result of flaws therein, and all the testimony as to previous inspections came from the defendant's employees, the government is entitled to have the question whether the delay was due to unavoidable causes, within the meaning of section 3 of the Hours of Labor Act, submitted to the jury. *United States v. Delaware, L. & W. R. Co.*, 134 C. C. A. 366, 218 Fed. 608.

Where a train was delayed by a hot box and the breaking of a tail-pin, and there was testimony as to the nature of a flaw in the pin and as to the packing and inspection of the journal box, it was for the jury to say whether the accident was unavoidable within the meaning of section 3 of the Hours of Labor Act. *United States v. Lehigh V. R. Co.*, 135 C. C. A. 282, 219 Fed. 532.

#### 6. Verdict, Judgment and Costs.

##### Amount of Penalty.

The amount of the penalty to be imposed for a violation of the Hours of Labor Act is to be determined by the court and not by the jury. *Missouri, K. & T. R. Co. v. United States*, 231 U. S. 112, 58 L. ed. 144, 34 Sup. Ct. Rep. 26.

By keeping an interstate train crew on duty for more than 16 hours a carrier incurs a separate penalty under the Hours of Labor Act for each member of the crew and not a single penalty for the entire crew. *Missouri, K. & T. R. Co. v. United States*, 231 U. S. 112, 58 L. ed. 144, 34 Sup. Ct. Rep. 26.

**Directing Verdict.**

The court cannot direct a verdict for the defendant in an action for the violation of the Hours of Labor Act, where a train was delayed by a hot box and the breaking of a tail-pin, when there is testimony as to the nature of a flaw in the pin and the packing and inspection of the journal or box, since the question whether the accident was unavoidable is for the jury. *United States v. Lehigh V. R. Co.*, 135 C. C. A. 282, 219 Fed. 532.

**Costs.**

Since there is no controlling Federal law, the government, in an action for a violation of the Hours of Labor Act, is, when it prevails, entitled to its costs and disbursements according to state laws. *United States v. Minneapolis, St. P. & S. S. R. Co.*, 235 Fed. 951.

When the government, in an action for numerous violations of the Hours of Labor Act, recovers for but one of them, it is not, under the laws of the state of

Minnesota, entitled to tax as necessary disbursements the fees of witnesses who testified only as to the causes of action for which a recovery was denied. *United States v. Minneapolis, St. P. & S. S. M. R. Co.*, 235 Fed. 951.

**VIII. APPEAL AND ERROR.****What Considered on Appeal.**

An appellate court will not consider a defense under the proviso of section 3 of the Hours of Labor Act, when raised by amendment to the answer filed more than 4½ months after the trial pursuant to permission given at the trial. *Great N. R. Co. v. United States*, 134 C. C. A. 98, 218 Fed. 302.

A verdict for the defendant is conclusive in an action for the violation of the Hours of Labor Act, where the government does not take exceptions to the instructions given and its own requests were given. *United States v. Delaware, L. & W. R. Co.*, 134 C. C. A. 366, 218 Fed. 608.

# SAFETY APPLIANCE ACT\*

## FEDERAL

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See same sections, Nos. 2 and 3, Vol. I, Federal Ry. Digest, for liability of carriers for injuries to employees caused by violation of Safety Appliance Act.

### I. VALIDITY.

See also same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

#### In General.

The Safety Appliance Act, as amended April 1, 1896, and March 2, 1903, is constitutional. *United States v. Atlantic C. L. R. Co.*, 153 Fed. 918, affirmed 94 C. C. A. 35, 168 Fed. 175.

\*For text of Act, see No. 2, Vol. I, Federal Ry. Digest, p. 97.

The amendment of 1903, extending the requirements of the Safety Appliance Act to all engines and cars used on any railway engaged in interstate commerce, is constitutional when applied to vehicles employed in intrastate traffic on interstate railways. *United States v. Wheeling & L. E. R. Co.*, 167 Fed. 198.

The Safety Appliance Act, as amended March 2, 1903, is constitutional as applied to an empty car customarily or generally employed in moving interstate traffic, when moved over a highway of interstate commerce. *Wabash R. Co. v. United States*, 93 C. C. A. 393, 168 Fed. 1.

The amendment of 1903 extending the provisions of the Safety Appliance Act to all engines, cars and other vehicles used on any railroad engaged in interstate commerce, cannot be constitutionally construed to apply to a car which is not shown ever to have been used or intended for use in such commerce. *United States v. Erie R. Co.*, 166 Fed. 352.

### II. NATURE AND CONSTRUCTION.

See also same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

#### In General.

The Safety Appliance Act is a remedial statute which must be so construed as to accomplish the intent of Congress. *United States v. Central of Ga. R. Co.*, 157 Fed. 893.

The Safety Appliance Act is remedial legislation which should be liberally construed. *United States v. Chicago, R. I. & P. R. Co.*, 173 Fed. 684.

The Federal Safety Appliance Act is not a criminal statute which is to be governed by the rules applicable to criminal laws. *United States v. Great N. R. Co.*, 144 C. C. A. 209, 229 Fed. 927.

While the Safety Appliance Act is penal and should be strictly construed, the construction given it must fairly carry out the legislative intent. *United States v. Southern R. Co.*, 135 Fed. 122.

Although the Safety Appliance Act is a penal law and must be strictly construed, acts which are not within the terms of the statute must not be brought within the scope of the punishment. *United States v. St. Louis S. W. R. Co.*, 106 C. C. A. 230, 184 Fed. 28.

**Territorial Extent.**

The Safety Appliance Act is applicable to and may be enforced by the Interstate Commerce Commission in Porto Rico. *American R. Co. v. Porto Rico R. R. L. & P. Co.*, 6 Porto R. Fed. 235.

**Effect on State Laws.**

A state law requiring secure grabirons and handholds on the ends and sides of cars, is, with respect to cars moved within the state on the line of an interstate carrier, in conflict with the Federal Safety Appliance Act. *Southern R. Co. v. R. R. Comm. of Ind.*, 236 U. S. 439, 59 L. ed. 661, 35 Sup. Ct. Rep. 304, reversing 179 Ind. 23, 100 N. E. 337.

A state statute relating to automatic couplers and handholds on freight cars was superseded with respect to interstate carriers by the Federal Safety Appliance Act. *Southern R. Co. v. R. R. Commission*, 183 Ind. 580, 109 N. E. 759; *Cleveland, C. C. & St. L. R. Co. v. Public Service Comm.*, 183 Ind. 165, 108 N. E. 515.

A state statute relative to safety devices is superseded by the Federal Act as amended and is inapplicable to logging cars of an interstate railway although they are used exclusively in intrastate traffic. *State v. Orange & N. W. R. Co.*, — Tex. Civ. App. —, 181 S. W. 494; *State v. Beaumont & G. N. R. Co.*, — Tex. Civ. App. —, 183 S. W. 120.

**III. DUTY IMPOSED.**

See also same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

**A. In General.****Duty Imposed.**

The Safety Appliance Act imposes an absolute and unqualified duty on carriers with respect to the maintenance and repair of the necessary safety devices on cars. *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612, affirming 95 C. C. A. 642, 170 Fed. 556, which affirmed 156 Fed. 180; *United States v. Trinity & B. V. R. Co.*, 128 C. C. A. 120, 211 Fed. 448; *Norfolk & W. R. Co. v. United States*, 112 C. C. A. 46, 191 Fed. 302; *Galveston, H. & S. A. R. Co. v. United States*, 105 C. C. A. 450, 183 Fed. 579; *Galveston, H. & S. A. R. Co. v. United States*, 105 C. C. A. 422, 183 Fed. 579; *Norfolk & W. R. Co. v. United States*, 101 C. C. A. 249, 177 Fed. 623; *Wabash R. Co. v. United States*, 97 C. C. A. 284, 172 Fed. 864; *Atchison, T. & S. F. R. Co. v. United States*, 96 C. C. A. 664, 172 Fed. 1021; *United States v. Southern P. Co.*, 94 C. C. A. 629, 169 Fed. 407; *Chicago, M. & St. P. R. Co. v. United States*, 91 C. C. A. 373, 165 Fed. 423, 20 L. R. A. (N. S.)

473; *United States v. Atchison, T. & S. F. R. Co.*, 90 C. C. A. 327, 163 Fed. 517, reversing 150 Fed. 442; *United States v. Illinois C. R. Co.*, 95 C. C. A. 628, 170 Fed. 542; *United States v. Baltimore & O. R. Co.*, 170 Fed. 456; *United States v. Southern R. Co.*, 170 Fed. 1014; *United States v. Louisville & N. R. Co.*, 162 Fed. 185, affirmed 98 C. C. A. 664, 174 Fed. 1021; *United States v. Philadelphia & R. R. Co.*, 162 Fed. 403, 405; *United States v. Lehigh V. R. Co.*, 162 Fed. 410.

The Safety Appliance Act places on carriers the responsibility of properly equipping cars in the first instance with the required safety devices, and of thereafter maintaining such equipment in good operative condition at all times. *United States v. Southern P. Co.*, 167 Fed. 699.

An unqualified duty to equip cars with couplers which will couple automatically by impact, and which can be uncoupled without the necessity of men going between the ends of cars, is imposed on carriers by the Safety Appliance Act. *United States v. Atchison, T. & S. F. R. Co.*, 167 Fed. 696.

**Exercise of Care and Diligence.**

See also *infra* "Duty With Respect to Repairs."

The fact that a carrier exercised due care and diligence to keep safety devices in proper condition and repair will not relieve it from liability for the penalty prescribed by the Safety Appliance Act, since the duty imposed on carriers by such Act is absolute. *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612, affirming 95 C. C. A. 642, 170 Fed. 556, which affirmed 156 Fed. 180; *Norfolk & W. R. Co. v. United States*, 112 C. C. A. 46, 191 Fed. 302; *Galveston, H. & S. A. R. Co. v. United States*, 105 C. C. A. 422, 183 Fed. 579; *Norfolk & W. R. Co. v. United States*, 101 C. C. A. 249, 177 Fed. 623; *Wabash R. Co. v. United States*, 97 C. C. A. 284, 172 Fed. 864; *Atchison, T. & S. F. R. Co. v. United States*, 96 C. C. A. 664, 172 Fed. 1021; *United States v. Southern P. Co.*, 94 C. C. A. 629, 169 Fed. 407; *Chicago, M. & St. P. R. Co. v. United States*, 91 C. C. A. 373, 165 Fed. 423, 20 L. R. A. (N. S.) 473; *United States v. Atchison, T. & S. F. R. Co.*, 90 C. C. A. 327, 163 Fed. 517, reversing 150 Fed. 442; *United States v. Southern P. Co.*, 167 Fed. 699; *United States v. Baltimore & O. R. Co.*, 170 Fed. 456; *United States v. Southern R. Co.*, 170 Fed. 1014; *United States v. Louisville & N. R. Co.*, 162 Fed. 186, affirmed 98 C. C. A. 664, 174 Fed. 1021; *United States v. Philadelphia & R. R. Co.*, 162 Fed. 405, 408; *United States v. Lehigh V. R. Co.*, 162 Fed. 410; *United States v. Southern R. Co.*, 135 Fed. 122.



The Safety Appliance Act requires all common carriers engaged in interstate commerce to keep their cars and engines at all times equipped with proper safety appliances, as the degree of diligence required is of the highest order, and as the duty imposed is absolute and unconditional, the exercise of due care and diligence by a carrier to comply with the Act is not sufficient. *Atlantic C. L. R. Co. v. United States*, 94 C. C. A. 35, 168 Fed. 175, affirming 153 Fed. 918.

The question of the diligence or carefulness of a carrier in inspecting cars is immaterial in an action for the violation of the Safety Appliance Act. *United States v. Philadelphia & R. R. Co.*, 160 Fed. 696.

The exercise of reasonable care by a carrier to keep its cars equipped with the appliances required by the Safety Appliance Act will not excuse the carrier from its default. *United States v. Baltimore & O. R. Co.*, 170 Fed. 456.

Since the Safety Appliance Act imposes an absolute duty on carriers, the matter of their willful negligence in failing to observe its requirements does not enter into an action for its violation. *United States v. Baltimore & O. R. Co.*, 170 Fed. 456.

#### **Ignorance of or Failure to Discover Defects.**

The fact that a carrier did not know that cars were moved with defective couplers, and that it had no actual intention to violate the Safety Appliance Act, but that on the contrary it had exercised reasonable care to keep such appliances in repair by making a reasonable inspection of them, does not relieve the carrier from liability for the penalty imposed by such law. *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612, affirming 95 C. C. A. 642, 170 Fed. 556, which affirmed 156 Fed. 180.

As the duty imposed on carriers by the Safety Appliance Act with respect to having and maintaining the safety devices on cars in good condition, is a positive one, ignorance of defects therein is no excuse. *United States v. Trinity & B. V. R. Co.*, 128 C. C. A. 120, 211 Fed. 448.

The fact that a carrier is not aware of the defective and inoperative condition of a coupler does not excuse a violation of the Safety Appliance Act by moving the car while in such condition. *United States v. Southern P. Co.*, 154 Fed. 897.

A carrier's ignorance of the fact that the safety devices of a car were defective is not a defense to an action for a violation of the Safety Appliance Act. *Chesapeake*

*& O. R. Co. v. United States*, 141 C. C. A. 439, 226 Fed. 683.

It is the duty of carriers to discover defects in the safety devices of cars, and if they do not find them the Safety Appliance Act is violated by the subsequent movement of a car which will not couple automatically. *United States v. Philadelphia & R. R. Co.*, 160 Fed. 696.

Where a car had been moved but a few miles from an inspection point when a defective coupler was discovered, the carrier may be convicted of violating the Safety Appliance Act, since it is improbable that the defect developed through the ordinary handling of the car in that distance. *United States v. Indiana Harbor R. Co.*, 157 Fed. 565.

When safety devices were in good condition before a car was started on an interstate journey and became defective en route without the knowledge of the carrier, a violation of the Safety Appliance Act is not shown by evidence of the movement of the car in defective condition unless it appears that the carrier learned of the defect or had reasonable opportunity to do so. *United States v. Illinois C. R. Co.*, 95 C. C. A. 628, 170 Fed. 542, certiorari denied 214 U. S. 520, 53 L. ed. 1066, 29 Sup. Ct. Rep. 701.

Before a carrier can be convicted of violating the Safety Appliance Act it must appear beyond a reasonable doubt that it hauled in interstate traffic a car which was not equipped or provided with the required safety devices, or that they had become inoperative, and if they were in good condition when the car started on its journey and became defective in transit, the evidence must show beyond a reasonable doubt that such defects had in fact been discovered by the carrier, or that they would have been discovered and corrected by the exercise of the utmost degree of care and diligence which could be expected of a highly prudent person under similar circumstances. *United States v. Illinois C. R. Co.*, 156 Fed. 182.

A carrier is not answerable for the penalty prescribed by the Safety Appliance Act for moving a car with an inoperative coupler where the defect was not discovered when the carrier made a careful inspection of a train. *United States v. Atchison, T. & S. F. R. Co.*, 150 Fed. 442, reversed 90 C. C. A. 327, 163 Fed. 517.

#### **Duty With Respect to Repairs.**

It is the duty of a carrier to keep safety appliances in repair. *United States v. Great N. R. Co.*, 150 Fed. 229.

The Safety Appliance Act requires not only that all cars used in interstate commerce shall be equipped with automatic couplers, but that they be kept so

equipped, and such duty cannot be qualified by the fact that after lawful couplers are supplied a carrier is bound to use only a high degree of skill to maintain them in perfect condition. *United States v. Erie R. Co.*, 166 Fed. 352.

A carrier must immediately repair safety devices on cars received from other carriers and put them in operative condition if it can be done with the means and appliances at hand at the time and place where the defects were discovered or could have been discovered by the exercise of reasonable care. *United States v. Chicago G. W. R. Co.*, 162 Fed. 775.

Carriers are required to repair immediately defects in the safety devices of cars arising during the time they are being hauled, if they can do so with the means and appliances at hand at the time and place, or when such condition should have been discovered by the exercise of reasonable care. *United States v. Atchison, T. & S. F. R. Co.*, 167 Fed. 696; *United States v. Southern P. Co.*, 167 Fed. 699.

That the safety devices were lost or became defective so recently before the time alleged as to make it impossible for a carrier, in the exercise of ordinary care, to replace or repair them, is no defense to an action for the violation of the Safety Appliance Act. *United States v. Wheeling & L. E. R. Co.*, 167 Fed. 198.

#### **Duty to Establish Repair Points.**

It is the duty of carriers who are subject to the Safety Appliance Act to establish reasonable repair points along their lines for making repairs of the kind necessary to comply with the law. *United States v. Atchison, T. & S. F. R. Co.*, 167 Fed. 696; *United States v. Southern P. Co.*, 167 Fed. 699.

#### **Moving Defective Cars From Repair Points.**

The Safety Appliance Act is violated if a carrier hauls from a repair point a car having defective safety devices. *United States v. Atchison, T. & S. F. R. Co.*, 167 Fed. 696; *United States v. Southern P. Co.*, 167 Fed. 699; *United States v. Chicago G. W. R. Co.*, 162 Fed. 775.

#### **Acts of Employees Disabling Safety Devices.**

If an employee deliberately puts coupling devices of an interstate car in a condition which the Safety Appliance Act undertakes to prevent, the carrier is answerable for the prescribed penalty. *United States v. Southern P. Co.*, 167 Fed. 699.

#### **Improper Manipulation of Couplers.**

Although the Safety Appliance Act re-

quires a carrier to equip its cars with the designated safety devices and to keep them in good order and repair, the Act is not violated by the improper manipulation of such equipment by employees. *United States v. Illinois C. R. Co.*, 156 Fed. 182, affirmed 95 C. C. A. 642, 170 Fed. 556, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612.

#### **Duty of Government Inspectors to Notify Carriers of Defects.**

Government inspectors need not notify a carrier of the discovery of defects in safety appliances in order to render the latter liable to the penalty imposed by the Safety Appliance Act. *Chicago, B. & Q. R. Co. v. United States*, 127 C. C. A. 438, 211 Fed. 12, reversed on other grounds 237 U. S. 410, 59 L. ed. 1023, 35 Sup. Ct. Rep. 634; *Norfolk & W. R. Co. v. United States*, 112 C. C. A. 46, 191 Fed. 302; *United States v. Chicago G. W. R. Co.*, 162 Fed. 775; *United States v. Baltimore & O. R. Co.*, 179 Fed. 456.

The failure of a government inspector to inform a carrier of the discovery of defective safety devices on a car does not discredit the former's testimony in an action for a violation of the Safety Appliance Act. *United States v. Chicago G. W. R. Co.*, 162 Fed. 775.

#### **B. Coupling Apparatus.**

See also same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

#### **In General.**

If a carrier hauls over its line any car which cannot be coupled automatically by impact, either by reason of being improperly equipped or the equipment being out of order, disconnected, or otherwise inoperative, the Safety Appliance Act is violated. *United States v. Southern P. Co.*, 167 Fed. 699; *United States v. Atchison, T. & S. F. R. Co.*, 167 Fed. 696.

#### **Both Ends of Cars Must Have Automatic Couplers.**

The Safety Appliance Act requires both ends of cars to be equipped with couplers that will couple automatically by impact and which may be uncoupled without the necessity of men going between the ends of the cars. *United States v. Louisville & N. R. Co.*, 162 Fed. 185, affirmed 98 C. C. A. 664, 174 Fed. 1021; *United States v. Southern R. Co.*, 170 Fed. 1014; *United States v. Atchison, T. & S. F. R. Co.*, 167 Fed. 696; *United States v. Southern P. Co.*, 167 Fed. 699; *United States v. Philadelphia & R. R. Co.*, 160 Fed. 696; *United States v. Central of Ga. R. Co.*, 157 Fed. 893.

### Using Engine Having One Inoperative Coupler.

The Safety Appliance Act is not violated by using a switch engine with an automatic coupler at one end only, where the coupling apparatus on the opposite end had been purposely made inoperative with the intention that coupling should not be made therewith. *Wabash R. Co. v. United States*, 97 C. C. A. 284, 172 Fed. 864.

The Safety Appliance Act is violated by the use of a locomotive without an automatic coupler on the front end thereof, although that end was not coupled to any car. *United States v. Southern P. Co.*, 167 Fed. 699.

There was a violation of the Safety Appliance Act where a locomotive was used for one day while the coupling apparatus on the front end was in a defective condition, although no couplings were made with such coupler during the time the engine was in use. *United States v. Philadelphia & R. R. Co.*, 223 Fed. 215.

### Effect of Fact That Adjacent Car Is Properly Equipped.

The violation of the Safety Appliance Act by moving a car which cannot be uncoupled from the side, is not excused by the fact that it could be uncoupled from the opposite side of the adjacent car, since under such Act each car is a unit and must be completely equipped with the required safety appliances. *Chicago, B. & Q. R. Co. v. United States*, 127 C. C. A. 438, 211 Fed. 12, reversed on other grounds 237 U. S. 410, 59 L. ed. 1023, 35 Sup. Ct. Rep. 634; *Central Vt. R. Co. v. United States*, 123 C. C. A. 308, 205 Fed. 40; *Norfolk & W. R. Co. v. United States*, 101 C. C. A. 249, 177 Fed. 623; *Wabash R. Co. v. United States*, 93 C. C. A. 393, 168 Fed. 1; *United States v. Southern R. Co.*, 170 Fed. 1014; *United States v. Atchison, T. & S. F. R. Co.*, 167 Fed. 696; *United States v. Southern P. Co.*, 167 Fed. 699; *United States v. Chicago G. W. R. Co.*, 162 Fed. 775; *United States v. Philadelphia & R. R. Co.*, 160 Fed. 696; *United States v. Central of Ga. R. Co.*, 157 Fed. 893.

The Safety Appliance Act is violated where an employee, by reason of the inoperative condition of a coupler from the side of a car, is compelled to crawl under the car or over or under the couplers in order to reach the opposite side of the train to operate the lever of the adjacent car, since such defect compelled him to go between the ends of cars to uncouple or couple them. *Norfolk & W. R. Co. v. United States*, 101 C. C. A. 249, 177 Fed. 623.

There was a violation of the Safety Appliance Act where a locomotive engine

was used for one day with the coupling apparatus on the front end in such a condition that it could not be uncoupled, notwithstanding that it would couple automatically by impact and uncouplings could be made from the attached cars, since such law requires that the coupling devices on each car or engine must be complete and operative in themselves. *United States v. Philadelphia & R. R. Co.*, 223 Fed. 215.

The Safety Appliance Act requires cars to be equipped with uncoupling levers on each end thereof, by means of which such cars can be at all times uncoupled from other cars by a man standing at one end of the side of a car, and without the reasonable necessity of going between the cars, or without having to go around the ends of the train or to crawl under or over the cars in order to reach the uncoupling lever on the adjacent car. *United States v. Southern P. Co.*, 167 Fed. 699.

A compliance with the Safety Appliance Act is not shown where one end of a car was not provided with a coupler which permitted the car to be uncoupled without a man going between the ends of the cars, although if he were on the other side of the car he might have uncoupled it with the lever on the adjacent car. *United States v. Central of Ga. R. Co.*, 157 Fed. 893.

Where a coupler will couple by impact, but cannot be uncoupled without a man going between, over or under the cars, or around the end of the train in order to reach the appliance on the connecting car, the movement of such car violated the Safety Appliance Act. *United States v. Chicago, M. & St. P. R. Co.*, 149 Fed. 486.

Evidence that an engine was not equipped with uncoupling levers does not show a violation of the Safety Appliance Act in the absence of testimony that the engine would not couple automatically by impact, where it appeared that it could be uncoupled from the attached car from the side thereof without a man going between the tender and such car. *United States v. Montpelier & W. R. Co.*, 175 Fed. 874.

### Necessity for Adjustment by Hand.

If the coupling and uncoupling apparatus of a car is so constructed that in order to open the knuckle to prepare the coupler for use, or to uncouple the car, it is reasonably necessary for a man to place part of his body, or his arm or leg in a hazardous or dangerous position, the car is not equipped as required by the Safety Appliance Act. *United States v. Nevada C. N. G. R. Co.*, 167 Fed. 695.

### Broken Lift Chains.

When the chain connecting the lock pin

and the lift lever of a coupler had never been connected so that a car could be coupled and uncoupled without a man going between the ends of cars, the Safety Appliance Act was violated. *United States v. Great N. R. Co.*, 150 Fed. 229.

The Safety Appliance Act is violated by hauling in interstate commerce a car with a broken chain which renders the coupler inoperative from the side of a car. *United States v. Louisville & N. R. Co.*, 162 Fed. 185, affirmed 98 C. C. A. 664, 174 Fed. 1021.

#### **Load of Car Preventing Access to Lever.**

The Safety Appliance Act is violated where a carrier moves a flat car when its load of lumber projects over the uncoupling lever and renders the automatic coupler inoperative from the side of the car. *United States v. Illinois C. R. Co.*, 101 C. C. A. 15, 177 Fed. 801.

#### **C. Grabirons and Handholds.**

See also same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

##### **In General.**

Section 4 of the Safety Appliance Act requires secure grabirons or handholds at those points in the end of each car where they are necessary to afford to men coupling or uncoupling the same greater security than would be given them in the absence at that point of any grabiron, handhold or other appliance affording equal security. *United States v. Boston & M. R. Co.*, 168 Fed. 148.

The hauling of a car from the place where defects in its grabirons and handholds was discovered and where they might easily have been repaired, to a point several miles distant, violates the Safety Appliance Act. *United States v. Erie R. Co.*, 237 U. S. 402, 59 L. ed. 1019, 35 Sup. Ct. Rep. 621, reversing 129 C. C. A. 307, 212 Fed. 853, S. C. 116 C. C. A. 649, 197 Fed. 287.

##### **Substitutes.**

Air hose, steam hose, signal hose, uncoupling chains, break-staffs, etc., in the ends of passenger cars do not obviate the necessity for providing grabirons or handholds, as required by the Safety Appliance Act, on such cars. *United States v. Norfolk & W. R. Co.*, 184 Fed. 99.

The Safety Appliance Act is violated where there were no handholds in the side near the end of the tender of a switch engine used in interstate commerce, although it was equipped with a running board across the rear end and the uncoupling lever rod extended nearly across the end of the tender so as to serve as a handhold. *United States v. Baltimore & O. R. Co.*, 184 Fed. 94.

If at any place in the end of a car there is not a grabiron or handhold, properly speaking, but some other appliance, such as a ladder or brake lever, which affords equal security with a grabiron or handhold, the Safety Appliance Act is satisfied. *United States v. Boston & M. R. Co.*, 168 Fed. 148.

#### **D. Power Brakes.**

See also same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

Connection of power brakes in switching movements, see *infra*, VII, C.

Connection of power brakes on empty cars, see *infra* VI, C.

Connecting power brakes on cars moved solely for repairs, see *infra* VII, E.

Duty of belt line railway to connect power brakes, *infra* IV.

Moving cars with defective brakes to repair points, see *infra* VI, C.

##### **In General.**

To move a train containing interstate commerce with a locomotive having an air pump in inoperative condition so as to render the power brakes useless, violated the Safety Appliance Act. *United States v. Louisville & N. R. Co.*, 162 Fed. 185, affirmed 98 C. C. A. 664, 174 Fed. 1021.

A carrier is liable for a penalty under the Safety Appliance Act for moving a train without having the required percentage of air brakes connected. *United States v. Chicago G. W. R. Co.*, 162 Fed. 775.

Loaded cars coupled together and hauled a distance of two miles from Black Rock, N. Y., over a drawbridge spanning the Barge Canal and across the International Bridge over the Niagara river to Bridgeport, Canada, from whence the cars were destined to other points, although they were not moved under orders from the train dispatcher, constitute a train movement within the meaning of the requirements of the Safety Appliance Act as to the connection of the air brakes on cars. *United States v. Grand Trunk R. Co.*, 203 Fed. 775.

##### **What Percentage of Brakes Must Be Connected.**

When 75 per cent of the air brake cars of a train are associated together so that their brakes can be operated by the engineer, a violation of the Safety Appliance Act is not shown by the fact that 4 additional cars with air brakes cut out and inoperative because of defects, were associated with said 75 per cent. *United States v. Baltimore & O. R. Co.*, 176 Fed. 114, affirmed 107 C. C. A. 586, 185 Fed. 486.

**E. Hand Brakes.**

See also same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

**In General.**

The Federal Safety Appliance Act as amended makes it unlawful to require brakemen to use the hand brakes in the ordinary management and movement of an interstate freight train. *United States v. Great N. R. Co.*, 144 C. C. A. 209, 229 Fed. 927.

The duty imposed on carriers by the Safety Appliance Act to operate trains under the control of power brakes is mandatory and absolute and they cannot for any reason disregard such requirement and require trains to be controlled with hand brakes. *Virginian R. Co. v. United States*, 139 C. C. A. 278, 223 Fed. 748.

When trains of 100 cars could not be moved in safety at the necessary slow rate of speed on a descending grade over a defective piece of track by using the power brakes, and a carrier required such trains to be controlled exclusively by the hand brakes, there was a violation of the Safety Appliance Act, where trains of 50 or perhaps more cars would be moved in safety over such track under the control of the power brakes. *Virginian R. Co. v. United States*, 139 C. C. A. 278, 223 Fed. 748.

Evidence that the hand brakes were used on a train while descending a heavy grade does not show that the train was not equipped with power brakes as required by the Safety Appliance Act. *United States v. Baltimore & O. R. Co.*, 176 Fed. 114, affirmed 107 C. C. A. 586, 185 Fed. 486.

**Use of Hand Brakes in Addition to Power Brakes.**

The Safety Appliance Act, as amended, is violated where a carrier requires brakemen to use the hand brakes in controlling movements of an interstate freight train, although the air brakes on the required percentage of the cars of the train are connected and in service as required by law. *United States v. Great N. R. Co.*, 144 C. C. A. 209, 229 Fed. 927.

The Safety Appliance Act is not violated where a carrier requires the hand-brakes to be used on freight trains as a precautionary measure while they are descending a heavy mountain grade, when the power brakes of the required number of cars were connected and operative by the engineer. *United States v. Baltimore & O. R. Co.*, 176 Fed. 114, affirmed 107 C. C. A. 586, 185 Fed. 486.

**F. Height of Drawbars.**

See also same section, No. 2, Vol. I, Federal Ry. Digest.

**In General.**

A carrier violates the Safety Appliance Act by moving in a train a car with a drawbar which is of less than the standard height above the rails, whether the lowering was caused by the breaking of a king pin, the sagging of the drawbar from the frame, or the sagging of the entire frame itself. *Atchison, T. & S. F. R. Co. v. United States*, 117 C. C. A. 341, 198 Fed. 637.

The provisions of the Safety Appliance Act with respect to the standard height of drawbars are violated where, on account of the defective condition of the pilot beam of an engine, the drawbar fell below standard height and the engine was turned around and a train made up with the other end of the engine. *Chicago, M. & St. P. R. Co. v. United States*, 116 C. C. A. 444, 196 Fed. 882.

**IV. WHAT CARRIERS WITHIN ACT.**

See also same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

Movement of interstate and defective intrastate cars in same train, see *infra* VII A.

When movement of intrastate cars within Act, see *infra* VII. B.

**In General.**

The word "engaged," as used in the phrase "shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce," in the amendment of 1903 to the Safety Appliance Act, relates to such vehicles as are used in such commerce rather than to railroads so engaged, and in that sense the amendment is constitutional. *United States v. Erie R. Co.*, 166 Fed. 352.

**Ownership of Cars.**

The fact that a car which had a defective safety device belonged to a carrier other than the defendant is immaterial in an action for a violation of the Safety Appliance Act. *United States v. Chicago, G. W. R. Co.*, 162 Fed. 775.

**Liability of Delivering Carrier.**

A carrier that delivers one of its own cars to another carrier when one of the grabirons was missing therefrom, violated the Safety Appliance Act, where the delivering carrier did not discover the absence of such appliance, although it twice inspected the car before delivering it to the connecting carrier. *United States v. Louisville & N. R. Co.*, 156 Fed. 193.

**Intrastate Carriers.**

A common carrier which operates a railway entirely within a single state is

within the requirements of the Safety Appliance Act where it transports thereon articles of commerce shipped from other states to places within the state, although such shipments are free from any common control, management, or arrangement with other carriers for a continuous carriage or shipment thereof. *United States v. Colorado & N. W. R. Co.*, 85 C. A. A. 27, 157 Fed. 321, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893, certiorari denied 209 U. S. 544, 52 L. ed. 919, 28 Sup. Ct. Rep. 570.

A common carrier which operates a railroad entirely within a single state and transports thereon articles of commerce shipped in continuous passage from places without the state to stations on its road, or from stations on its road to points without the state, is subject to the provisions of the Safety Appliance Act, although it carries the property free from a common control, management or arrangement with other carriers for continuous carriages or shipments of the articles. *United States v. Colorado & N. W. R. Co.*, 85 C. C. A. 48, 157 Fed. 342.

A railway lying wholly within one state is within the Safety Appliance Act where it transports goods received from another carrier and which come from other states, although always transferred from the cars of the one carrier to those of the other, notwithstanding that the receiving carrier has no contractual relations with the original shipper nor any traffic agreement with the initial carrier. *Pacific C. R. Co. v. United States*, 98 C. C. A. 31, 173 Fed. 448.

The transportation by a common carrier by railroad of articles of interstate commerce for an independent express company is "engaging in interstate commerce by railroad," within the meaning of the Safety Appliance Act. *United States v. Colorado & N. W. R. Co.*, 85 C. C. A. 48, 157 Fed. 342.

An intrastate railway was not within the original Safety Appliance Act where it transported to destination on local bills of lading and for its local charges, interstate freight received from a connecting carrier, although the former assumed and paid the charges of the connecting carrier. *United States v. Geddes*, 65 C. C. A. 320, 131 Fed. 452, affirming 180 Fed. 480.

#### Connecting and Terminal Carriers.

The connecting carrier only violates the Safety Appliance Act by hauling a car with defective coupler from the point where it was delivered to it by a preceding carrier. *United States v. Chicago, P. & St. L. R. Co.*, 143 Fed. 353.

A railway company is under no ob-

ligation to receive from any other company cars having defective safety devices, and if it does so, it must know at its peril that each car is equipped with safety appliances in good condition as required by the Safety Appliance Act. *United States v. Southern P. Co.*, 167 Fed. 699.

A carrier violates the Safety Appliance Act by receiving from a connecting carrier and transporting two cars which are chained together. *United States v. Southern P. Co.*, 167 Fed. 699.

A terminal company is within the Safety Appliance Act in transferring from one carrier a car of coal coming from another state to the engines of a connecting carrier within the terminal yards. *United States v. Northern P. T. Co.*, 144 Fed. 861.

#### Belt Lines.

A belt line railway lying wholly within one city and connecting various trunk lines and industrial plants, over which cars are transported by the belt line company as agent for the various trunk lines, is within the requirements of the Safety Appliance Act with respect to the connection of the power brakes on cars of a train containing one car loaded with interstate traffic and moved between two trunk lines. *Belt R. Co. of Chicago v. United States*, 93 C. C. A. 666, 168 Fed. 542, 22 L. R. A. (N. S.) 582, certiorari denied 223 U. S. 743, 56 L. ed. 638, 32 Sup. Ct. Rep. 532.

#### Stockyards Companies.

A stockyards company which with its own engines and employees transfers over its own tracks for connecting carriers cars engaged in interstate commerce, is within the Safety Appliance Act, although its compensation is paid by such carriers and not by the shippers or consignees. *Union Stockyards Co. v. United States*, 94 C. C. A. 626, 169 Fed. 404, affirming 161 Fed. 919.

#### Electric Railways.

An interstate electric interurban railway is within the requirements of the Safety Appliance Act with respect to automatic couplers. *Spokane & I. E. R. Co. v. United States*, 241 U. S. 344, 60 L. ed. 1037, 36 Sup. Ct. Rep. 668, affirming 127 C. C. A. 61, 210 Fed. 243, L. R. A. 1917 A. 558.

#### Cars Moved by Licensee.

A railway company is answerable for a penalty under the Safety Appliance Act where a car with defective handholds or grabirons is moved in one of its interstate trains with its own engine and employees, but over the road of another company under a traffic agreement, although the train was subject to the rules and regulations of the latter carrier and was inspected by its servants. *Philadel-*

phia & R. R. Co. v. United States, 111 C. C. A. 661, 191 Fed. 1.

An interstate railway company is liable for a penalty under the Safety Appliance Act when, under a contract, a lumber company, with its own engines and employees and under its own control except as to the time of movement, ran logging trains over a portion of the carrier's road with some of the cars failing to comply with such statute. *United States v. Northwestern P. R. Co.*, 235 Fed. 965.

#### V. WHAT EMPLOYEES WITHIN ACT.

See also same section, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

#### Employee Connecting or Disconnecting Air Hose.

In connecting or disconnecting the air hose between cars a man is engaged in coupling or uncoupling cars within the meaning of the Safety Appliance Act with respect to grabirons and handholds. *United States v. Boston & M. R. Co.*, 168 Fed. 148.

#### VI. WHAT CARS AND VEHICLES WITHIN ACT.

See also same sections, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

##### A. In General.

#### What Cars Within Act in General.

The Safety Appliance Act, as amended, applies to all cars and trains operated by a carrier of interstate commerce over an interstate railway, irrespective of whether the defective cars are engaged in interstate commerce only. *United States v. International & G. N. R. Co.*, 98 C. C. A. 392, 174 Fed. 638; *Wabash R. Co. v. United States*, 93 C. C. A. 393, 168 Fed. 1; *United States v. Wheeling & L. E. R. Co.*, 167 Fed. 198; *United States v. Erie R. Co.*, 168 Fed. 352.

#### What Constitutes a Train.

The word "train" is used in the Safety Appliance Act in its ordinary and not its technical sense, and means a locomotive and one or more cars coupled together and run upon a railway. *United States v. Grand Trunk R. Co.*, 203 Fed. 775.

The words "any train," as used in the Safety Appliance Act, include all trains having cars coupled together and a locomotive drawing them, irrespective of whether a caboose is attached or markers displayed. *United States v. Grand Trunk R. Co.*, 203 Fed. 775.

A "train," within the meaning of the Safety Appliance Act, is one aggregation of cars drawn by the same engine, and if the engine is changed there is a different train. *United States v. Boston & M. R. Co.*, 168 Fed. 148.

##### B. Locomotives.

#### In General.

A locomotive engine is a "car" within the meaning of the Safety Appliance Act. *United States v. Philadelphia & R. R. Co.*, 223 Fed. 215.

A locomotive is included within the term "freight cars" as used in the Safety Appliance Act with reference to the standard height of drawbars. *Chicago, M. & St. P. R. Co. v. United States*, 116 C. C. A. 444, 196 Fed. 882.

##### C. Cars in General.

#### Passenger Cars.

Passenger cars are within the requirements of the Safety Appliance Act with respect to grabirons or handholds in the ends and sides of cars. *United States v. Norfolk & W. R. Co.*, 184 Fed. 99; *Norfolk & W. R. Co. v. United States*, 101 C. C. A. 249, 177 Fed. 623.

#### Empty Cars.

An empty car is within the requirements of the Safety Appliance Act when moved in a train with other cars which carry interstate traffic. *United States v. Southern R. Co.*, 170 Fed. 1014; *United States v. Wheeling & L. E. R. Co.*, 167 Fed. 198.

The hauling in a train containing interstate traffic of an empty car regularly used in movement of such traffic, violates the Safety Appliance Act when the coupling apparatus of such car is inoperative from the side thereof. *United States v. Louisville & N. R. Co.*, 162 Fed. 185, affirmed 98 C. C. A. 664, 174 Fed. 1021.

The Safety Appliance Act is violated when an empty car with defective coupler was hauled in a train containing a car loaded with interstate shipment, although the train was being moved through or around the city to which the interstate shipment was consigned, since such shipment had not yet reached its final destination. *United States v. Western & A. R. Co.*, 184 Fed. 336.

Empty cars are within the Safety Appliance Act as amended March 2, 1903, when customarily and generally employed in hauling interstate traffic on a highway of interstate commerce. *Wabash R. Co. v. United States*, 93 C. C. A. 393, 168 Fed. 1.

The Safety Appliance Act is violated by the hauling of an empty car with defective coupler in a train containing a

car loaded with interstate traffic, although not immediately connected with the defective car. *United States v. Western & A. R. Co.*, 184 Fed. 336.

A train of empty cars is not within the terms of the Safety Appliance Act with respect to the connection of the air brakes, when moved by a switch engine from one yard to another in a city railway yard system 6 miles long, although the train was moved a portion of the way over a highway on which interstate traffic was customarily transported. *United States v. New York C. & H. R. R. Co.*, 205 Fed. 428.

The original Safety Appliance Act was not violated by the hauling in an interstate train of an empty car having defective safety devices, where it does not appear that such car was used or intended to be used in moving interstate traffic. *United States v. Illinois C. R. Co.*, 156 Fed. 182, affirmed 95 C. C. A. 642, 170 Fed. 556, and 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612.

#### Logging Cars.

Standard 8-wheel flat cars exceeding 25 inches in height from the top of the rail to the center of the couplings, although equipped specially for holding logs, are not within the exception of the Safety Appliance Act relating to logging cars. *United States v. Northwestern P. R. Co.*, 235 Fed. 965.

#### D. Street and Interurban Cars.

##### In General.

Passenger cars ordinarily run on a city street car system only are within the requirements of the Safety Appliance Act with respect to automatic couplers where, although moved on the city tracks for a mile and a quarter, they were operated in trains on an interstate interurban electric line. *Spokane & I. E. R. Co. v. United States*, 241 U. S. 344, 60 L. ed. 1037, 36 Sup. Ct. Rep. 668, affirming 127 C. C. A. 61, 210 Fed. 243, L. R. A. 1917A. 558.

Passenger cars ordinarily operated exclusively on the city tracks of a street railway are within the requirements of the Safety Appliance Act with respect to grabirons and handholds, where such cars, although moved for a mile and a quarter on the city lines, were then run in a train on an interstate interurban electric line. *Spokane & I. E. R. Co. v. United States*, 241 U. S. 344, 60 L. ed. 1037, 36 Sup. Ct. Rep. 668, affirming 127 C. C. A. 61, 210 Fed. 243, L. R. A. 1917A. 558.

Street cars which are ordinarily run only on a city street railway system, are not within the exception of the Safety Appliance Act, as amended, as cars "used upon street railways," where such cars

although moved over the city tracks for a mile and a quarter, were run in trains on an interstate interurban electric line. *Spokane & I. E. R. Co. v. United States*, 241 U. S. 344, 60 L. ed. 1037, 36 Sup. Ct. Rep. 668, affirming 127 C. C. A. 61, 210 Fed. 243, L. R. A. 1917A. 558.

The fact that the equipping with grabirons and handholds of street cars, operated on an interstate interurban electric railway line, would interfere with the necessary lateral motion of the radial couplers, and that cars not equipped with such safety devices were operated on one day only when traffic was unusually heavy, does not excuse the violation of the Safety Appliance Act. *Spokane & I. E. R. Co. v. United States*, 241 U. S. 344, 60 L. ed. 1037, 36 Sup. Ct. Rep. 668, affirming 127 C. C. A. 61, 210 Fed. 243, L. R. A. 1917A. 558.

The fact that street cars could not be equipped with automatic couplers, and that they were used in trains on an interstate interurban electric line on one day only when there was an unusually heavy traffic, does not excuse the violation of the Safety Appliance Act. *Spokane & I. E. R. Co. v. United States*, 241 U. S. 344, 60 L. ed. 1037, 36 Sup. Ct. Rep. 668, affirming 127 C. C. A. 61, 210 Fed. 243, L. R. A. 1917A. 558.

#### VII. WHAT MOVEMENTS OF CARS WITHIN ACT.

See also same sections Nos. 2 and 3, Vol. 1, Federal Ry. Digest.

##### A. In General.

##### What Movements Within Act in General.

The purpose of the amendment of 1903 to the original Safety Appliance Act was to broaden its scope so as to include cars used by an interstate carrier on any part of its line. *United States v. Chicago, M. & St. P. R. Co.*, 149 Fed. 486.

The construction of the language of the Safety Appliance Act with respect to what constitutes interstate commerce is not controlled by the language, or the interpretation of the terms of the Act Regulating Commerce. *United States v. Colorado & N. W. R. Co.*, 85 C. C. A. 27, 157 Fed. 321, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893, certiorari denied 209 U. S. 544, 52 L. ed. 919, 28 Sup. Ct. Rep. 570; *Pacific C. R. Co. v. United States*, 98 C. C. A. 31, 173 Fed. 448.

The test of the application of the Safety Appliance Act, as amended, which makes the act applicable to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in inter-



state commerce, is the employment of the vehicles on a railroad which is a highway of interstate commerce, and not the use of such vehicles in moving interstate traffic. *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822, affirming 164 Fed. 347.

The amendment of March 2, 1903, to the Safety Appliance Act applies to all cars and trains operated by a railway carrier of interstate commerce over an interstate highway, irrespective of whether operated between points in the same state. *Wabash R. Co. v. United States*, 93 C. C. A. 393, 168 Fed. 1.

It is the use of a car in a defective condition that the Safety Appliance Act seeks to prevent, and not the length of the haul. *United States v. Southern P. Co.*, 167 Fed. 699.

The hauling within a state, on an interstate railway, of a car with defective couplers, violates the Safety Appliance Act as amended in 1903. *United States v. Great N. R. Co.*, 145 Fed. 438.

A carrier is engaged in interstate commerce within the meaning of the Safety Appliance Act prior to the amendment of 1903, when it moved a car containing interstate traffic, although it did not haul the car across the state line. *United States v. Central of Ga. R. Co.*, 157 Fed. 893.

The hauling or using by an interstate carrier of any cars, tenders, locomotives or other rolling stock in carrying interstate commerce, which are not equipped with the required safety devices, or which are not in a state of repair so that they are operative, is a violation of the Safety Appliance Act. *United States v. Southern R. Co.*, 170 Fed. 1014.

The use, upon the tracks of a railway engaged in interstate commerce and in connection therewith, either in switching movements or in actual road service, of a car having an inoperative automatic coupler is a violation of the Safety Appliance Act. *United States v. Pere Marquette R. Co.*, 211 Fed. 220.

#### Cars With "Bad Order" Cards.

By placing a bad order card on a car having a defective coupler a carrier does not escape liability under the Safety Appliance Act where the car in such condition is moved in interstate commerce. *United States v. Chicago R. I. & P. R. Co.*, 173 Fed. 684.

The Safety Appliance Act is violated when a carrier places a M. C. B. bad order card on a car which has defective couplers, and then moves and delivers such car to a connecting carrier. *United States v. Southern R. Co.*, 135 Fed. 122.

#### B. Cars Moving Intrastate Traffic.

##### In General.

When moved on a railway which is a highway of interstate commerce, cars containing intrastate traffic are within the Safety Appliance Act as amended, extending the provisions thereof to all vehicles used on a railway which is engaged in such commerce. *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822, affirming 164 Fed. 347.

The provisions of the Safety Appliance Act, as amended, apply only to cars when moved by carriers engaged in interstate commerce and not to cars moved in intrastate traffic. *Louisville & N. R. Co. v. United States*, 108 C. C. A. 326, 186 Fed. 280.

The Safety Appliance Act, as amended, is violated by the movement within a state on an interstate railway of a car which contains intrastate traffic, when such car has a defective coupler. *United States v. Great N. R. Co.*, 145 Fed. 438.

##### In Trains Containing Interstate Traffic.

A car set apart exclusively for carrying intrastate traffic but not confined to movement in intrastate trains on an intrastate line, is within the requirements of the Safety Appliance Act when, while laden with intrastate traffic, it is hauled in connection with interstate cars on an interstate line. *Elgin, J. & E. R. Co. v. United States*, 93 C. C. A. 393, 168 Fed. 1.

The Safety Appliance Act, as amended in 1903, is violated by the movement entirely within one state on an interstate railway by a locomotive having defective couplers, of a car containing interstate freight. *United States v. Great N. R. Co.*, 145 Fed. 438.

The Safety Appliance Act applies to a car containing intrastate traffic when moved in any part of a train containing a car moving interstate traffic, although not directly connected thereto. *Norfolk & W. R. Co. v. United States*, 101 C. C. A. 349, 177 Fed. 623; *Louisville & N. R. Co. v. United States*, 108 C. C. A. 326, 186 Fed. 280; *Contra United States v. Illinois C. R. Co.*, 166 Fed. 997.

When cars engaged in both interstate and intrastate commerce are mixed in the same train all of them are subject to the requirements of the Safety Appliance Act. *United States v. Erie R. Co.*, 166 Fed. 352.

The Safety Appliance Act is violated if a carrier hauls a defective car, although it does not contain interstate traffic, in a train which contains another car that is loaded with such traffic. *United States v. Baltimore & O. R. Co.*, 170 Fed. 456.

The fact that a car with a defective

coupler was hauled wholly within one state does not excuse a violation of the Safety Appliance Act, where in the train there were other cars moving interstate traffic. *United States v. Great W. R. Co.*, 162 Fed. 775.

The Safety Appliance Act is not violated when a local car with defective grabirons is moved in a different part of an intrastate train than a car containing interstate traffic. *United States v. Illinois C. R. Co.*, 166 Fed. 997; *Contra Norfolk & W. R. Co. v. United States*, 101 C. C. A. 249, 177 Fed. 623; *Louisville & N. R. Co. v. United States*, 166 Fed. 997.

### C. Switching and Making Up Trains.

#### Switching in General.

It is not a violation of the Safety Appliance Act to move cars with defective couplers in switching operations. *Chicago, B. & Q. R. Co. v. United States*, 127 C. C. A. 438, 211 Fed. 12, reversed on other grounds 237 U. S. 410, 59 L. ed. 1023, 35 Sup. Ct. Rep. 634.

The Safety Appliance Act does not require the connection of the air brakes on cars while being switched about in railway yards. *United States v. Erie R. Co.*, 129 C. C. A. 307, 212 Fed. 853, reversed on other grounds 237 U. S. 402, 59 L. ed. 1019, 35 Sup. Ct. Rep. 621; *contra United States v. Atlantic C. L. R. Co.*, 214 Fed. 498.

The moving of a car having a defective coupler from a repair track to an interchange track or vice versa, and otherwise about a congested railway yard, in order to move good order cars, previously to the amendment of 1910 violated the Safety Appliance Act. *United States v. Southern P. Co.*, 94 C. C. A., 629, 169 Fed. 407.

If a carrier receives from a connecting carrier and hauls but a few blocks to destination, a car having a defective coupler, it violates the Safety Appliance Act. *United States v. Chicago M. & St. P. Co.*, 149 Fed. 486.

When a loaded car, which came from another state, was delivered on an exchange track a few blocks from its ultimate destination and was moved by another carrier by a switch engine with other cars from such track and when the inoperative condition of a coupler of such car was discovered it was replaced on such track, the Safety Appliance Act was violated, where the car was not inspected and it could not be inferred that the coupler became defective at the time its condition was discovered. *Chicago, M. & St. P. R. Co. v. United States*, 91 C. C. A. 373, 165 Fed. 423, 20 L. R. A. (N. S.) 473.

#### Moving Cars for Unloading.

There is a violation of the Safety Appliance Act by the movement of a loaded freight car having a defective coupling device, from a railway yard to the place of unloading, since the movement was in a commercial service, and the violation of the act was not excused because of the carrier's ignorance of the condition of such apparatus. *Chesapeake & O. R. Co. v. United States*, 141 C. C. A. 439, 226 Fed. 683.

Where, on discovering a defective coupler on a car which was standing on a busy track at a point where repairs could not be made without blocking business at an important point of connection with other lines, a carrier moved the car for unloading to the consignee's track four blocks away and afterwards moved the car to a repair track further away, the Safety Appliance Act was not violated. *United States v. Louisville & N. R. Co.*, 156 Fed. 195, affirmed on other grounds 93 C. C. A. 58, 167 Fed. 306.

Moving a car a short distance for unloading after discovering that the lever chain of the coupler was broken, and thence to a repair shop a mile and a half distant, violates the Safety Appliance Act, since the defect was one which might have been remedied at the place where it was discovered. *United States v. Southern P. Co.*, 154 Fed. 897.

#### Moving Cars Between Different Yards.

Three railway yards of an interstate carrier, lying from 2 to 3½ miles apart and not so linked together that cars could be moved between them with the freedom that is usual and essential in intrayard movements, but which were connected by double tracks over a portion of which 15 regular freight trains were operated daily and which crossed at grade other tracks that were used daily by 35 passenger trains, cannot be regarded as a single yard, and trains of freight cars, although without cabooses and having flags and signals of their own and not moved on a regular schedule, cannot be transferred from one yard to another without having the percentage of the air brakes connected as required by the Safety Appliance Act. *United States v. Erie R. Co.*, 237 U. S. 402, 59 L. ed. 1019, 35 Sup. Ct. Rep. 621, reversing 129 C. C. A. 307, 212 Fed. 853 S. C. 116 C. C. A. 649, 197 Fed. 287.

Freight cars moved in trains without cabooses or markers and run without regular schedules or orders, are within the requirements of the Safety Appliance Act with respect to the connection of air brakes, where they were moved to and from yards of an interstate carrier situated on each side of the Missouri River, over tracks which were used by other

interstate passenger and freight trains, and which crossed 12 or 15 tracks of other carriers on which freight and passenger trains were operated. *United States v. Chicago, B. & Q. R. Co.*, 237 U. S. 410, 59 L. ed. 1023, 35 Sup. Ct. Rep. 634; reversing 127 C. C. A. 438, 211 Fed. 12.

The hauling of a "drag" of freight cars from one yard to another within a city, is within the requirements of the Safety Appliance Act and the orders of the Interstate Commerce Commission with respect to the connection of air brakes. *Chesapeake & O. R. Co. v. United States*, 141 C. C. A. 439, 226 Fed. 683.

Interstate cars are within the requirements of the Safety Appliance Act with respect to the connection of the air brakes, when such cars are moved in trains by switching crews from outer yards into the City of Chicago for 8 miles over switch tracks, leads, maintracks, 3 railroads and a drawbridge, at the rate of 6 to 8 miles an hour. *Atchison, T. & S. F. R. Co. v. United States*, 117 C. C. A. 341, 198 Fed. 637.

The movement of a string of freight cars over a track used for the passage of interstate trains, from the yard of one railway to that of another company several city blocks distant, is not a mere switching operation but is a train movement within the requirements of the Safety Appliance Act as to the connection of the train brakes. *United States v. Louisville & J. B. Co.*, 236 Fed. 1001.

The movement by a switch engine of a string of 17 freight cars, in a busy city between a freight yard and a freight house yard 2 miles distant, over the main track of an interstate railway on which both passenger and freight trains were operated, and which crossed 5 city streets and 1 street car line, is not a switching operation but is a train movement within the requirements of the Safety Appliance Act with respect to the connection of the air brakes. *United States v. Pere Marquette R. Co.*, 211 Fed. 220.

The Safety Appliance Act is violated by the moving from one yard to another and back again of a car after the discovery of a broken lift lever chain, a defect which might have been easily and quickly repaired at the place where it was first discovered. *United States v. Chesapeake & O. R. Co.*, 130 C. C. A. 262, 213 Fed. 748.

A car is moved in interstate commerce, within the meaning of the Safety Appliance Act, where a connecting carrier accepts and moves the car from one yard to another in the same city in order to place it in a train for movement towards its interstate destination. *United States v. Pittsburgh, C. C. & St. L. R. Co.*, 143 Fed. 360.

The Safety Appliance Act is violated where a car with a defective coupler is moved by a switch engine in a string of 17 cars between a railway yard and a freight depot yard 2 miles away, over the main track of an interstate railway on which regular freight and passenger trains are operated and which crosses 3 city streets and 1 street car line. *United States v. Pere Marquette R. Co.*, 211 Fed. 220.

#### D. Work Trains.

##### In General.

The movement from one state to another in a construction train containing rails, of a car having a defective coupler, violates the Safety Appliance Act. *United States v. Chicago, M. & St. P. R. Co.*, 149 Fed. 486.

#### E. Moving Cars for Repairs.

Duty of carrier with respect to making repairs, see *supra* III A.

##### Hauling Cars to Nearest Repair Point.

##### — In General.

Hauling in an interstate freight train 2 empty cars chained together in the absence of couplers, violates the Safety Appliance Act, although such cars were bound to a shop for repairs. *United States v. St. Louis, I. M. & S. R. Co.*, 154 Fed. 516.

The movement of a defective car from a track in a railway yard to a repair track does not violate the Safety Appliance Act. *United States v. Rio Grande W. R. Co.*, 98 C. C. A. 293, 174 Fed. 399.

The proviso of section 4 of the Safety Appliance Act as amended, relative to the hauling of cars when their safety devices become defective while on use on a line of railroad, to the nearest available repair point, does not operate retrospectively; and it is inapplicable to offenses committed before its passage. *United States v. Colorado M. R. Co.*, 121 C. C. A. 194, 202 Fed. 732.

Prior to the amendment of 1910 the movement in interstate commerce in connection with other cars, of a car having defective couplers, although in order to obtain repairs violated the Safety Appliance Act. *United States v. Southern P. Co.*, 94 C. C. A. 629, 169 Fed. 407.

The movement across a river dividing two states of a car by itself in order to repair a defective handhold does not violate the Safety Appliance Act. *Chicago & N. W. R. Co. v. United States*, 93 C. C. A., 450, 168 Fed. 236, 21 L. R. A. (N. S.) 690, reversing 157 Fed. 616.

The hauling from one state to another to a repair shop of an empty car which,

because of the loss of an automatic coupler, was chained to another car in a train, violates the Safety Appliance Act. *Chicago, M. & St. P. R. Co. v. United States*, 91 C. C. A. 373, 165 Fed. 423, 20 L. R. A. (N. S.) 473.

A carrier may, under the proviso of the Safety Appliance Act as amended, move to the nearest repair point cars that are properly equipped as required by such law, when such equipment becomes defective or insecure while the cars are in use on a line of railway, although the cars are not equipped with all of the safety devices required by such amendment but with respect to which the time for compliance with the act has been extended by the Interstate Commerce Commission. *United States v. Pennsylvania R. Co.*, 237 Fed. 471.

The amendment of 1910 to the Safety Appliance Act declaring that when the safety appliances of cars become defective or insecure while being used on a line of railroad, they may be hauled from the place where defects are first discovered to the nearest available repair point, does not limit such movements to the main line of a road to the exclusion of sidings and yard tracks. *United States v. Chesapeake & O. R. Co.*, 130 C. C. A. 262, 213 Fed. 748.

Before a carrier can demand immunity under the Safety Appliance Act as amended, permitting the movement of cars with defective safety devices to the nearest available place of repairs, it must bring itself clearly within such proviso. *United States v. Trinity & B. V. R. Co.*, 128 C. C. A. 120, 211 Fed. 448.

In order to avail itself of the benefit of the provision of the Safety Appliance Act as to the movement of bad order cars to repair points, the burden is on a carrier to bring itself strictly within the letter and reason of the law. *United States v. Pennsylvania R. Co.*, 237 Fed. 471.

#### — Necessity for Taking to Repair Point.

In order to permit a carrier to move a car with a defective coupler to the nearest available repair point the defect must be one that cannot be remedied at the place where it was discovered, and such as to require the taking of the car to such point for repair purposes only. *Chicago, B. & Q. R. Co. v. United States*, 127 C. C. A. 438, 211 Fed. 12, reversed on other grounds 237 U. S. 410, 59 L. ed. 1023, 35 Sup. Ct. Rep. 634.

If the requisite means for repairing defective safety appliances are not at hand a carrier may haul a defective car to the nearest regular repair point without incurring the prescribed penalty. *United States v. Atchison, T. & S. F. R. Co.*, 167

Fed. 696; *United States v. Southern P. Co.*, 167 Fed. 699; *United States v. Chicago, G. W. R. Co.*, 162 Fed. 775.

The provisions of section 4 of the Safety Appliance Act, as amended April 14, 1910, permitting a car to be hauled to the nearest available repair point from the place where a defect in its safety devices was first discovered, permit the removal of a car when the required repairs can be made only at the repair point, but does not permit such removal merely for the convenience of the carrier. *United States v. Atchison, T. & S. F. R. Co.*, 220 Fed. 215.

When air brakes become defective during the run of a train so as to reduce the percentage of cars below that required by the Safety Appliance Act, it is the duty of the carrier to immediately make the necessary repairs as soon as the defect is discovered or might have been discovered by the exercise of reasonable diligence, if it can be done with the means and appliance at hand, otherwise the cars may be moved to the nearest repair point. *United States v. Chicago G. W. R. Co.*, 162 Fed. 775.

Where an engine and train were in perfect condition with respect to safety appliances and air brakes when it left a terminal, and en route the air pump on the engine suddenly broke and rendered the train brakes system inoperative, and there were no facilities at hand to make the necessary repairs, the amendment of 1910 to the Safety Appliance Act permitted the train to be run under the hand brakes to the nearest repair point. *Galveston, H. & S. A. R. Co. v. United States*, 118 C. C. A. 339, 199 Fed. 891.

#### — Defects Which May Be Repaired Any-Where.

The amendment of 1910 to the Safety Appliance Act permitting the hauling of cars from the place where defects or insecurities in their safety devices are first discovered, to the nearest available place of repair, applies to such repairs as can be made only at repair shops, and does not permit such movement of cars where the defects are such as can be easily and quickly repaired at the place of discovery. *United States v. Chesapeake & O. R. Co.*, 130 C. C. A. 262, 213 Fed. 748.

The fact that a car had other defects which could be repaired only at a repair shop does not excuse the violation of the Safety Appliance Act by hauling the car to a shop with its couplers in an inoperative condition in consequence of slight defect which could have been easily remedied at the place where the defect was first discovered. *United States v. Southern P. Co.*, 154 Fed. 897.

The provisions of section 4 of the Safety Appliance Act as amended April 14, 1910, permitting cars to be hauled to the nearest available repair point from the place where defects in their safety devices are first discovered, does not permit the removal from a transfer track to a repair track about a mile away, of a car which has lost the clevis connecting the lever to a coupler, since it was a defect which could have been repaired without moving the car. *United States v. Atchison, T. & S. F. R. Co.*, 220 Fed. 215.

#### — Moving Cars From One Repair Point to Another.

The provisions of the Safety Appliance Act which permit the movement of cars when in use of the line of a railway from the place where defects in safety appliances are first discovered to the nearest available repair point, does not permit, in consequence of an undue congestion of work and an insufficient number of employees, the movement of empty bad order cars without having the required percentage of air brakes connected, from one repair point to another repair point 60 miles distant; nor is such movement permissible as a movement by themselves of empty cars not in use in interstate traffic within the meaning of the Federal law. *United States v. Pennsylvania R. Co.*, 237 Fed. 471.

Where an interstate carrier hauls cars which were considerably damaged by derailment, so that the coupling devices were gone, 379 miles past three or more places where repairing is done, in order to make the repairs at larger and better equipped shops, the Safety Appliance Act is violated. *United States v. Chicago, M. & St. P. R. Co.*, 149 Fed. 486.

#### — Moving Cars for Repairs in Revenue Train.

In order to permit a car with defective safety devices to be hauled to the nearest repair point in a train in commercial use, a carrier must show that the car was properly equipped when the train started on its journey, that the movement of the car in such train was necessary to repair the defects, and that repairs could be made only at such repair point. *United States v. Trinity & B. V. R. Co.*, 128 C. C. 120, 211 Fed. 448.

The hauling of a car having defective couplers, by attaching it with a chain to other cars in commercial use, to a place where repairs could be made, violates the Safety Appliance Act, where the defective car did not contain live stock or perishable freight. *United States v. Erie R. Co.*, 237 U. S. 402, 59 L. ed. 1019, 35 Sup. Ct. Rep. 621, reversing 129 C. C. A. 307, 212 Fed. 853, 5 S. C. 116 C. C. A. 649, 197 Fed. 287.

#### — Failure to Connect Power Brakes.

An interstate railway company that moves to a repair point a train of empty bad order cars with some of them chained together, without coupling the air brakes on 85 per cent of the cars, violates the Safety Appliance Act, where it does not appear that it was not reasonably possible before the cars were moved to make temporary or permanent repairs to the draw-bars so that the air might be coupled between them. *United States v. Pennsylvania R. Co.*, 237 Fed. 471.

### VIII. LIABILITY FOR PERSONAL INJURIES.

Actions for personal injuries see section 7, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

#### Assumed Risk.

The question of assumed risk is eliminated from an action under the Federal Employers' Liability Act, where an employee's injuries are due to the failure of a carrier to comply with the Safety Appliance Act. *Wagner v. Chicago, R. I. & P. R. Co.*, 200 Ill. App. 305, affirmed 277 Ill. 114, 115 N. E. 201; *Chicago, R. I. & G. R. Co. v. De Bord*, — Tex. —, 192 S. W. 767, reversing — Tex. Civ. App. —, 146 S. W. 667.

### IX. ACTIONS FOR PERSONAL INJURIES.

See section VIII, Nos. 2 and 3, Vol. I, Federal Ry. Digest.

Pleading in action under Federal Employers' Liability Act, when based on breach of Safety Appliance Act, see Employers' Liability Act, XVI.

### X. ACTIONS FOR PENALTIES.

#### A. In General.

#### Jurisdiction of Courts.

The special terms of the supreme court of the District of Columbia has jurisdiction of an action for the recovery of the statutory penalty for a violation of the Safety Appliance Act. *United States v. Baltimore & O. R. Co.*, 26 App. D. C. 581.

#### Joint Liability.

A judgment for violating the Safety Appliance Act may be rendered against one or more carriers in a joint action against them. *United States v. Chicago, P. & St. L. R. Co.*, 143 Fed. 353.

### Penalties When More Than One Defective Car Moved in Same Train.

The penalty prescribed by the Safety Appliance Act applies to every defective car hauled contrary to the provisions of the statute, whether moved separately or in a train together, and irrespective of the distance moved. *United States v. Southern P. Co.*, 167 Fed. 699.

When several cars each without the requisite safety appliances are hauled by a carrier at one and the same time, there are several distinct violations of the Safety Appliance Act for each and every of which the prescribed penalty is due and recoverable. *St. Louis S. W. R. Co. v. United States*, 106 C. C. A. 136, 183 Fed. 770.

There are three separate violations of the Safety Appliance Act for which three penalties may be imposed where a car not equipped with automatic couplers, a car with missing grabirons or handholds, and a caboose with defective automatic couplers, are hauled in the same train. *United States v. St. Louis S. W. R. Co.*, 106 C. C. A. 230, 184 Fed. 28.

### Penalties for Several Movements of Same Car.

Where a car is not properly provided with grabirons on a given day, and the train in which the car is moving stops and then goes on again the next day, there is but one violation of the Safety Appliance Act. *United States v. Boston & M. R. Co.*, 168 Fed. 148.

### Penalty for Failure to Connect Air Brakes.

There is but one violation of the Safety Appliance Act where a train regularly scheduled between interstate points is moved without the required percentage of cars being equipped with air brakes, although engines were changed during the trip and cars were set out and others taken into the train. *United States v. Chicago, G. W. R. Co.*, 162 Fed. 775.

### B. Nature of Action.

#### In General.

An action against a carrier for the recovery of a penalty for violating the Federal Safety Appliance Act, is a civil and not a criminal proceeding. *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612, affirming 95 C. C. A. 642, 170 Fed. 556, which affirmed 156 Fed. 180; *United States v. St. Louis S. W. R. Co.*, 106 C. C. A. 230, 184 Fed. 28; *United States v. Atlantic C. L. R. Co.*, 182 Fed. 284; *United States v. Oregon S. L. R. Co.*, 180 Fed. 483; *United States v. Baltimore & O. R. Co.*, 176 Fed. 114, affirmed 107 C. C. A. 586, 185 Fed. 486; *United States v. Chicago,*

*R. I. & P. R. Co.*, 173 Fed. 684; *United States v. Baltimore & O. R. Co.*, 170 Fed. 456; *United States v. Illinois C. R. Co.*, 95 C. C. A. 628, 170 Fed. 542, certiorari denied 214 U. S. 520, 53 L. ed. 1066, 29 Sup. Ct. Rep. 701; *United States v. Southern R. Co.*, 170 Fed. 1014; *United States v. Louisville & N. R. Co.*, 162 Fed. 185, affirmed 98 C. C. A. 654, 174 Fed. 1021; *United States v. Chicago G. W. R. Co.*, 162 Fed. 775; *United States v. Philadelphia & R. R. Co.*, 160 Fed. 696.

An action for the recovery of the penalty prescribed by the Federal Safety Appliance Act is of a civil nature, and such act is not to be construed by the rules governing criminal statutes. *United States v. Great N. R. Co.*, 144 C. C. A. 209, 229 Fed. 927.

A suit for the penalty prescribed by the Safety Appliance Act is a civil action for debt and not a criminal prosecution. *Atlantic C. L. R. Co. v. United States*, 94 C. C. A. 35, 168 Fed. 175, affirming 153 Fed. 918.

Actions to recover the penalty prescribed by the Safety Appliance Act are so far civil in their nature that the strict construction applicable to criminal procedure is not required. *St. Louis S. W. R. Co. v. United States*, 106 C. C. A. 136, 183 Fed. 770.

The Safety Appliance Act is a criminal law and all violations of its provisions are in the broad sense crimes or misdemeanors, notwithstanding that the prescribed penalties are recoverable in an action at law. *United States v. Illinois C. R. Co.*, 156 Fed. 182; *Atchison, T. & S. F. R. Co. v. United States*, 96 C. C. A. 646, 172 Fed. 194, 27 L. R. A. (N. S.) 756.

### C. Pleadings.

#### Complaint or Declaration.

##### —Sufficiency in General.

The complaint in an action by the government for a violation of the Safety Appliance Act need not allege that the defendant acted knowingly and negligently in the premises as it is sufficient if each count or cause of action sets forth the alleged dereliction of the defendant in the language of the statute, and in addition specifically avers the time and place, the car, and the particular part of the car where the defect existed, as well as the nature of the defect. *United States v. Oregon S. L. R. Co.*, 180 Fed. 483.

A complaint in an action for the violation of the Safety Appliance Act is not demurrable because, although it shows an actual and substantial hauling in interstate traffic of a car having a defective coupler, it fails to specify how far the hauling was continued, and is silent in respect to any actual use of the defective

coupler. *United States v. Denver & R. G. R. Co.*, 90 C. C. A. 329, 163 Fed. 519.

A complaint for violating the Safety Appliance Act is sufficient where the offense is alleged to have occurred on or about a particular date. *Atlantic C. L. R. Co. v. United States*, 94 C. C. A. 35, 168 Fed. 175, affirming 153 Fed. 918.

That a car was moved in interstate commerce held sufficiently shown by a declaration in an action by the government for the violation of the Safety Appliance Act. *Louisville & N. R. Co. v. United States*, 108 C. C. A. 326, 186 Fed. 280.

A complaint in an action for the violation of the Safety Appliance Act is not demurrable because it shows that one of the couplers only of a car was out of repair and inoperative because the uncoupling chain was kinked. *United States v. Denver & R. G. R. Co.*, 90 C. C. A. 329, 163 Fed. 519.

#### — Want of Care or Diligence.

The government need not allege, in a complaint for a violation of the Safety Appliance Act, that the defect in a safety device was discoverable by a reasonable inspection before a car was moved in a train. *Atlantic C. L. R. Co. v. United States*, 94 C. C. A. 35, 168 Fed. 175, affirming 153 Fed. 918.

That a carrier did not exercise due care or ordinary diligence to discover or repair a defect in a safety device, need not be alleged by the government in a complaint for a violation of the Safety Appliance Act. *Atlantic C. L. R. Co. v. United States*, 94 C. C. A. 35, 168 Fed. 175, affirming 153 Fed. 918.

The failure of a complaint for a violation of the Safety Appliance Act to negative the exercise of reasonable care on the part of the defendant in maintaining a coupler in operative condition, is not ground for demur. *United States v. Denver & R. G. R. Co.*, 90 C. C. A. 329, 163 Fed. 519.

#### — Negating Exceptions.

A complaint for the violation of the Safety Appliance Act is not demurrable because it fails to negative the exception created by the proviso of section 6. *United States v. Denver & R. G. R. Co.*, 90 C. C. A. 329, 163 Fed. 519.

A complaint for the violation of the Safety Appliance Act need not negative the fact that the defendant is not within the exception of the act with respect to four-wheel cars or standard eight-wheel logging cars. *United States v. Atlantic C. L. R. Co.*, 153 Fed. 918, affirmed 94 C. C. A. 35, 168 Fed. 175.

### D. Evidence.

#### 1. Presumptions.

##### Innocence.

Since the Safety Appliance Act is a criminal law a carrier will be presumed innocent of a violation thereof. *United States v. Illinois C. R. Co.*, 156 Fed. 182.

##### Use of Local Car in Connection With Interstate Car.

It will not be presumed, in the absence of proof in an action for a violation of the Safety Appliance Act, that a local car with defective grabirons was used in an intrastate train in connection with an interstate car or that the two cars were in a position to be coupled together or uncoupled. *United States v. Illinois C. R. Co.*, 166 Fed. 997.

##### Condition of Safety Devices.

Where the testimony shows that a car had been equipped at one time in the manner required by the Safety Appliance Act it will not be presumed that any part of the equipment was imperfect when such car was started on an interstate journey, where there is no evidence that the safety appliances were defective previously thereto. *United States v. Illinois C. R. Co.*, 156 Fed. 182, affirmed 95 C. C. A. 642, 170 Fed. 556, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612.

#### 2. Burden of Proof.

##### In General.

The burden of proof rests on the government to show a violation of the Safety Appliance Act. *United States v. Montpelier & W. R. Co.*, 175 Fed. 874; *United States v. Southern P. Co.*, 167 Fed. 699; *United States v. Philadelphia & R. R. Co.*, 160 Fed. 696.

The government has the burden of showing that cars were not equipped as required by the Safety Appliance Act. *United States v. Baltimore & O. R. Co.*, 176 Fed. 114, affirmed 107 C. C. A. 586, 185 Fed. 486.

##### Sufficiency of Evidence to Convict.

Since an action for the violation of the Safety Appliance Act is of a civil nature the government is required to prove its case by a preponderance of the evidence only and not beyond a reasonable doubt. *United States v. Louisville & N. R. Co.*, 162 Fed. 185, affirmed 98 C. C. A. 664, 174 Fed. 1021; *St. Louis S. W. R. Co. v. United States*, 106 C. C. A. 136, 183 Fed. 770; *United States v. Southern R. Co.*, 170 Fed. 1014; *United States v. Baltimore & O. R. Co.*, 170 Fed. 456; *United States v. Boston & M. R. Co.*, 168 Fed. 148;

United States v. Nevada C. N. G. R. Co., 167 Fed. 695; United States v. Atchison T. & S. F. R. Co., 167 Fed. 696; United States v. Chicago G. W. R. Co., 162 Fed. 775; United States v. Philadelphia & R. R. Co., 160 Fed. 696; United States v. Central of Ga. R. Co., 157 Fed. 893.

Since an action for the penalty prescribed by the Safety Appliance Act is of a civil nature no greater burden of proof is imposed on the government to show a violation of the act than is required of the plaintiff in any other civil action. United States v. Baltimore & O. R. Co., 176 Fed. 114, affirmed 107 C. C. A. 586, 185 Fed. 486.

Every material fact must be proved by a fair balance of evidence to entitle the government to recover the penalty prescribed for a violation of the Safety Appliance Act. United States v. Montpelier & W. R. Co., 175 Fed. 874.

The rule of the criminal law that the evidence must satisfy the jury of the respondent's guilt beyond a reasonable doubt does not apply to an action for the penalty prescribed by the Safety Appliance Act, since it is a civil and not a criminal proceeding. United States v. Illinois C. R. Co., 95 C. C. A. 628, 170 Fed. 542, certiorari denied 214 U. S. 520, 53 L. ed. 1066, 29 Sup. Ct. Rep. 701; United States v. Chicago, R. I. & P. R. Co., 173 Fed. 684; United States v. Baltimore & O. R. Co., 170 Fed. 456; United States v. Chicago G. W. R. Co., 162 Fed. 775; United States v. Louisville & N. R. Co., 162 Fed. 185, affirmed 98 C. C. A. 664, 174 Fed. 1021; United States v. Philadelphia & R. R. Co., 160 Fed. 596; United States v. Central of Ga. R. Co., 157 Fed. 893.

Since the Safety Appliance Act is a criminal law the burden is on the government, in an action for a violation thereof, to show the guilt of the defendant beyond a reasonable doubt. United States v. Illinois C. R. Co., 156 Fed. 182.

Since the Safety Appliance Act is a criminal law a carrier cannot be found guilty of violating the same until the evidence removes all reasonable doubts. United States v. Illinois C. R. Co., 156 Fed. 182.

### Use of Hand Brakes.

In an action for a violation of the Safety Appliance Act by requiring the use of the hand brakes on a train, the government has the burden of showing that such brakes were used to control the speed of the train. United States v. Baltimore & O. R. Co., 176 Fed. 114, affirmed 107 C. C. A. 586, 185 Fed. 486.

### Excuses and Justification.

When the government proves that a car laden with interstate traffic and hav-

ing defective couplers was hauled by a railway company, the latter is bound to prove exculpatory facts, such as that it used all possible reasonable endeavors to perform its duty to discover and remedy the defect. United States v. Illinois C. R. Co., 95 C. C. A. 628, 170 Fed. 542.

A carrier has the burden of showing, in an action for the penalty prescribed by the Safety Appliance Act, that it is within the exception with respect to four-wheel cars or eight-wheel standard logging cars. United States v. Atlantic C. L. R. Co., 153 Fed. 918, affirmed 94 C. C. A. 35, 168 Fed. 175.

### 3. Admissibility.

#### Condition of Cars.

The defendant may show in an action for violating the Safety Appliance Act, that cars were in perfect condition when inspected 37 miles from the place where the alleged defects were first discovered, and may introduce material slips made by repairmen showing the specific repairs made on such cars. United States v. Rio Grande W. R. Co., 98 C. C. A. 293, 174 Fed. 399.

#### Copies of Waybills.

Carbon copies of waybills made by a station agent are admissible in an action for a violation of the Safety Appliance Act to prove that a freight car contained interstate freight. Louisville & N. R. Co. v. United States, 108 C. C. A. 326, 186 Fed. 280.

#### To Show Interstate Nature of Traffic.

In an action against an intrastate railway company for a violation of the Safety Appliance Act, evidence is admissible to show that it was a daily occurrence for it to carry interstate express matter in its cars consigned from points without the state to places therein. United States v. Colorado & N. W. R. Co., 85 C. C. A. 48, 157 Fed. 342.

#### Opinion Evidence.

Expert testimony is not admissible to show that openings in the sills of cars run in trains on an interstate interurban electric line are sufficient substitutes for grabirons or handholds to protect employees and to accomplish the purpose intended by the Safety Appliance Act, since that is a question for the jury. Spokane & I. E. R. Co. v. United States, 241 U. S. 344, 60 L. ed. 1037, 36 Sup. Ct. Rep. 668, affirming 127 C. C. A. 61, 210 Fed. 243, L. R. A. 1917A. 558.

An expert trainman may be asked, at the trial of a case under the Safety Appliance Act, as to the condition of an automatic car coupler in question, and as to what



is necessary in order to operate it, since the mode of operation of such device and the effect of various conditions thereon, are subjects for expert testimony. *Elgin, J. & E. R. Co. v. United States*, 93 C. C. A. 393, 168 Fed. 1.

#### Rules Relating to Government Inspectors.

Government rules requiring inspectors to inspect cars in the presence of designated railway officials whenever practicable, except when securing evidence of violations of the Safety Appliance Act, are not admissible in an action for such a violation. *Norfolk & W. R. Co. v. United States*, 112 C. C. A. 46, 191 Fed. 302.

#### Models.

A coupler of a different model than that with which a car was equipped may be used in an action for a violation of the Safety Appliance Act to illustrate the testimony of a witness in aiding the court and jury to determine whether there was a defect in the coupler in question. *Norfolk & W. R. Co. v. United States*, 112 C. C. A. 46, 191 Fed. 302.

#### E. Examination of Witnesses.

##### Cross-Examination.

A witness for the government in an action for a violation of the Safety Appliance Act cannot be cross-examined as to whether he had not previously declared that a coupler was defective, and whether an employee of the defendant did not immediately after such declaration, give the lift lever several jerks whereupon the coupler worked properly. *Norfolk & W. R. Co. v. United States*, 112 C. C. A. 46, 191 Fed. 302.

#### F. Questions of Law and Fact.

##### In General.

The question whether a train is equipped as required by the Safety Appliance Act is one of fact for the jury. *United States v. Baltimore & O. R. Co.*, 176 Fed. 114, affirmed 107 C. C. A. 586, 185 Fed. 486.

The question whether the Safety Appliance Act was violated by a carrier is a question for the jury when depending on conflicting testimony. *United States v. Southern R. Co.*, 170 Fed. 1014.

Where an engine and train left a terminal in perfect condition and en route the air pump on the engine suddenly broke and rendered the train brake system inoperative, and the necessary appliances to make repairs were not at hand, the question of the carrier's good faith in clearing the track, and of the necessity for running the train to the nearest repair point for repairs, is one of fact for the jury in an action for a violation of the

Safety Appliance Act, as amended. *Galveston, H. & S. A. R. Co. v. United States*, 118 C. C. A. 339, 199 Fed. 891.

Whether openings in the sills of cars used in trains on an interstate interurban electric line, were sufficient protection to employees and constituted an equivalent for the handholds and grabirons required by the Safety Appliance Act, is a question for the jury. *Spokane & I. E. R. Co. v. United States*, 241 U. S. 344, 60 L. ed. 1037, 36 Sup. Ct. Rep. 668, affirming 127 C. C. A. 61, 210 Fed. 243, L. R. A. 1917A. 558.

#### G. Instructions.

##### In General.

It was error, in an action for the violation of the Safety Appliance Act, to instruct the jury that evidence of inspection of the cars in question by defendant's employees could not be considered except as tending to contradict the testimony of the government inspectors as to the existence of the alleged defect, since the testimony of the defendant was positive and not negative in character, and the instruction gave undue prominence to the testimony of the government inspectors. *Norfolk & W. R. Co. v. United States*, 101 C. C. A. 249, 177 Fed. 623.

An instruction requested by the defendant in an action for violating the Safety Appliance Act, that if there was a mistake of fact as to the basis of the charge the defendant was entitled to recover, was sufficiently covered by an instruction that a car was defective if the uncoupling chain was kinked in the coupler head so as to be inoperative from the side of a car, and to find for the government if the preponderance of the evidence showed that the car was hauled in a train in such condition. *Norfolk & W. R. Co. v. United States*, 112 C. C. A. 46, 191 Fed. 302.

In an action by the government for a violation of the Safety Appliance Act the jury was erroneously instructed that the defendant was not liable if it exercised reasonable care in ascertaining whether the coupler of a car was in good repair, and in putting it in good repair after ascertaining that it was defective. *United States v. Atchison, T. & S. F. R. Co.* 90 C. C. A. 327, 163 Fed. 517, reversing 150 Fed. 442.

The jury was correctly instructed, in an action for a violation of the Safety Appliance Act, to the effect that the defendant was liable irrespective of whether it was diligent and careful in inspecting a car for defective safety devices, since the law requires a carrier to discover such defects at its peril, and that the carrier was answerable for the prescribed penalty, even though it may have honestly done all it could do to discover the

defects. *United States v. Philadelphia & R. R. Co.*, 162 Fed. 403, 405; *United States v. Lehigh V. R. Co.*, 162 Fed. 410.

The jury was erroneously instructed in an action for the penalty prescribed by the Safety Appliance Act, to the effect that the movement of a car after its coupling apparatus becomes defective is not a violation of the act if the movement of the car is for the sole purpose of obtaining necessary repairs, and that the distance the car is moved is immaterial. *United States v. Southern P. R. Co.*, 94 C. C. A. 629, 169 Fed. 407.

#### H. Verdict.

##### Directing Verdict.

A verdict cannot be directed for the government in an action against a carrier for the prescribed penalty for a violation of the Safety Appliance Act, for, although the action is civil in form, it is of a criminal nature, and the defendant is entitled to a jury trial. *Atchison, T. & S. F. R. Co. v. United States*, 96 C. C. A. 646, 172 Fed. 194, 27 L. R. A. (N. S.) 756.

A verdict may be directed for the plaintiff in a proper case in an action by the government for a violation of the Safety Appliance Act. *St. Louis S. W. R. Co. v. United States*, 106 C. C. A. 136, 183 Fed. 770; *Galveston, H. & S. A. R. Co. v. United States*, 105 C. C. A. 450, 183 Fed. 579.

A verdict may be directed for the government in an action for the recovery of a penalty for a violation of the Safety Appliance Act when the evidence showing the violation is uncontradicted. *United States v. Atlantic C. L. R. Co.*, 182 Fed. 284.

A verdict should be directed for the government on a prosecution for the violation of the Safety Appliance Act, where a train in commercial use was inspected and found in good condition at a terminal and a car thereof was hauled from an intermediate station to destination, which was the nearest repair point, with a broken lift chain which rendered a coupler inoperative from the side of a car, although the defect was not discov-

ered by the carrier until the arrival of the train at destination. *United States v. Trinity & B. V. R. Co.*, 128 C. C. A. 120, 211 Fed. 448.

An instruction to find for the defendant in an action for a violation of the Safety Appliance Act, if the kink in an uncoupling chain which prevented the opening of a coupler from the side of a car, became unkinked and righted before the car was started on a trip, was held sufficiently covered in the general charge as given. *Norfolk & W. R. Co. v. United States*, 112 C. C. A. 46, 191 Fed. 302.

#### I. Appeal and Error.

##### Right of Government to Review.

The government is entitled to a review on writ of error of an action against a carrier for the violation of the Safety Appliance Act, since the proceeding is a civil and not a criminal action. *United States v. Illinois C. R. Co.*, 95 C. C. A. 628, 170 Fed. 542, certiorari denied 214 U. S. 520, 53 L. ed. 1066, 29 Sup. Ct. Rep. 701; *United States v. Louisville & N. R. Co.*, 93 C. C. A. 58, 167 Fed. 306, affirming 156 Fed. 195.

##### Actions Tried to Court.

An action for the violation of the Safety Appliance Act, when tried to the District Court without a jury, is not reviewable by the Circuit Court of Appeals. *United States v. Louisville & N. R. Co.*, 93 C. C. A. 58, 167 Fed. 306, affirming 156 Fed. 195.

##### What Reviewable.

An appellate court will not disturb an order of a trial court refusing to take off a compulsory nonsuit in an action by the government for a violation of the Safety Appliance Act, granted on the grounds that there was not sufficient evidence to sustain a verdict for the government on any of the 22 counts, where the appellate court was unable to determine from the record as presented whether there was any evidence sufficient to go to the jury. *United States v. Baltimore & O. R. Co.*, 107 C. C. A. 586, 185 Fed. 486, affirming 176 Fed. 114.

*Ex. J. M.*  
4/12/18











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